

**RESOLVING LAND RELATED CONFLICT IN KENYA: THE ROLE OF, AU  
FRAMEWORK AND GUIDELINES ON LAND POLICY.**

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of Masters of Arts in International Conflict Management, university of Nairobi.**

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## DECLARATION

I Jacob Mwangangi Mutava do declare that this research is my original work and has not been submitted to any other examination body.

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R52/74719/2014

## RECOMMENDATION

This research project has been submitted for examination with my approval as the University of Nairobi Supervisor.

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## **DEDICATION**

To my late dad, Patrick Mutava Nzue for having instilled in me the importance of education, to my wife Tabitha and my daughters Grace, Joy and my niece Keza for the endurance of my absence while undertaking this project.

## **ACKNOWLEDGEMENT**

I wish to thank the almighty God for granting me an opportunity to strength and will to complete the project.

I humbly express my gratitude to my supervisor Prof. Peter Kagwanja for his invaluable advice, patience and guidance in the course of writing this project.

I sincerely thank my family for prayers and support during this journey of seeking knowledge.

## **LIST OF ABBREVIATIONS AND ACRONYMS**

AU	African union
AUC	African Union Commission
AfDB	African Development Bank
AU F&G	African Union Framework and Guidelines on land Policy
ACHPR	African Charter on Human Rights and Peoples Rights
APRM	African Peer Review Mechanisms
CBD	Convention on Bio- Diversity
CDAW	Convention on the Elimination of all Forms of Discrimination against Women
CESR	Convention of Economic Social and Cultural Rights
CPEV	Commission on Post Election Violence
FAO VG	Food and Agricultural Organization Voluntary Guidelines
GDP	Gross Domestic Product
ILO.169	Convention No. 169 of the International Labour Organization
MDG	Millennium Development Goals
NEPAD	New Partnership for Africa's Development
PFPA	Policy Framework for Pastoralist in Africa
SDGEA	Solemn Declaration on Gender Equality in Africa
TJRC	Truth Justice and Reconciliation Commission
UNCCD	United Nations Convention to Combat Desertification
UNECA	United Nations Economic commission for Africa

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## **ABSTRACT**

Land is measured to be very crucial to Africa's profitable means of development, as the largest part of the populations depend on it for their wellbeing. Land disagreements are inevitable, since this is expected to occur while the population pursues their interests on land. This study examines the responsibility undertaken by the African Union framework and Guidelines on Land Policy (AU F&G) in the resolution of land associated conflicts in Kenya. Kenya has experienced a long past characterized by land associated conflicts since the colonial era and in subsequent regimes, the attempt to resolve land associated conflicts has necessitated the land reforms in the country and the undertaking of a National Land Policy. A consensus between African leaders on land matters and problems in Africa necessitated the development and subsequent endorsement of the in AU F&G the guidelines are to aid African states in developing their guidelines on land policy that attain acceptable global standards of good governance. This study uses a qualitative method of research. The main purpose of the study is to comprehend the role AU F&G, in tackling conflicts associated with land. The study findings indicate that Kenya's of land reform agenda has taken into consideration the continentals guidelines on land policy. The reform agenda is geared toward developing land guiding principles and laws that address the setbacks of land, conflict on land being one of them. The study concludes that the Kenyan National land policy and her new constitution have attempted to handle the issues associated with land related conflict and provide for its resolution. The recommendations of the study are to facilitate the developed policies on land are implemented, with an ultimate goal of achieving economic development and ensure security of land tenure and sustainable livelihoods.

## CHAPTER ONE

### INTRODUCTION TO THE STUDY

#### 1.1 Background

Land is considered a valuable commodity, it has in it economic value, political and cultural importance. Communities, individuals, private practitioners, the government agencies and other interested stakeholders exploit land for various purposes. In the course of seeking to positively accrue from land use, often more than not tensions are bound to arise and may later develop into serious land conflicts<sup>1</sup>. As consequence of important cultural and economic significance of land, the access and other rights to land are very important issues in relation to land related tensions and conflicts. The situations that expose land to issues associated to land conflicts include insufficient availability of land, Insecurity of land possession and a long past of unresolved land grievances.

Land has been observed as one cause of conflicts in Sub Saharan Africa. It is said that local land disagreements can progress into pronounced civil strife of greater magnitude and political movements. The underlying issues such as, population pressure, commercialization of agriculture, and rural urban migration, have been a contributing factor of increased amount of land conflicts<sup>2</sup>. One source of conflict and uncertainty in Africa is land. Kenya, South Africa and Zimbabwe, being former settler colonies, have over a given duration of time tried to deal with historical injustices on land meted on the indigenous land owners of these countries. These land atrocities and other land related disputes, undertaken by colonial masters, and post colonial

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<sup>1</sup> Bruce, J.W., et al, (2011), Land And Conflict Prevention , *Initiative on Quiet Diplomacy*, pg11

<sup>2</sup> Yamano, T., K. Deininger, *Land conflicts in Kenya: (Causes Impacts and Resolutions*, Discussion paper presented on 12 December 2005 at the foundation Of Advanced Studies on International Development (FASID), World Bank.)

governments, have negatively impacted on the citizens of these countries. The available evidence of people who have been forcefully ejected from their land, issues of land resettlement and rehabilitation that are very complex, mass transfer of people and genocides is a proof of serious unresolved land related conflicts<sup>3</sup>.

The African Union leaders of States and governments, while announcing the affirmation on land matters and difficulties in the continent and being conscious of the urgency of having good principles of land governance, anchored in doctrines of Sustainability in an effort to achieve preservation, renewability and guarding of Africa's land and other natural possessions welcomed, a joint three party bodies of consortium comprising of the African Union Commission, (AUC) The African Development Bank (AfDB), and the United Nations Economic Commission For Africa (UNECA) to initiate a process of formulating the AU F&G<sup>4</sup>. The main aim of the AU F&G was to reinforce land rights, promote productivity and ensure Africa's population livelihoods is safe. The highly consultative process involved participants from the five regional Economic Communities (RECs), civil society organizations, researchers, practitioners, centers of excellence in Africa, government bodies and Africa's development partners. July 2009, during a meeting of African leaders of state and government, they unanimously approved and adopted the outcome of the initiative<sup>5</sup>.

AU F&G recognizes that African states have an agreement on ensuring that they develop good land management practices within member states, as a central feature

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<sup>3</sup> AU,(2010) "Framework and Guidelines on Land Policy In Africa", AUC-ECA-AfDB consortium, pp.25

<sup>4</sup> Declaration On Land Issues And Challenges In Africa ,Assembly/AU/Decl.1(XIII) Rev.i, 2010. pp.1

<sup>5</sup> AU, (2010)"Framework and Guidelines on Land Policy In Africa", AUC-ECA-AfDB consortium, pp.1

for their growth and for championing peace and security in Africa. It is a fact that many African states have attempted to undertake land policy reforms with an aim of addressing the witnessed land matters in the confines of sustainable national development. The AU F&G in its report noted that most member countries had been caught up in carrying out land reforms without any available African reference or national agreement on the goal that is believed to guide and inform such reforms<sup>6</sup>.

Institutions charged with managing land occupancy have an influence on issues of development; they reflect social class structures and relations. A poor land occupancy structure affects social and economic growth. Land reforms are considered as an essential tool to reorganize the institutional guidelines of land tenure structures and for eliminating obstacles to development. Land reforms are therefore very critical for ensuring redistribution of property rights in land are done to the advantage of the landless peasants, small farmers and tenants<sup>7</sup>. The AU F&G are expected to guide member states on the process of undertaking land policy reforms and mostly on how to tackle matters of resolving land related conflicts in Africa.

## **1.2 Statement of Research Problem**

To attain sustainable growth and development in the African continent, as well as Africa's contribution to and get fully involved in, the global economy of the 21<sup>st</sup> century will mostly be dependent on how land and associated resources are utilized, secured and managed. Land is a very crucial item to Africa's socioeconomic growth. The largest fraction of the African population, depend on land for their basic survival. Land therefore becomes central in the variety of complex social and economic

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<sup>6</sup> Ibid p.p 4

<sup>7</sup> Hasmah, A.Z.,et al,(1994) Theory on Land Reforms, *Ukur Bulletin*, Vol.5 No.1, pp.14

relations of within which disputes between persons and groups are bred<sup>8</sup>. One of the gravest challenges facing least developed nations today is the availability of sound management of land and natural resources. The exploitation of natural resources, growing struggle for dwindling renewable resources, environmental damage, population increase and global climatic changes have precipitated escalation of conflicts globally.

Kenya has historically had a long past of land associated misunderstandings, originating from the colonial period, which imposed foreign land tenure relations and introduced misunderstanding in the theory, legal and social traditional tenure systems. Actors in the land related conflicts include the public sector, civil society, private sector and the community at large. They all alternate as either the offender or the offended.. According to Lumumba O., in reference of the processes ranging from legal, policy and institutional policies created for social, political and economic development; are perceived, to have been unable to meet the intended objective<sup>9</sup>.

There have been several attempts by the Kenyan government to adequately determine land related conflicts. Such as The Njonjo Commission, the commission of inquiry into illegal and irregular allocation of land in Kenya (commonly referred to as the Ndungu Commission), Commission of inquiry into Post Election Violence of 2017-2008(CPEV). According to Lumumba O., “The Kenyan government seek to use new conflict resolution means for resolving land conflicts. This should be undertaken

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<sup>8</sup> Zwan, J. , “Conflict sensitive Land Policy and Land Governance In Africa, “ International Alert, Practice Note 7

<sup>9</sup> Lumumba,O. “*Land Tenure & Conflict in Africa*” ( Paper Presented At A Conference In Nairobi, Kenya, December( 2004)pp 3

without devoid to multiplicity of land law administration system that has proved to an obstacle to development”<sup>10</sup>.

This study seeks to find out the nature of African Union’s response to land associated conflict in Africa. The research will seek to analyse the type of land related conflicts in Kenya and finally establish the role of the AU F&G in resolving land related conflicts in Kenya. Kenya economic blue print, vision 2030, recognizes the significance of land reforms, it therefore essential for Kenya to undertake major land reforms that will specifically deal with the issue of land related conflicts.

### **1.3 Objectives of the Study**

#### **1.3.1 General Objective**

1. To establish the contribution of the African union in Resolving land related conflicts in Kenya through African Union Framework and Guidelines on land Policy

#### **1.3.2 Specific Objective**

1. To establish the nature of African Union’s response to land related conflicts in Africa
2. To understand the nature of land related conflicts in Kenya
3. To establish the role of the African union’s framework and guidelines on resolving land related conflicts in Kenya.

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<sup>10</sup> Ibid. pp 4

## **1.4 Justification of the study**

### **1.4.1 Policy Justification**

Land being a very essential commodity for a country's development process, it is essential that issues associated to land conflicts are prevented and resolved as quickly as possible. Proper land administration and management of land system is very necessary. Legislators cannot ignore the issues of land reforms due to the earlier stated reason. This study will inform policy makers, in government on the various land policies to implement for preventing land related conflicts. The study will also inform other stakeholders on land, on the best practices for land policy formulation which will be essential tool for engagement during the stakeholders' participation process. The study will inform the African Union monitoring and evaluation on the use of the AU F&G on land reforms.

### **1.4.3 Academic Justification**

The study is a reference for further research on the topic; the study will add to the field of academia in relation to land linked conflicts and in particular peace and conflict studies. The findings of the study throw in further to the development of the framework and guidelines.

## **1.5 Literature Review**

### **1.5.1 Introduction**

The literature review will consist of three essential components. The first part will review land and conflict nexus, the second and part will review land policy and land governance. The African Union conflict resolution mechanisms, land related issues in Kenya and finally state the literature gap.

### 1.5.2 Land and Conflict

According to Zartman in while defining conflict, states that it is an important aspect of human relations, a necessary affiliation of choice and decision. He further notes that disagreements can be avoided on some occasions and properly handled on others, but determined just if the term is taken to imply the accomplishment of obvious demands to a certain extent than the overall elimination of principal sentiment, memories and interests. Zartman notes that only duration of a period actually resolves conflict and the injury it heals deposit wounds for future mention. But little of such total healing, much can be undertaken to lessen conflict and thus unleash desired energies for more productive tasks”<sup>11</sup>. Conflict has been defined as tensions between opposing views or interests <sup>12</sup>. Conflict is also a condition of divergent or disagreement amid two or more people or groups<sup>13</sup>. It can also be a competition between two or more forces that create tensions which need to be resolved<sup>14</sup>.

Land disputes can be stated to be a societal fact in which a bare minimum of two parties are involved, the reasons of which are conflicting desires over the property rights to land; the right to land use, to administer the land in a way that would create earnings from the land, to separate others from the land, to change ownership and the privilege to compensating for it. Much as conflicts lead to destructiveness, the nevertheless perform opposite functions. According to Baracker 1996, he underlines

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<sup>11</sup> Zartman, I. M., (1991) Conflict Reduction: Prevention, Management, and Resolution. In: Deng, F. M. und I. W. Zartman (ed.): Conflict Resolution in Africa. Washington, pp. 299-319.

<sup>12</sup> Suhrke A and Chaudhary TW (2007) Conflict and Development. In: Haslam PA, Schafer J and Beaudet P (eds) Introduction to International Development. Approaches, Actors and Issues. 2nd Edition. Don Mills: Oxford University Press.

<sup>13</sup> Horowitz D (1985) Ethnic Groups in Conflict. Berkeley, CA: University of California Press

<sup>14</sup> Nasongo W (2000) Nationalism and State Integrity In Kenya: The case of Somali Irredentism and Mwambao separatism. In: Chweya L (ed.) Constitutionalism and Electoral Politics in Kenya. Nairobi: SAREAT.



the significance of societal disagreement for social change<sup>15</sup>. Land conflicts can become tools of transformation if they lead to large protests and cause policy changes and implementation.

For the purpose of this study, the word conflict refers to challenge, difference, argument, dispute or quarrel, a struggle, confrontation, turmoil chaos over land. Land has economic value, strategic value, political and structural value. The state, communities, individuals and private sector use land differently, often being for opposing purposes and aims to gain from land. Frequently is to the disadvantage of others. Land is a fixed asset but the demand upon it is enormous, forming a good breeding ground for tensions which may later escalate into conflicts<sup>16</sup>.

According to Zwan V. Joost, land is a unique valuable and immovable resource of minimal measure and is a key element with intricate social relations within which conflicts are bred<sup>17</sup>. Zarin A.H denotes that land a valuable natural resource of a country, which represents the principal wealth and the main source of economic and Political power<sup>18</sup>. Land plays a crucial aspect in the survival and existence of populations in least developed countries. Land is a base for agricultural production, source of food and security for rural population. The worth attached to land is so enormous that it makes it to be a sought after resource by international corporations. The requirement for conservation for trees and plants for various uses has witnessed

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<sup>15</sup> Wehrmann B.,(2008) "Land Conflicts; A practical Guide to Dealing with Land Disputes" GTZ, Germany,pp. 22

<sup>16</sup> Bruce w. J., S.Holt,(2011), *Land and Conflict Prevention*, Colchester, (Initiative on quiet Diplomacy, pp.10

<sup>17</sup> Zwan, J. "Conflict Sensitive Land Policy and Governance in Africa" International Alert, Practice Note 7

<sup>18</sup> Zarin, H. A.,(1994) "Theory on Land Reforms; An Overview" *Ukur Bulletin*, Vol. 5, No. 1. pp1.

the growth in conservation efforts for land. Land being a fixed asset, population claim to own land its resources has increased over time. Land is now becoming in global terms a limited commodity and is becoming a sought after resource. The global growing desire to own land whether for bio fuel production, food production, biodiversity and other conservation purposes coupled with diverse interests and needs at national and local level, creates a real and rapidly increasing potential for serious conflict<sup>19</sup>.

Cotula states that land is regarded as major cause of conflict in rural populations around the globe. Most land disagreement can be linked to conflicting claims over inheritance, boundaries and rights. The clamor for land has been on the rise in sub-Saharan Africa. This is pegged on land essentially connected to increased scarcity, in majority of cases caused by population increase, and rising values determined by agricultural activities for intensification and commercialization. Cotula notes that the weakening of customary institutions to balance land differences has impacted on the land associated to conflicts. Tensions witnessed from competition for scarce, strategic natural resources like irrigated lands, dry seasonal water points and pastures across East and West Africa. The Inequitable land distribution process and slow land reform programmes have fostered tensions on land leading to conflict confrontations, like the invasion of the many white owned farms in Zimbabwe. Cotula also notes that competition over minimal land resources coupled with lack of farming opportunities, frustrations and loss of hope for the youth, creates instability where other trigger

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<sup>19</sup> Bruce w. J., S.Holt,(2011) *Land and Conflict Prevention*, Colchester, (Initiative on quiet Diplomacy, pp.1

factors for land conflict like political or ethnic manipulation may lead to violent conflicts<sup>20</sup>.

Homer D. States that shortage of renewable resources like land will increase tremendously, meaning that total area of high quality agricultural land will reduce, as including forests, and the numbers of species that depend on them. He states that wide spread depletion of other natural resources, leading to environmental scarcities becoming sever and further degenerate into conflicts<sup>21</sup>. Peters, o. Argues that the fight and dispute over land call into serious issues on the picture of relatively, open, flexible and adaptive customary principles of land holding and land use and instead portrays process of exclusion, strong social divisions and class formations. Data shows that the intensified struggle and disagreement over land leading to clear divisions amid and within tribal and regional groups<sup>22</sup>.

Revreny cites numerous examples of land conflicts resulting in environmental movement. Revreny cites that more than half a million, people moved from central/northern Ethiopia to the south west regions due to drought and famine resulting into nomad farmer conflict over land. Another example is that of 1990's when Rwandese migrated from central regions and rural south north Rwanda due to disputes and genocide resulting from land water scarcity and degradation<sup>23</sup>. Mkhabela,( 2006) identified that disproportionate access to land and gender favoritism, population increase on Swazi nation land, land dilapidation, land tenure insecurity, farm squatting and limited land availability , tentative trends in the land market, time

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<sup>20</sup> Cotula,L.C., et al(2004) Land Tenure Administration in Africa, *Research Gate Journal*,p.p 1

<sup>21</sup> Homer, D., et al,(1994) Environmental Scarcities and Violent Conflict, *International Security*, Vol. 9, No.1, p.p 5

<sup>22</sup> Peters, P.(2004), Inequality and Social Conflict Over Land In Africa, *Journal Of Agrarian Change*, Vol. 4, No. 3 , p.p 269

<sup>23</sup> Reuveny, R. (2007). Climate Change-Induced Migration and Violent Conflict. *Political Geography*, 26, pp. 656

consuming socio cultural transformation and underprivileged land control occasioned by non existence of land rights as a likely source of land conflicts<sup>24</sup>. Campel et al 2000 indicates that the land use conflict in Kajiado county of Kenya is a reflection of the continuing conflicts over access to very inadequate land and water resources between herding, wildlife and farming<sup>25</sup>.

### **1.5.3 Land governance and land policies**

The theory of governance gained recognition in its present form, only in the 1980s. While many institutions formulated their own definitions, four particular uniqueness of the concept are now commonly accepted. Whereas inclusive approach is fundamental because, in many countries, state actors co-exist with their customary, religious and informal counterparts, the stakeholders in land thus mirror a wide range of state actors, customary establishment, and non state actors, the private and professional sectors.

Palmer et al, denotes that land is globally regarded as an significant governance issue. The challenges witnessed today globally including, rapid urbanization, climate change bigger claim for natural resources, water, and food and energy all pose serious security threats. The majority of the above challenges are one way or another related to land. This may manifest inform of unfair rights to use to land, Insecurtiy of tenure, unsustainable land use, inadequate institutions for dispute and conflict resolution. According to a land tenure working paper, Governance is the application of political, economic and supervisory mandate in management of a country's dealings at all

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<sup>24</sup> Mkhabela, T. (2006). Impact of Land Tenure Systems on Land Conflicts: Swaziland – a country case study. *Africanus*, 36 (1), pp. 58

<sup>25</sup> Campbell, D.J., H. Gichohi, A. Mwangi and L. Chege (2000) Land use Conflict In Kajaido District, Kenya: Land Use Policy, 17, pp. 337

levels. Governance is regarded as a neutral ideology incorporating mechanism, process and institution on which society and groups champion their interests by exercising their legal rights and obligations<sup>26</sup>. According to Toulmin and Quan, in the last two decades, close to all countries in Sub-Saharan Africa participated in land reforms with the aim being to, promote economic development, promote more sustainable management and reduce poverty<sup>27</sup>. McAuslan states that, the new policy initiative reflect two spheres, one is reform for economic reasons while the other is a newer policy which involves good governance and the market economy occasioning a greater reliance on legal reforms and legal culture<sup>28</sup>.

According to Palmer et al, Land governance or control is characterized with set of laws, processes and structures through which decisions are passed and enforced and it incorporates the process of managing the competing interests. Palmer states that governance on land includes constitutional, traditional and religious institutions. The state agencies tasked with governance on land are judicial institutions, state ministries and land agencies. Sometimes it may consist of informal agents and customary bodies. Land governance further incorporates both legal and policy structure for land in addition to customary bodies and unofficial practices that are socially legitimized by the society. The Land tenure working paper elaborates that land governance involves influence and the political economy of land<sup>29</sup>. Governance on land can either be weak or effective. Weak governance on land is intentionally allowed to serve the interests of the influential in the society in their attempts to manage the competition

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<sup>26</sup> Palmer, D., et al,(2009) Towards Improved Land Governance, Land Tenure Working Paper, p.p 9

<sup>27</sup> Toulmin, Camilla and Julian Quan, eds, (2000). *Evolving Land Rights, Policy and Tenure in Africa*. London: DFID/IIED/NRI

<sup>28</sup> McAuslan, Patrick, (1998). 'Making Law Work: Restructuring Land Relations in Africa'. *Development and Change*, 29: 525

<sup>29</sup> Ibid p.p 11

for limited land resources. In these scenarios land practices such as corruption facilitate the illegal land transactions witnessed. Land redistribution policies may be implemented in favour of the influential elite persons. On the other side, effective land governance allows for impartial right of entry to land and security of land tenure, which contribute to improvements in social, economic and environmental conditions. Good and effective land policies have been associated with reduced tensions on land and encouragement of economic growth.

Good Land governance advocates for strong land Policies. A land policy is the course of action defined by the Nation in order to administer modalities of right of entry to land and natural resources. It incorporates the modalities of land attainment and the protection of land and natural resources, usage and organization of space. Ciparise, 2005 denotes that policy on land is connected to a social project. It normally serves political, economic and environmental objectives and is influenced by related strategies thus relying on tools and instruments for achieving the set objectives.

Policies are both formal and informal discourses from public authorities expressing what they intend to achieve<sup>30</sup>. The state has the legitimate preserve and responsibility of formulating land policies. While formulating these policies the state must put up with is the credibility of these policies will be achieved through the public participation of key stakeholders. The government has the duty to coordinate the progress of a land policy which should be influenced by national and international challenges which include political, social and economic. The core aim of a land policy

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<sup>30</sup>Ibid p.p 29

is to determine the way lands will be utilised for sustainable development, economic, ecological and conflict prevention and consolidation of peace.

The AU F&G defines land governance as the political and managerial structures and process through which discussions regarding access to and utilisation of land possessions are made and implemented including the way in which general supervision on the performance of the land sector is managed<sup>31</sup>. Land policies should never be considered in separation, but as a requirement for economic growth, sustainable human development, peace and security. In the understanding and appreciating the significant function of land in Africa development, The African Union Commission, The United Nations Economic commission for Africa ECA and the African Development Bank (AfDB) under the leadership of the AUC launched a joint land policy initiative in the April 2006. The endeavor of the joint initiative was to come up with an AU F&G in Africa<sup>32</sup>.

The AU F&G was undertaken between 2006 and 2009 by various scholars and professionals drawn from the African continent representing all the economic regions, through a extremely participatory process. The AU F&G was endorsed in year 2009 by a joint AU ministerial conference on Agriculture. While adopting a “affirmation on land issues and challenges in Africa.” The affirmation advocated for effective utilization of AU F&G to assist national and regional land policy process while committing to give detailed thought to strengthening security of land tenure for African women. The implementation phase of AU F&G was launched in Lilongwe, Malawi on 28<sup>th</sup> October 2010. The AU F&G has been widely distributed throughout African Continent and efforts are presently being undertaken to build capacity for

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<sup>31</sup> UNECA, (2010-2011) “Natural Resources and Conflict Management” case of Land , A.b. 7, pp.1

<sup>32</sup> Ibid pp.2

African countries to develop, apply, examine and appraise their respective land policies<sup>33</sup>.

For land to execute its major position in national and regional development in Africa, a bunch of focus and attention should be on the state of land administration system. Two very important aspects must be considered, the state of the land rights, delivery and efficiency of the laws, structures and institutions in land governance<sup>34</sup>.

#### **1.5.4 African Union and Conflict Resolution Mechanisms (ACRM)**

Many peace scholars consider conflict resolution as a very ambitious goal to set for one self. The peace scholars believe conflicts are complex to resolve. Thus peace they advocate for the management and prevention of conflicts. The peace scholars argue that incidences of conflicts can be resolved but disagreement per se cannot be resolved. Kenneth E. Bouldig and Robert Cooley Angell invented the concept of conflict resolution but later shifted ground and started advocating another concept of conflict management. He argued that conflict should be managed rather than being solved. Sort to maximise the total gain to both parties no matter the distributional outcome. Woodhouse (1994) , Gur (1995) and Rupersinghe (1995) all equally noted that that conflict is not static phenomenon in any situation, it changes from latent to manifest stage and from escalation stage to that of de escalation. If not well managed, conflict can transform from positive stage to negative stage. It is hence vital to better manage problems so as to prevent them from becoming manifest and later escalate into violence<sup>35</sup>.

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<sup>33</sup> Ibid pp3.

<sup>34</sup> Ibid pp.2

<sup>35</sup> Rupersinghe, K., (1993), Early Warning and Preventive Diplomacy: A Discussion Paper, London: International Alert, February



Marc Ross, work on the culture of conflict established that, the manner in which conflict is managed largely depends on how the society is centralised as opposed to cross cutting. Ross notes that conflict is expensive and difficult to resolve due to the ease of mobilizing others in core groups. Few people hinge on the resolution of the dispute thus a conflict may continue unless common external forces disputants attempt to resolve their differences. Whereas individuals in cross cutting ties communities cannot account on a large loyal core group who share the same interests' ties among members of the same society and among different societies limit the severity of overt conflict and promote dispute settlement through shared interests. Another concept by peace scholars is preventive Diplomacy developed by former UN secretary General Boutros Boutros Ghali (1992) as an action to prevent disputes between parties and to avert existing disputes from developing into violent conflicts and to lessen the increase of the conflict. Preventive Diplomacy involves various attempts of diplomatic nature, economic and social, military, political institutions, legal, judicial normative<sup>36</sup>.

The mechanism for conflict prevention, management and resolution (MCPMR) of the Organisation of African Unity (OAU) was recognized pursuant to a resolution taken by the African Heads of state during the 29<sup>th</sup> Session of the Assembly of heads of state and government, in Cairo in June of 1993. The same mechanism was integrated as an organ of the African Union when it was established at the Lusaka summit of July 2001. The AU formally assumed the rights and obligations of the OAU of Conflict management.<sup>37</sup> The OAU charter of 1963 created the commission of

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<sup>36</sup> Boutros-Ghali, B., (1992), *Agenda for Peace*, New York: United Nations

<sup>37</sup> Olawale, A.,(2007) "The African Union and Conflict Management", *Africa Development*, vol.32 No.1, pp. 8

mediation, conciliation and Arbitration, whose objective was to facilitate peaceful resolution of disputes between member states. The commission never became equipped to operate and was abolished<sup>38</sup>.

The constitutive Act of the AU in the beginning never provided for MCPMR, the AU later adopted a set of rules on the establishment of Peace and Security Council (PSC) to supersede all resolutions and decisions of the OAU on the MCPMR when it entered into force<sup>39</sup>. One of the chief Objectives of the PSC is; Promotion and encouragement of superior democratic practices, proper governance and rule of law, protection of human rights and fundamental freedoms, the respect for sanctity of human life and international humanitarian law as part of efforts to avert conflicts. This objective gives the reason why the AU came up with a frame work and guidelines on land policy.. The Attention given to issues of conflict management by the AU is informed from the realization that it is difficult for any community affected by aggressive conflict to realize any gains from political and economic globalization. The main objective of AU mechanism for conflict prevention management and resolution, (MCPMR) is the anticipation of conflict prevention with a vision of making certain that the need to resort to the most often complex and resource demanding peace keeping operations which states will in more often than not find difficult to finance<sup>40</sup>.

The African Union was legitimately launched in Durban in the year 2002. The Constitutive Act of the AU states in Article 3 (F&G) that the AU shall strive for peace, security and solidity on the continent. It also advocates for democratic ideals

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<sup>38</sup> Ibid pp.9

<sup>39</sup> African Union,(2002) Decisions on the Establishment of Peace and Security Council of the African Union, AU Assembly, 1<sup>st</sup> Ordinary Session, AU,

<sup>40</sup> Ibid pp10

and institutions, as well as popular contribution by stakeholders and overall good governance among the member states. The AU charter has obligated the AU to intervene in conflicts arising within member states. The rights of intervention are as a resultant of the Pan- Africanism ideals and concepts of indifference. The responsibility for establishing and maintaining the peace and security is harmonized by the AU's security organ called Peace and Security Council. One of its main roles is to advocate and support democratic ideals, strong governance and the rule of law, protection of Human rights and the fundamental freedoms, including respect for the sanctity of human life and international humanitarian law as a segment of its efforts to prevent conflicts. According to Aguonu et al, 2014, conflict resolution in Africa has been a difficult task to undertake, he advocates that AU should insist on an improvement of governance institutions in order to respond to the primary needs of the population<sup>41</sup>.

The AU has certain minimum threshold that guides these institutions and sub-institutions of AU in conflict resolution. Article 4 of the Constitutive Act of AU, has outlined some principles for conflict resolution which include, sovereign impartiality and interdependence among member states of the union. Respect for borders as they existed since independence The AU advocates for a universal defense policy for the continent. The AU advocates for resolution of conflict among member states of the union as may be decided upon by the top decision making body of the union. There is also the provision for non meddling on a constituent state in the internal affairs of another. The AU advocates for the right to get involved in a member state, pursuant to a pronouncement of the Assembly in respect to serious circumstances like war crimes,

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<sup>41</sup> Oguonu, C. Et al.(2014), Africa Union And Conflict Resolution In Africa , Mediterranean Journal Of Social Science, Vol. 5, No. 27 , p.p 326

genocide and crimes against humanity. Each member state is correct to ask for involvement from the union in-order to reinstate peace and security. The AU advocates for the respect for democratic values, human rights, and the rule of law and superior governance, advocates for endorsement of social justice for a balanced economic development<sup>42</sup>.

### **1.5.5 Kenya and Land Related Issues**

The Kenyan conflicts connected to land have a historic origin. The Kenyan land possession- political evolution witnessed massive displacement and landlessness, conflict between customary and formal laws, ethnicisation, politicisation and regularisation of land ownership, disparities in land ownership, procedural and substantial abuse of land laws and finally corrupt practice in land administration and management<sup>43</sup>. According to Kalande the strains are deeply engrained and are a stage on which Kenyan land disagreements are based<sup>44</sup>. In Kenya the Ndungu report on illegitimate and unequal allocation of land initiated from the year 2004, discovered that former presidents Kenyatta, Moi, and other influential persons in government became beneficiaries of unlawful and unequal allocations of public land. It is therefore worth to noting that Corruption- bribery, fraud, nepotism and clientilism in land management and state land organization in Kenya seen an increase in number of land related conflicts<sup>45</sup>.

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<sup>42</sup> Ibid p.p 327

<sup>43</sup> ECA,(2012) "Natural Resources and Conflict Management", *Economic Commission for Africa*, pp17

<sup>44</sup> Kalande,W., *Kenyan Land Disputes in the Context of social conflict theories*,(FIG Commission, 7 Annual Meeting and open Symposium on Environmental and Land Administration Big Works for Defence of the territory, Verona ITALY, 11-15 September ,(2008) pp.11

<sup>45</sup> Ibid pp 4

According to Nyandimo, (2005) land dispute in Kenya is a long standing issue. These disputes were the reason for Kenya's fight for self-rule but the strain has in the recent history rocked the boat of peace and tranquility of Kenya<sup>46</sup>. The government of Kenya, (1991) stated that Kenyan land linked disputes have been a continuous affair and occasionally escalated into land conflicts resulting into violent bloody conflicts that are characterized by massive population displacement and extensive damage of property to levels that can be described as international humanitarian crises<sup>47</sup>. Veit P. notes that Kenya has undergone a extensive record of land associated conflicts dating back to its colonial administration period. Where the colonialists introduced land policy and practice that alienated the indigenous Kenyans from their land and caused one cultural group against to turn against another<sup>48</sup>. Boone, observes that a large amount of literature on political premise and political economy argue that private property regime help advocate for liberal electoral regimes by hampering majoritarian politics, by making the stakes of elections so low with the intention of protecting minority rights.

### **1.5.6 Literature Gap**

Based on the above analysis there is a clear literature gap on certain key issues associated to land conflicts in Kenya and how the AU F&G has been implemented in the country. There is limited literature on a regional and continental land policy guideline for resolving land related conflicts. Most of the global guiding principles on land policy especially the FAO voluntary guidelines on land, forests, fisheries policies

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<sup>46</sup> NYADIMO ERIC (2005); Land Conflicts in Kenya, Paper Presented for Examination in Unit 13; Land Conflicts and Possibilities of Reconciliation –Master of Science Program in Land Management and Land Tenure- Technische Universitat Munchen June 6th 2005

<sup>47</sup> GOVERNMENT OF KENYA (1999): Report of the Judicial Commission Appointed to inquire into Tribal Clashes in Kenya, Government Press, Nairobi, Kenya.

<sup>48</sup> Veit, P.,(2011) History Of Land Conflicts In Kenya , Brief, *Focus On Land In Africa*, pp.3

emphasis more on redistributive equality and worldwide access. Most of the literature on land policies border on governance and reforms but do not give explicit explanations on how they resolve land linked conflicts. This study will give accounts on how land related disputes may or not be solved by regional or continental land policies.

## **1.6 Theoretical Framework**

This research was guided by the liberalism view of society. Liberalism continues to be a powerful and influential doctrine, to the level that its ideas have been realized in recent global democratic transitions and it has manifested itself in globalization of the global economy. Liberalism has had a great influence on the shape of modern individual societies. It has influenced government and scientific rationality; advocating that believing individuals should be free from arbitrary state power, prosecution and superstition. Liberalism seeks to foster political freedoms, democracy and constitutionality guaranteed rights, and privileged the liberty of the individual and equality before the law. Liberalism advocates for individuals' competition in civil society and claims that market capitalism best champions the welfare of all by most efficiently distributing scarce resources within the community<sup>49</sup>.

Other strand of liberal thought that further explains the phenomenon of this study includes, Robert Keohane's theory of neo-liberal institutionalism, which explain how countries being members of international institutions, can significantly enlarge their understandings of self interests in order to broaden the scope for cooperation. Adherence to the rules and regulations of these organizations, not only discourages

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<sup>49</sup> Burchill, S. Et al, *Theories of International Relations*, (New York, Macmillan, 2005) pp. 55

the shallow pursuit of national interests, but it weakens the meaning and overall outlook of state sovereignty<sup>50</sup>. Liberal institutionalism emphasizes the key role of the state and the anarchical condition of the global system. The institutionalists believe that strong relations between states can and ought to be structured and formalized in institutions. “Institutions” in this environment implies a set of rules which govern state behaviour in specific policy areas, institutions then take the duty of promoting cooperative acts, monitoring compliance and sanctioning violators.

The AU F&G are a set of guidelines that have been undertaken through cooperation by a continental body and supported by heads of states and governments, are to aid member states develop land policies. The AU F&G have developed measuring platforms and indicators for measuring progress in land reforms in Africa. One of the major goals of the Agenda 2063 of the African Union is to have a continent that practices good governance, uphold human rights, justice, democracy, and the rule of law<sup>51</sup>. Land governance includes the policies, process and structure by which decisions are undertaken about the utilization and management over land, in the manner in which the decisions are applied and imposed, and the way that challenging interests on land are handled. Land governance is connected with power and the political economy of land<sup>52</sup>. The two independent variables in this study is land and conflict, linked together by an dependent variable, which is governance issue in this context the AU F&G. The AU’s F&G, calls upon the African governments to keenly observe the status of their land administration systems, delivery system on land rights and governance on land structures and institutions. It has been observed that a

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<sup>50</sup> Ibid pp. Pp56

<sup>51</sup> AU, “Agenda 2063;(2014) The Africa we want” AU, 2eds.,

<sup>52</sup> Palmer, D., S. Friscka, B. Werhrmann,(2009) “Towards improved Land Governance”, Land Tenure Working Paper, pp.1

significant number of African Union member states, have begun undertaking on land policy reforms, with an intention of addressing existing land issues and challenges in the perspective of sustainable national development. A distinct level of indifference exists in the process of undertaking these land reforms within the states.

The AU F&G appreciates that the majority African countries admit that the good organization of land management practices, to be an important factor in development, and the conservation of peace and security. The AU F&G, takes cognizance of the reality that to date these reforms have been pursued in the absence of any clear continental guidance. It is therefore this need for a continental guidance that justifies and informs the Pan African framework to offer assistance to member states in the undertaking and implement land policy reforms with the plan of attaining their national development agendas<sup>53</sup>.

### **1.7 Hypothesis**

- The AU has positively been involved in the resolution of land related conflicts in Kenya
- The inherited land policies from colonial Kenya has fuelled land related conflicts
- The AU framework and guidelines have been instrumental in resolving land related conflicts in Kenya.

### **1.8 Research Methodology**

This study used qualitative techniques, of doing research. It analysed data from reports, journals, books and materials from internet.

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<sup>53</sup> AU,(2010) Framework and Guidelines on land Policy in Africa , AUC, ECA, AfDB Consortium (2010pp.10



### **1.8.1 Research Design**

Orodho, (2003) defines research design as the framework that is used to produce answers to research problems. It is the organized process for collection and analysis of data in a manner that seeks to combine relevance with the research objective. This research will do case study of Kenya in relation to other African countries that subscribe to the AU F&G. The research will use both primary and secondary data. The primary data will be obtained by conducting interviews with land professionals who participated in formulating the AU F&G. Secondary data will be obtained from journals, books, reports, and internet

### **1.8.2 Target Population**

The target population for this study is Kenyan population. Due to the large population and technicality of the subject, this study cluster sampling technique will be the most appropriate, however the clusters will include ministry of land officials, land commission official, civil society representatives, Academic scholars on land matters, Key stakeholders on land e.g. land owners, financial institutions.

### **1.8.3 Data Analysis**

The period of Analysis goes back to year 2009 when the AU's framework and guidelines on land policy were endorsed by the African Heads of government and States. The Analysis will lay focus on the land reform process in Kenya, which began from 2009 towards the era of Kenya's new constitution period. The analysis will include analysing the national land policy and institutions created it.

#### **1.8.4 Limitation of study**

The challenges faced in the study is the time constraints due to the remaining time frame given for completing the research for this reason they may not be in a position to gather more data field as would have been expected for this type of study.

#### **1.9 Chapter Outline**

The study is presented in five chapters;

Chapter gives the background of the study by highlighting the significance of land globally and specifically Africa and its relation with conflict and introduces the AU F&G. The chapter gives the statement of the problem focusing on area of study and how the study will attempt to establish the role of AU F&G in resolving land related conflicts. Detailed literature review is undertaken to fill in the literature gaps and to understand what other scholars have done on the topic. The chapter contains a theoretical framework to help explain the concept of the framework in relation to its role in resolving land related conflicts in Kenya. The chapter has a research methodology which is a plan on how to generate answers to the research problems. The chapter ends with a chapter outline that gives an overview of the entire contents of the document.

Chapter Two is linked to the first objective which seeks understand the African Union policies on land and conflict resolution mechanisms. The chapter will analyse the various African Union policies that have been endorsed and ratified by the AU, and other International policies on land conflict resolution mechanisms that binds the AU member states.

Chapter Three discusses land related conflicts in Kenya for various periods, pre-independence, single party era, multiparty era and under the current constitution.

Chapter four will form the analysis of the study which will entail putting the data collected into some systematic form. It will be unveiling the underlying structures, extracting crucial variables, detecting anomalies and testing any underlying assumptions. It will involve scrutinizing the acquired information and making inferences. The chapter will gather data from various reports, research finding on the three objectives.

Chapter five being the final chapter, it will provide the summary of findings conclusions and recommendations. The chapter will answer the hypotheses question and the objectives set earlier. The chapter will give its findings , conclusions and recommendations on the African Union conflict resolution mechanism, findings , conclusions and recommendations on land related conflicts in Kenya , and finally give findings, conclusions and recommendations on the role of the AU 's framework and guidelines on land policy in resolving land related conflicts in Kenya.

## CHAPTER TWO

### AFRICAN UNION'S RESPONSE TO LAND RELATED CONFLICTS IN AFRICA

#### 2.0 Introduction

In the non existence of a continental policy on land, member countries have prior to 2009, relied on their customary land tenure system and land policies developed throughout the colonial time and post independence regimes. Land polices and laws developed by the colonialists served their economic and political interests to the disadvantage of the indigenious inhabitants' interests on their land. Most African states have made several attempts to properly deal with land related conflicts, by use of inherited colonial laws and policies and customary land laws that previously existed. This state of legal pluralism has contributed immensely to land related conflicts in most African states rather than resolving them.

The journey for developing a continental policy on land began in 2006 in the course of coming up with a land policy initiative (LPI), spearheaded by three institutions, African Union Commission, (AUC), the United Nations Economic Commission For Africa (UNECA) and the African Development Bank (AfDB). The process ended with the development of the continental Framework and Guidelines on land policy. The AU F&G was to, objectively guide and assist African countries on the procedure of formulating land policy. This is conversant by the understanding of good number African countries that appreciate proper land management as a crucial component in development and an essential aspect for the conservation of peace and security.

## 2.1 Causes of Land Related Conflicts in Africa

Conflicts over land are a wide spread phenomenon throughout West Africa; this is mainly attributed to desertification. This assertion however is refuted by scholars (Benjaminsen, 2008 et al). Issues associated with land conflicts in this African region have been witnessed among groups that are involved in the same means of production i.e. herders and pastoralists. Previous research points to the fact that environmental scarcity is regarded as the main cause of communal violence especially in areas where community is actively engaged in the primary sector. Meier, Bond & Bond, (2007) suggest that resource variable maybe related to violence not necessarily because of grievances over the scarcity of resources but due to groups tactical consideration. Boone,(2007) Berry,(2009) Woods, (2003) state that there exists a correlation between cash crop and political violence, as resource related rent seeking changes focus from the motivation organization for peaceful versus conflictual interactions. Multiplicity of laws and land adjudication process are mainly the cause of land related conflicts in West African region. Eck,( 2004) denotes that when there are competing jurisdiction with multiplicity of mandates, the legitimacy of the system is overlooked thus forcing people to settle land related disputes, extra judicially<sup>54</sup>.

Land in Sub-Saharan Africa has a long past record of land dispossession and contestation leading to land inequalities coupled with evidence of distribution inequality of land resources. The land discrepancies witnessed on land in the region of Sub-Saharan Africa has had implications on the political and socio-economic positions of divergent group of people, resulting in various land conflicts. Most East African Countries, the issue of land tenure and right to use land has been main cause

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<sup>54</sup> Eck, K., (2014), The Law Of The Land; Communal Conflicts and Legal Authority, *Journal of Peace Research*, Vol. 51, No. 4, pp. 442

of conflicts between ethnic groups in the region. Rugege et al (2007) Huggins et al (2003;1) have indicated that studies show that transformations in land use and land right to use have been crucial factors in the various observed land related conflicts due to transformation in land possession patterns occasioned by weakening autonomy and resulting in exploitation of vulnerable groups. The taking of advantage of communities in connection to contestation of mining rights. Peters (2004; 275) on the other hand he asserts that land reforms have been carried out in almost all states within the region of Sub- Saharan Africa. Land related conflict resolution process in Sub- Saharan Africa involves both official and unofficial institutions and practices.

In central Africa region, state control over land is quiet common in most central African countries. This is linked to non acknowledgement of traditionally based land rights held by local communities. Non existence of apparent land policy, poor land laws coupled with legal pluralism, weak capacity in land laws and implementation, excessive centralization of land policy and meager land related governance are contributors to major crisis and land linked conflicts. Current land guiding principle and laws in the central African region are mainly influenced by colonial legacy, traditional based land rights are overlooked by these laws whereas state power over land is strongly suggested.

## **2.2 The African Union Conflict resolution Mechanisms**

Jonah , (2001) literates that the focus that is now implored to issues of conflict management of intra state nature since the culmination of the cold war, is depicted from the apprehension by the African leaders of states and governments that violent conflicts are an obstacle to states that intend to benefit both politically and

economically in the global arena. Ali Mazrui, (1995:9) observed that as conflicts in Africa increased; the continent became more marginalized and pushed to the periphery on the world system. The UN does advocate globally for preventive diplomacy (PD) in conflict resolution. The concept of PD was developed in a report on “Agenda for Peace” authored by former UN secretary general Boutros Boutros Ghali. The report was received in the UN General Assembly of 1992. Since the approval of the report, various regional organizations and communities have been encouraged to practice preventive diplomacy<sup>55</sup>.

Former US president Clinton in his mid 1994 speech on Africa, he promised to grant assistance to African countries, discover and resolve issues before they erupt. It is out of this concept of PD that the (MCPMR) of the African Union is entrenched. The MCPMR was recognized subsequent a resolution taken by African leaders of state and governments in June of 1993 in Cairo, during the 29<sup>th</sup> session of (OAU). Following the 38<sup>th</sup> ordinary session of the OAU, The OAU was dissolved and a gave forth to a new entity called the African Union (AU). The AU assumed the obligations of OAU, one of them being conflict management<sup>56</sup>.

The constitutive Act of the African Union, which replaced the Charter of the OAU, failed to provide a means for conflict deterrence, administration and resolution. The threat of Africa’s development occasioned by the abundance of small arms, called upon the AU to endorse a set of laws on the organization of the peace and Security Council (PSC) to undertake resolution and decision of the OAU in the MCPMR.

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<sup>55</sup> Albert , O.L,(2007) The African Union and Conflict Management, *Africa Development*, Vol. 32, No.1 pp. 41

<sup>56</sup> Ibid pp. 46

various aims of the PSC as found in Article 3 of the protocol establishing PSC is to; encourage peace, security and stability in Africa in order to promise the protection and conservation of livelihood and property, the well being of the African people and their environment as well as creating an environment that is advantageous to sustainable development. The PSC is mandated to promote democratic practices superior governance and the rule of law, including the defending of human rights and basic freedoms, respect for the sacredness of human life and global humanitarian law as part of its labors to prevent conflicts

The guiding tenets of the MCPMR suggest that African states have come to the realization, that they can no longer continue relying on the international community to provide leadership in making, building and keeping peace in Africa, but can only offer support. Africa must find African solutions to their African challenges. Some of these challenges include challenges on land, and thus, the declaration of challenges on land issues in Africa<sup>57</sup>.

### **2.3 Declaration on Land Issues and Challenges in Africa**

The land policy initiative (LPI) formed in 2006, as joint framework for land policy and land reform in Africa, had the objective of intensifying land rights in Africa, promoting efficiency and securing livelihood in Africa. The process of formulating a draft proposal included the participation of African continent wide and regional multi-stakeholder consultations and deliberations, before the document underwent refinement by national experts and finalizing by ministers of agriculture, land and livestock from African continent. The AU F&G were firstly approved by the

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<sup>57</sup> Ibid pp.47



executive council of the AU and then by its highest authority organ, the Assembly of African leaders of state and government at the AU summit in July, 2009 specifically affirming the declaration of land challenges in Africa. The affirmations contained useful agreements on leading land policy development, allocating adequate resources, striving to achieve equitable access to land and strengthening of women's land rights in Africa<sup>58</sup>.

The AU F&G is non-binding policy but its legitimacy and influence on member states is derived from the affirmation by African heads of states and government, the long inclusive process of consultancy engagement and popular participation that led to its affirmation. The development of a AU F&G aims to provide direction and assistance on how better land policies and governance practices for sustainable development. The AU F&G are about the urgent requirement for land guiding principle in African continent, the context and issue that require urgent attention to be addressed and the land challenges that have been observed in Africa. The AU F&G advocates for change processes, land policy, land policy development, its implementation and progress tracking. The AU F&G contains two parts the "framework" and the "guidelines" the framework is apprehensive with land issues on the Continent which include, land in the sense of resource scarcity, land in the sense of a political tool, economic logic of land in Africa, land and its social aspects<sup>59</sup>. The Africa Union has in its disposal various policies and international laws involving land and natural resource governance, among the crucial policies is the African Peer Review Mechanism APRM, which is a measuring tool for improved governance among the African states that have signed up .the instruments are categorised into two

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<sup>58</sup> International Land Coalition (2014), " Benchmark For Land Governance In Africa", ILC, Rome

<sup>59</sup> African Union, (2010) , Framework and Guidelines On Land Policy In Africa, ECA, Addis Ababa, pp.vi

namely; binding instruments (international law) and Non-binding instruments (soft law). The following are the International instruments that are applied by AU in resolving land related conflicts; ACHPR- African Charter on Human and Peoples Rights, CBD- Convention on Bio-Diversity, CEDAW- Convention on the Elimination of all Forms of Discrimination against women, CESC- Convention on Economic Social and Cultural Rights, Maputo Protocol- Protocol to the ACHPR on the Rights of Women in Africa, UNCCD- United Nations Convention to Combat Desertification, ILO169 – Convention no. 169 of the international labour Organization.

The Non Binding Instruments include; F&G- Framework and Guidelines on Land Policy Development, PFPA- Policy framework for pastoralist in Africa, Pretoria Declaration- Pretoria Declaration on Economic Social and Cultural Rights in Africa ,SDGEA- Solemn declaration on Gender Equality in Africa, VGGT- Voluntary Guidelines on the responsible Governance of Tenure of Land, Fisheries and Forests in context of National Food Security.

This chapter will discuss the APRM policy and the three international instruments that center on land policy and governance which are, VGGT, F&G, and the UNCCD.

#### **2.4 African Peer Review Mechanisms**

The African peer Review Mechanism APRM is a recent mechanism for evaluating acceptable governance practices within member states. It is characterized by the procedure of evaluating political, economic and corporate governance and socioeconomic development in participatory countries. The main objective is to prompt member states to draft a national program of action to correct identified deficiencies. The peer review process performs its functions under the backing of the

African Union (AU) and its development framework, the New Partnership for Africa's Development NEPAD.

In June 2002 the NEPAD implementation committee while in a meeting in Rome, adopted the affirmation on Democracy, Political, Economic and Corporate Governance, giving forth to the APRM. The document was supported by development partners and donors during a G8 meeting in Canada in June of 2002 where African road map was adopted which stated "the peer review persons will inform their consideration for eligibility for improved partnership.. They stated that they will not work with governments that deliberately ignore the interests and dignity of their people. The AU assembly meeting in July 2002 adopted a affirmation on the execution of the NEPAD which encouraged AU member to adopt the governance Declaration and acceptance to APRM<sup>60</sup>.

#### **2.4.1 United Nations Convention to Combat Desertification UNCCD**

The UNCCD is very crucial policy to land management and rights. The convention appreciates the duty of national government in combating desertification and mitigation of the drought effects and emphasizes the betterment of the effectiveness and harmonization of international cooperation to provide for the accomplishment of national plans and priorities.

Article 4(2) of the convention provides for parties need to undertake and to promote cooperation among affected parties in the field of environmental conservation and conservation of land and water resources, in relation to drought and desertification.

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<sup>60</sup> Killander M,(2008) The African Peer Review Mechanism and Human Rights; The First Reviews and the way forward, Human Rights Quarterly, 30 , pp1

The article 4(2) also undertakes to strengthen sub–regional and global cooperation in this regard. The convention calls upon parties to prepare national action programmes to attain the aim of the convention and impress upon states to ensure that they undertake such activities to accomplish the intended goals of the convention, and require that such programmes be closely associated with other efforts to formulate national policy for sustainable growth<sup>61</sup>.

Article 9(1) provides for the resettlement of communities where actions which warn to effect desertification, are carried out and regulations of right to use and control of other natural resource rights as it involves a re—definition of these rights through national process of legislation and realization of other national policies aimed at satisfying the obligations assumed under the convention<sup>62</sup>.

#### **2.4.2 The FAO Voluntary Guidelines for the Responsible Governance of Tenure of Land, Fisheries and Forests. FAO VG**

The FAOVGs for the accountable Governance of tenure of land , fisheries and forests was sanctioned by FAO committee on world Food Security (WFS) on 11 May 2012 and the UN General Assembly called for its implementation. The FAO VGs were the initial global instruments on the occupancy of land, fisheries and forests, building on the consensus of accepted best practices, in line with accessible international law and covenants. The FAOVGs are anchored in the principle that secure tenure is a precondition for food security. The guidelines were formulated by UN member states, civil society, Academia and Private sector during the period 2009 and 2012<sup>63</sup>.

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<sup>61</sup> PLAAS Policy Brief, “international and Regional Guidelines on Land Governance and Land –Based investment An Agenda for Africa States, (September 2014), pp 2

<sup>62</sup> Ibid pp3

<sup>63</sup> Ibid. pp3

## **2.5 African Union Framework and Guideline on Land Policy (AU F&G)**

The AU F&G provides an impression of the history historical, political, economic and social background of the land issue in Africa and describes the function of land as an important natural resource for economic development and poverty eradication. The framework gives a common vision among stakeholders of an elaborate and sound structured land policy as main aspect in national development. AU F&G calls upon all African states and governments to focus keenly on the type of land administration systems, land rights, delivery system, land control structures and institutions, and to guarantee sufficient budgetary condition to land policy development and implementation is factored in their countries. The Land policy formulation and execution will facilitate African governments to gather knowledge from past achievements and failures, and facilitate them to make timely reorganizations to national land policy development process<sup>64</sup>.

The AU F&G mirrors a continental agreement on land matters and challenges. It provides a stage for obligation of African governments in land guiding principle and implementation and a suitable foundation for majority inclusion in the process for improved land governance. Some of the issues on land in Africa fuelling instability, is a long past of past injustices arising from colonial expropriations followed by a skewed redistributive process by post colonial regimes have remained an origin of conflict. The issues of global commercialisation of land and minerals resources have spurred conflict leading to raise in the number of internally displaced persons (IDPs)

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<sup>64</sup> Ibid, pp. vii

further raising complexities on accessibility of land, resettlement and rehabilitation. The AU F&G notes that these land associated conflicts have resulted in compulsory eviction and other horrific atrocities. African countries are called upon to develop land polices and undertake land reforms to resolve these conflicts and attain social equity and deal with the predicament of conflict deterrence and reinstatement of peace and security in Africa<sup>65</sup>. In July of 2009, the African Union AU, heads of states and government accepted the declaration on land issues and challenges in Africa. This declaration saw the establishment of the AU F&G. For the foremost time the African leaders were unison in approving key goal and fine practices for reforming land governance<sup>66</sup>.

The AU F&G document is not intended to be dictatorial in terms of what independent African government should undertake, but provide a framework which be of beneficial to the various government in which they can prepare their national land policy framework using the developed AU F&G. AU F&G are available to those countries that are yet to develop their national Land Policy but also for those that have already developed them but need to be improve and perform evaluation on the existing policies.<sup>67</sup>. Under the declaration , the heads of state and government agreed to give precedence and undertake a leadership role in land policy development and implementation process, it would champion the development of the institutional framework necessary for the effective development and completion of land policies, and provide adequate financial resources for land policies development and implementation process. The leaders agreed to among others strengthen land laws that

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<sup>65</sup> Ibid pp. 7

<sup>66</sup> International Land Coalition (2014), "Benchmark for land Governance in Africa," ILC, Rome, pp4

<sup>67</sup> PLAAS Policy Brief, "international and Regional Guidelines on Land Governance and Land –Based investment An Agenda for Africa States, (September 2014), pp 2

provide for reasonable access to land and related resources among all users including youth and displaced persons and they also agreed to guarantee the strengthening of security of land tenure for women as an issue that must be given special attention<sup>68</sup>.

The AU commitment to broadly determine long standing political issue of land in Africa is stuck in the view that land policies must to maintain a wide range of Continental and national economic, social and political goals. AU F&G are not binding to the AU states; due to the reality that it appreciates the element of state power as contained in the constitutive Act of AU, the objective of the AU F&G is to guide member states on the procedure of formulating land policy in their particular country situations. The AU F&G recognizes that most African States appreciates that the correct management of land is an essential factor in development and will strive to provide for the preservation of peace and security<sup>69</sup>. Specifically the AU F&G seeks to; provide a stage for obligation by African member states to the formulation and operationalisation of proper land policies as a tool for sustainable human development that incorporates provision of social stability, maintaining economic expansion and reducing poverty and protecting natural resources from dilapidation and pollution; develop a mutual understanding for common principles as the platform for securing access to land for all users, developing agricultural efficiency and supporting livelihoods, promote for the need for popular input in land formulation and accomplishment in order to assist improved governance of land resources, grant a base for more logical partnership between states, citizens and development partners in land policy formulation and accomplishment on the continent, develop general doctrine for working with development partners for the aim of mobilizing resources

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<sup>68</sup> AU,(2010) Framework and Guidelines on land Policy, Addis Ababa, Ethiopia, pp. 17

<sup>69</sup> AU,"(2000) *Constitutive Act of the African Union*", pp.3

for intensifying capacity for transformative land policy reform process and, provide for greatest practices for land policy reforms and standards for the practice of land institutions that member states can apply for maintaining with their respective contexts, promote a policy framework for dealing with emerging issues and predicting future trends associated with land resources, encourage ideology for regional meetings on the sustainable organization and use of land and other related resources shared by two or more member states in various parts of Africa.<sup>70</sup>.

In comprehending the land problem in Africa, the land issues affecting African States have their history in geo- political, economic, social and demographic factors coupled by emerging, international and strategic imperatives. These imperatives have been characterized by a range of legal regimes associated with land tenure, use, management and environmental governance. The contemporary process of social association and mobilization including those resulting from class, gender, region, culture, ethnicity, nationality and generation linkages now prevail in forming a scenario where access to manage and use of land, is associated with a complex basis of claims and conflicts over land resources. The issue of Land and Conflict in Africa is characterized by long fierce struggles for land and natural resources being the factors that are fuelling volatility in the continent. The purposeful failure by various government regimes to tackle these historical injustices on land meted out on previous settler colonies of in the likes of Kenya, Zimbabwe and South Africa, will carry on to remain a major source of conflict. Interest on land in the mineral rich countries like Angola, DRC, South Sudan, Sierra Leone and Liberia; have also contributed to

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<sup>70</sup> Ibid pp18



conflicts over land occasioned by global commercial interests<sup>71</sup>. The question of IDP has largely been as a result of conflicts within the affected states. Other than dealing with past injustices and realization of social impartiality, land policy development and reform the problem of conflict deterrence and reinstatement of peace and security in Africa. For land to play its useful prime role in national and regional development in Africa, more effort will require to be channeled urgently on the state of land management systems. Two very important issues come to fore; the condition of land rights freedom and the efficiency and effectiveness of the laws, policies and institutions for land control<sup>72</sup>.

The AU F&G has envisioned reform of land governance institutions to be able provide for good governance of land, natural resources and processes. Land governance in this perspective implying the route by which decisions associated with access to, and use of, land are made, the manner in which those decisions are implemented, and the manner in which opposing interests in land are determined or reconciled. Land governance is associated with techno- legal, bureaucratic and political exercise. This is conversant by the fact that the procedure of allocation and delight of land rights cannot be distinguished from civil, political and human civil rights of the citizenry and relies on the political administrative and professional desire to achieve fair treatment and equal opportunities for all<sup>73</sup>. The implications of land guidelines development is to guarantee that the policy balance the rights and interests of all users and adequately provides for the inclusion of all members of society including women, persons with disability and other landless poor to facilitate them

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<sup>71</sup> Ibid pp.19

<sup>72</sup> Ibid pp.19

<sup>73</sup> Ibid PP.20

attain full social environmental and economic rewards from land which further develops political strength and democratic institution building<sup>74</sup>.

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<sup>74</sup> Ibid pp. 21

## **2.6 Conclusion**

Legal pluralism and, weak capacity in land policy progress and completion coupled with over centralization of land management has characterised the land problem in Africa. The development of the AU F&G is instrumental in formulating benchmarks that are of international standard for addressing land challenges and assisting in land reform in the various African countries. The subsequent chapter will take an comprehensive analysis of land associated conflicts in Kenya and the available conflict resolution mechanisms.

## **CHAPTER THREE**

### **LAND RELATED ISSUES IN KENYA SINCE PRE –INDEPENDENCE**

#### **3.0 Introduction**

This chapter dwells on conflicts related to land in Kenya since Independence. It will discuss the land linked conflicts in Kenya for three significant periods of Kenya's history, pre-colonial period which involves the introduction of colonial land administration policies to that replaced the traditional land tenure system of the African community. and its consequences. Post colonial regimes and their land administration policies. The chapter finalises by assessing the journey for land reforms in Kenya.

#### **3.1 History of land related conflicts in Kenya**

The Daily Nation newspaper of 22<sup>nd</sup> May 2013 in an article written by Lucas Barasa says that past injustices over land are the major causes of disputes and ethnic tension in Kenya<sup>75</sup>. Kenya was a British colony, which attained self rule in 1963. When analyzing issues on land in Kenya it is logical to get reference of land tenure system during the pre- independence period, colonial period and post colonial period. The British citizen view on the African Customary tenure agreements practiced by greater part of the indigenous African people as being inconsistent with development and global modernization practices. The Colonial administrators wished for the eventual abolishment of traditional systems of land tenure. The British succeeded scraping the system by successfully declaring all land to be Crown land. During the Post colonial

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<sup>75</sup> Barasa L., Daily Nation, 22<sup>nd</sup> May 2013

period, the Kenyan Government declared the “crown lands” as government owned land and the native owned reserves transformed into Trust lands<sup>76</sup>.

Kenya’s early indigenous political protest pressure groups was formed in 1921 by Harry Thuku with the aim of recovering Kikuyu land by practicing civil disobedience over new taxes , reduced wages and continued loss of land to the white settlers<sup>77</sup>. Kenya’s land conflicts have been characterized by structural scarcity. Land ownership, access and utilization have been unequally distributed since colonial times.<sup>78</sup> The British colonial administrators had implications to inequality on land tenure and land utilization leading to landlessness, squatting land degradation poverty and African anger toward the white settlers<sup>79</sup>. The colonial administration created a pluralistic system of land tenure, one based on English property law applicable to high potential areas and another of disused regime of traditional property law for the marginal areas or the low productive areas. The Administrators developed land laws that favored the high productive areas and totally disregarded the Africa’s native reserves. This situation was a recipe for conflicts leading to the struggle for independence based on the demand by the African for their land.

Syaaga, notes that predominant inequalities witnessed between the Africans marginalized areas and former European high potential was very profound. The policies, laws and practices adopted after independence was a continuation of the existing, colonial policies and laws<sup>80</sup>. The laws and policies included, excessive focus of power in the executive branch of government further empowering the structural

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<sup>76</sup> Veit P,“(2011) History of land conflicts in Kenya”, Focus on land in Africa, pp.7

<sup>77</sup> Ibid. Pp8

<sup>78</sup> Wakhungu,J., Nyukuri, E., Huggins, C.,(2008) “Land Tenure and Violent Conflict in Kenya”, Consultative Conference proceeding Report (ACTS) Nairobi.

<sup>79</sup> Syaaga,P., “Public Land Historical Land Injustices and the new Constitution” SID, Working Paper 9, Nairobi,

<sup>80</sup> Ibidd pp

differences inherited from the colonial government. Unequal resettlement policies and practices undertaken by post colonial regimes acted as a catalyst for more tensions on land and aggravated the historical injustices on land meted on the indigenous Africans.



### **3.1.1 Post Colonial Period**

Throughout the 1960's the Kenyatta government undertook a process of Africanisation of the economy. Land purchased from the colonial settlers with the help from the British Government was subdivided for occupation for those unemployed and progressive farmers. Land was sold to the government owned ventures and to prominent and wealthy African families. Ogot (1996, 64) concluded that greater than half of the settler lands ownership changed almost intact by sale to influential and prominent Africans. A new policy on land characterized by class, other than race was recognized in Kenya<sup>81</sup>. The latter half of the 1960's saw a disagreement along ideological lines between those deemed to be radicals like Oginga Odinga and those deemed to be moderates like Tom Mboya. The groups failed to agree on a number of issues including, land tenure rights, land distribution and compensation for whites as well as on the issue of nationalisation of business and industry.

Sessional paper No. 10 of 1965 which was a compromise document advocated for African socialism. Differences arose on modalities of its implementation and in February of 1966 Oginga was overlooked. Throughout 1970's the transfer of farmland, the irregular allocation of public land, both urban and rural by powerful

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<sup>81</sup> Ogot, B. 1996. The decisive years 1956-63. In Decolonization and Independence in Kenya 1940-93, ed. B. Ogot and W. Ochieng, 4880. Nairobi: East African Educational Publishers. Oduho, J. 1996. Urban migrants and rural development in Kenya. Nairobi: Nairobi University Press.

persons continued unchecked. Attempts to raise concerns into these scandals by parliament and police received no attention<sup>82</sup>. Politicians or businessmen fraudulently disguised as the leaders of companies initiated by the landless to buy large farms. Majority of these land buying companies were financially incapacitated before the members were settled or the lands fraudulently ended up in the possession of the leaders. Many families especially the Kikuyu community was tricked this way and became victims of the con games.<sup>83</sup>.

### **3.1.2 Single Party Era 1978-1992**

When President Moi ascended to power after the demise of President Kenyatta in 1978, no transformation on matters of land was witnessed. President Moi closed Kikuyu owned banks and built his Kalenjin power base which favored Kalenjin ethnic nationalism<sup>84</sup>. The structural adjustment programmes introduced, had minimal impact on government development and saw the emergence of nepotism and ethnicisation of power. The failed 1982 coup attempt turned less favorable for the Kikuyu elite creating opportunities and support for the Kalenjin elite.

Ahead of 1992 multiparty elections Rift-valley political elites incited the Kalenjin against perceived immigrants. According to a human rights watch/Africa Watch 1993, three reasons were given as cause for the clashes. That the land illegally acquired by outsiders was lost due to interference of the Europeans and should be returned to the Kalenjin Community since it once belonged to them. Another factor that contributed is that Immigrant among their midst were hated and finally was ethnic loyalty to the

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<sup>82</sup> Leo, C. (1984). Land and class in Kenya. Toronto: University of Toronto Press

<sup>83</sup> Rutten, M., S. Owuor, (2009) Weapons Of Mass Destruction; Land Ethnicity and 2007 elections in Kenya, Journal of Contemporary African Studies Vol. 27 ,3, Pp310

<sup>84</sup> Ibid 313

Kalenjin politicians<sup>85</sup>. Previous accounts established that in 1991-1992 violence in Kenya originated from a long history of land conflicts that had deep roots of ethnic dimensions and that the violence was fuelled by re-election seeking political leaders of Rift valley province. The regional base, of the regime of Daniel Moi. Kenyan leaders such as Nicholas Biwot had an agenda of unleashing fear or punishing likely opposition voters who were mostly members of the rival ethnic groups in order to create voter apathy, by driving them away from their homes and farms so that they would be encounter a challenge of voting on Election Day. There was a connection between the observed pattern of violence and particularly the land tenure regime established in 1962 -1979. The unresolved land grievances in Rift Valley were connected to national level politics, and the outcome of multiparty politics. Politicians were able to use deep rooted land grievances for political gain<sup>86</sup>.

The land grab experience by the post independence governments by well connected personalities fuelled ethnic tensions due to ethnic dimension and concentration in the unlawful and unequal allocation of land. In the Rift Valley for instance, the Kikuyu community who had acquired land and settled there, were viewed as outsiders by the host community of the Kalenjins. The Akiwumi Commission of inquiry put in place in 1998 to look into ethnic tensions related to 1997 elections, one of its findings was that the Kikuyu community had settled in the Rift valley by 1957 and they had increased in number to significant levels. The report noted that the District Commissioner of Uasin Gishu annual report indicated that ethnic tensions were on the rise between the two communities. The report further noted that the Kikuyu

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<sup>85</sup> Ibid 314

<sup>86</sup> Boone, C., "Politically Allocated Land rights and Geography of Electoral violence" *The comparative political studies*, Vol. 44 pp. 1314.



community had been allocated land that previously belonged to white settlers, as a reward for political patronage<sup>87</sup>.

### **3.1.3 Multi Party Era**

Immediately after the first multiparty elections of 1992, clashes erupted. 500 people mainly kikuyu immigrants were attacked at Enosupukia in northern Narok by Maasai warriors, 20 people were killed, houses burnt, shops looted and 30,00 people forcefully evicted from their land. Opposition MP's blamed the clashes on Narok North Member of Parliament ( MP), William Ole Ntimama. The Mp replied by stating that Kikuyu community had suppressed the Maasai, taken over their land occasioning the dilapidation of the environment. The 1997 elections were characterized by clashes at the coast and the rift valley. Those responsible of the coast attacks were largely unsatisfied local youth men, whose hostility was directed towards non indigenous residents in the region. The raiders' main objective was to reclaim their ancestral land. Other major conflicts erupted in the Njoro , Laikipia areas weeks after December 1997 multiparty elections<sup>88</sup>.

### **3.1.4 Kibaki Era 2002-2007**

The Kibaki government was overwhelmingly noted in with the promise of free education, jobs, fighting corruption and a promise of a new constitution that would deal and provide a solution to the land problem. The PEV period of 2003 was not characterized by violent flare ups. The election of 2007 is Kenya's recent political turmoil. The Post election violence brought to fore dominant unresolved issue since

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<sup>87</sup> Ibid pp.314

<sup>88</sup> Ibid pp. 315

Kenya's independence. Land has been notably identified to clarify ethnic strife. Oucho, 2002, suggests that at independence, Kenyans missed out on an opportunity to correct the land injustices carried out on the indigenous population by colonialists. This further gravitated the problem by fostering a land policy, benefiting certain groups in society at the expense of others<sup>89</sup>. Kanyinga (1998.352) advocates for democratization of land occupancy system simply owing to economic and liberalization processes on land have increased the number of conflicts over land between the landed and the land poor. With more pressure subjected on the land as a result of increased population growth, unequal ownership and competition over agricultural resources water in particular, coupled with many young educated job seekers and with weapons available at cheap rates, serious trouble might occur in Kenya unless major land reforms are pursued<sup>90</sup>.

### **3.2 Other forms of land related conflicts in Kenya**

Odeda,(2004) Notes that an important connection to land connected to conflicts is the credit institution in Kenya and how its relationship land access to rights. The individualization of land in Kenya was by intentionally designed to enable registered owners to produce their land titles to a financial institution for purpose of accessing credit. Financial lenders have been associated with land related conflict with defaulters, in the effort of recovering debt from them. Odeda, (2004) also denotes that land related conflicts manifest itself through the human wildlife management and conservation practices through gazettelement of large portions of community lands as national parks, game reserves and conservancy sanctuaries. Communities feel that

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<sup>89</sup> Oucho, J. (2002). Undercurrents of Ethnic Conflict in Kenya. Leiden: Brill

<sup>90</sup> Kanyinga, K. (1998). The Land Question in Kenya: Struggles, Accumulation and Changing Politics. PhD thesis Roskilde University. Unpublished.

they have been excluded from such lands, which are managed as public trust lands under the Kenya wildlife Service (KWS). These lands have taken up land meant for grazing for the pastoralists' community and farming lands for communities, permanent and potential land related disputes occur between communities' dependent to wildlife areas and the KWS as an agent leading directly to human wildlife conflict. The use of environmental riparian reserves, forests is another potential ground of land related conflicts amid conservationists and owners of illegal allocations of such lands<sup>91</sup>.

Mining extraction practices in Kenya are another source of land linked conflicts mostly characterised by issues of compulsory land acquisitions and compensation practices. The laws governing mining practices in Kenya is exclusive in nature from the communities land rights of tenure within the mining region. Numerous land related conflicts arise from the manner of handling the dispute resolution mechanism in Kenya. The judicial system has contributed to land associated conflicts due to lack of inefficiency and efficacy in resolving land related disputes. Most of the land related cases tend to drag in court for a long period of time thus negatively impacting on major land development projects<sup>92</sup>.

### **3.3 Attempts for Resolving Land related Conflicts in Kenya**

The 1994-1996 Kenya's National Development Plan, the government observed that the previous Development plan had failed to adequately address the issue of land administration and management. A proposal of 1970s to establish an independent land

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<sup>91</sup> Lumumba, O., Land Related Conflicts in Kenya, policy implications, extract from a paper presented at a conference in December , 2004 pp.1

<sup>92</sup> Ibid pp.1

commission was completely ignored. This kind of situation has formed a path for the many witnessed land related conflicts in Kenya<sup>93</sup>.

Kenya is to a great extent an agrarian society and in reference to a report on land occupancy and violent disagreement of 2008, it stated that agriculture and forestry services in Kenya, contributed 27% of Gross Domestic Product GDP. In Kenya issues of land rights account for the root causes of conflicts in Kenya. Various commissions and taskforces have been launched by the many post independence regimes with the vision of attempting to resolve the land associated conflicts in Kenya.

The Akiwumi commission of inquiry into tribal clashes selected on 13<sup>th</sup> July 1998. One of its findings is that skewed distribution of land and tenure practices have fuelled ethnic tensions, in the majority of cases leading to violent conflicts through Kenya and was more noticeable in the Rift Valley and Coast Regions<sup>94</sup>. In 1999 the Njonjo Commission selected to inquire into land law systems and aid the country to develop a nationwide land policy. June 2003, the Ndungu commission was selected to look into the unlawful and unequal allocation of public land in Kenya. The commission recommended the formation of a Land Titles Tribunal in Kenya, with the directive of scrutinizing each and every case of suspected unlawful and unequal allocation of land<sup>95</sup>. The Commission on Post Election Violence (CPEV) or the Waki Commission of 2008 established immediately after the post election violence of 2007-2008, corroborated the finding of the Akiwumi Commission. The report noted that the provision in the constitution that granted permission to a citizen to own land

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<sup>93</sup> GOK, (1994) National Development Plan 1994-1996, Nairobi, Government Printer, pp. 107

<sup>94</sup> Wakhungu, J., Nyukuri, E., Huggins, C. (2008), "Land Tenure and Violent Conflict in Kenya", Consultative Conference proceeding Report (ACTS) Nairobi

<sup>95</sup> Southhall, R., (2005) The Ndungu Report; Land and Graft in Kenya, Review of African Political Economy, Vol.103, pp142-51

anywhere was merely a *dejure* but was not a true reflection of the scenario on the ground.<sup>96</sup>

The Truth, Justice and Reconciliation of Kenya TRJC, Act No. 6 of 2008 established as part of the accountability part for the Agenda four of the National deal signed in 2008. The TJRC was to inquire into the serious human rights offences and other past grievances, in Kenya between 12th December 1963 and 28<sup>th</sup> February 2008. During the colonial rule the Crown Land Ordinance, controlled the process in which land was distributed to individuals or corporations for development. Public Auction was the main method of distribution unless directed otherwise by the Governor. The other method was controlled by leasing of land on basis of acreage. A circular issued in 1951 to transform the procedure of distribution of land in township from public sale to direct grants with assistance of local committee, while being undertaken within the local municipalities was through the tendering process.

The Land Act of 1963 provided for allocation of government land, without limitation to acreage, Section 12 of the Act provided for town plots to be sold by public auction unless the president directed otherwise. The other option was the tendering process. In the 1980 the procedural safeguards in the Lands Act of 1963 were disregarded. Legal notice no. 305 of 1994 legalized the selling of allotment letters to third parties on payment of consent fees levied at 2 percent of the selling price or capital value of the land. This provision created a fraud window that witnessed a tremendous increase in the land grabbing “phenomenon” in Kenya, where land allocated to individuals would later on be sold for millions of shillings without first paying, the standard premium.

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<sup>96</sup> Syagga, P., “Public Land, historical land injustices and the new constitution”, Constitutional working paper No.9, Society for international development (SID)

Most of the unlawful land allocations were approved immediately before and after the 1992, 1997 and 2002 multiparty elections. This was undertaken through straight grant as political rewards for political support rather than public auction or tendering process as set out before<sup>97</sup>. The Mau Forest Task Force report established that very influential and powerful persons had acquired land illegally and irregularly in the forest catchment areas, that had been previously preserved for the landless. Most of the beneficiaries were prominent and influential government officials and political leaders<sup>98</sup>.

### **3.4 The land reform Process in Kenya**

The journey for reforms on land in Kenya was precipitated by a long historical past of skewed land administration and governance system. Kenya has been characterised with rampant land grabbing irregular or illegal allocation of land and tribal clashes related to land. The post election violence of 1992, 1997 and 2008 brought to fore the deep rooted issues associated to land that urgently needed to be addressed to avert more land associated conflicts in the country. During the post election peace agreements and negotiations brokered by Koffi Annan, one of the issues discussed is “Agenda 4” which focused on the long term issues one of them being land reforms. Sessional paper no. 3 also known as the NLP a plan of the Kenya government to address the land question in Kenya which manifest in many ways, such as policy, meager land administration, unequal land tenure and poverty. This turn of events add to environmental, social, economic and political challenge including dilapidation of

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<sup>97</sup> Ibid pp.

<sup>98</sup> Okwembah, D. (2009) ‘How Moi Allies Acquired Land Meant for Ogiek’, The Daily Nation, 6 December, p. 9.

land value, landlessness, squatting, disinheritance of some groups and persons, urban squalor, under use and rejection of agricultural land, tenure insecurity and conflict<sup>99</sup>.

### **3.5 Conclusion**

It is appreciated that Kenya has since attainment of her independence relied on a pluralistic system of land tenure one based on the English property law parallel to a neglected regime of customary law. The dualism of the land law negatively impacted contributed the land administration processes, giving rise to unequal land tenure system and a large population affected by poverty. The political, economic and legal aspect of the land problem in Kenya witnessed environmental, social, economic and political problems including degradation on land quality, landlessness, land tenure insecurity and conflicts. It is against out of this realization that the government of Kenya embarked on comprehensive land reforms and formulation of a NLP to address theses challenge. The subsequent chapter will attempt to analyse the role of the AU F&G in the formulation of a Kenyan NLP to address these land related challenges

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<sup>99</sup> Government of Kenya , Sessional paper no. 3, National Land Policy.

**CHAPTER FOUR**  
**ANALYSIS OF THE AFRICAN UNION FRAMEWORK AND GUIDELINES**  
**ON LAND POLICY IN RESOLVING LAND RELATED CONFLICTS IN**  
**KENYA**

**4.0 Introduction**

The AU F&G endorsed by leaders of states and governments as the agreed continental guidelines to help member countries in formulating their national land policies. Kenya as a country has began its journey on land reforms, with the purpose of tackling the land problem in Kenya that has been characterised by poor in land management practices, disparity in land possession and poverty. The scenario has further generated to environmental, societal, economic and political challenge including landlessness, insecurity of land tenure and land related disputes. This study seeks to comprehend the responsibility of the AU F&G in the resolution of land related conflicts in Kenya. This study has identified a small amount of of the land linked conflicts for analysis, in order to understand if the AU F&G are of any help in the development of polices that are key in the resolution of land associated conflicts and to pledge the enjoyment peace and security.

For the purpose of this study the parameters to be analysed include, the restitution of past injustice, security of land possession, land administration, outdated legal framework, and environmental degradation.



#### **4.1 Restitution of historical injustices on land**

European settlers assumed control over land through agreements conquests and appropriation. The grouping together of such control and follow up of regulation of acquired lands was affected through the introduction of various European laws and establishment of political, administrative and economic management systems in African colonies. The laws were worked onto a diverse range of indigenous economic and cultural practices leading to parallel legal policies in land tenure and administration. The land reforms undertaken to deal with the past colonial injustices based on skewed land ownership and to qualify discriminatory land use policies and insecure land tenure systems began in the 1950's. Efforts to reform land owned by native communities through a diversity of processes as well as individual and group titling or appropriation have been received with limited success due to continued abdication of social and cultural attachment to land, in some instances leading to confrontation and later maturing into a conflict<sup>100</sup>. AU F&G advocates that rather than addressing the land injustices, it advocates for prevention of conflict and attainment of peace and security in Africa and achievement of social equity.

The government of Kenya Sessional paper no. 3 (NLP) acknowledges that past land injustices which included skewed land adjudication and administration, registration law and procedure and treaty and agreements between local communities and the British colonialists. The Successive post independence regimes have not been successful in addressing the issue holistically. The GoK seeks to undertake the essential reforms in order to attain a suitable legal and administrative framework to inquire, document and establish the extend of past land injustices and advocate

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<sup>100</sup> AU,(2010) framework and guidelines on land Policy In Africa, pp.6

suitable remedy for their resolution. The government seeks to re-evaluate all laws and policies adopted by post the independence regimes that permitted the past historical injustices to take place under their watch and thereafter specify a time period within which land claims should be made and resolved conclusively<sup>101</sup>.

#### **4.2 Security of land tenure**

The AU F&G seeks to champion a secure access to land through a variety of forms of tenure to provide an opportunity and livelihood together with the provision of security for all land users. Land tenure reforms linked with redistribution of land programmes will most certainly improve right of entry to land and confer security for less privileged in the society. The AU F&G gives each member state the opportunity to choose the type of tenure system to implement.

The NLP refers to acceptable process including policies on land tenure as the reference circumstances from which rights to land and land based resources are obtained, retained, used, disposed of or transmitted. Existing polices and laws on land have not sufficiently being providing, equal protection to all categories of land rights. Consecutive regimes in Kenya have been poor champions of public land and trust land, resulting to the irregular and illegal allocation of vital public land and annihilation of critical natural resources such as forests and water catchment areas. To secure tenure of public land, the GOK according the NLP, shall repeal the government Land Act (cap 280), the government of Kenya shall undertake to identify and maintain a record of all public land and place it under the national land commission (NLC) an independent constitutional commission, mandated to hold and

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<sup>101</sup> Government Of Kenya, Sessional Paper No. 3 of 2009. Pp.

manage land on behalf of the people of Kenya. The GOK shall make proper decisions concerning public land holding and its use. The state shall further develop a good fiscal management system to dampen land speculation and mobilize revenue<sup>102</sup>. The NLP promotes for the establishment a detailed process for the repossession of any public land acquired unlawfully or irregularly. The state Endeavour to establish participatory all inclusive and accountable means for the allocation, expansion and disposal of public land by the national land Commission. The NLP seeks for establishment of a credible system for registering public institutional land.

In order to protect community land the GOK shall seek to develop a document and highlight existing forms of communal tenure, whether customary or contemporary, rural or urban, in liaison with the affected groups, and include them into major principles that will ensure the orderly transition of community land law. GOK shall seek to amend the trust land Act (cap 288) , define in the land Act, the proper meaning of the term community and lay ownership of community land in the community and provide in the land Act a proper framework and procedures. The government shall invest in training capacity for communal land governance institutions and make stronger their mandates and make easy flexible and negotiated cross boundary access among communities.

In rationalizing already present systems of private land tenure, the government shall, balance available modes of statutory tenure under the land Act. The state shall ensure that the estrangement of private rights for land takes into thoughtful legal rights, such as the right of spouses and children. The Government shall seek to ensure that private

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<sup>102</sup> Ibid p.p 17

land is held alienable and transferable with no biasness on grounds of sex, ethnicity or geography. The government shall seek to have good fiscal incentive to support full use of private land and limit land speculation and guarantee that all private land is given back to the state to be managed by NLC on behalf of the people of Kenya, in the result that the owner die with no heirs and in the nonexistence of legally demonstrable claims on the land. The absolute land tenure principles guiding the acquisition, use and disposal of land rights according to the government shall apply as follows; Non favoritism in ownership of land access to land under Act tenure system, the defense and promotion of the multiple values of land and the increase of fiscal incentives to encourage the optimal utilization of land<sup>103</sup>.

#### **4.4 Land Administration**

For land to play its basic role in national and regional development in Africa, concentration should be directed as a matter of necessity on the status of land management systems. While some issues are bound to occur, the condition of land rights delivery and the efficiency and efficacy of the laws, structures and institution for land governance must be established. Land rights delivery system is closely connected to the process concerned with ascertainment, separation, survey, registration and records of land rights transactions. In the majority African countries, these systems are in various circumstances of disuse and often mismanage it. Institutions mandated to handle land governance, including land seized by the state are to operate in a clear responsible and resourceful manner, which they are coordinated and their particular mandate rationalized. The decentralization of decision make power and power to local community and other stakeholder, land resources are

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<sup>103</sup> Ibid p.p 18

expected to be more productively used and preserved. In addressing these issues, the AU F&G will need a considerable amount of will and commitment from policy makers and practitioners.

The Kenyan NLP Refers to land policy refers to land administration as the procedure of, shaping, recording and providing information about ownership, value and use of land. Well-organized and proficient land administration system guarantees the recording of land rights encourages good land tenure and security and gives guidance to land transaction. Land administration system promotes good land rights and supports the process of land distribution, dispute resolution arising from land linked conflicts and fiscal management of land. Kenya prior to the enactment of the land Act 2012, land administration system that has been in operational, has performed below the expectation of many. Owing to bureaucracy, very expensive undemocratic practices system that is frequently abused and thus resulting in improper delays and injustice in land administration. The GOK has committed to; align land rights delivery measures and procedure with the NLP, combined with harmonizing and streamlining all land registration statutes to ensure proper and minimal bureaucracy inefficiencies, strive to have land records authenticated, documented and other custody and sanctity secured, the government has purposed to computerise all land records and assist access to land information.

#### **4.5 Conclusion**

From the above analysis, the AU F&G has been active in the land reform agenda for Kenya. The national land policies developed for Kenya (sessional paper no. 3 of 2009) has borrowed immensely from the continental set benchmarks and guidelines in

formulating land policies. The Kenyan Land Act of 2012 and the Kenya Constitution 2010 have heavily borrowed the recommendations of the sessional paper no. 3. The purpose of developing the NLP was to address the Kenya land question that has been an obstruction in development in various aspects ranging from economic, social and political.

## CHAPTER FIVE

### SUMMARY, FINDINGS AND RECOMMENDATIONS

#### **5.1 Summary of the study**

From the study, it is clear that land linked conflicts are common among most African countries. The conflicts date as far back to the colonial era. It is also very apparent that most countries inherited the land law and policy that were introduced by the colonialists. Most land reform processes in Africa began in 1950's in the nonexistence of the AU F&G . There is an emerging agreement among African Heads of states, that there are common Land related challenges among the states that need urgent land reforms to be undertaken. The AU F&G are benchmarks of internationally accepted best practices in the development of land policy. Though the AU F&G are non-binding but the endorsement and popular participation process in its formulation, gives the continental framework the legitimacy to be accepted as best practice for land policy formulation. The Development of the AU F&G was part of AU efforts to ensure that the continent has peace and security.

#### **5.2 Findings**

##### **5.2.1 Nature of African Union Land related conflict Resolution Mechanism**

The AU F&G developed from 2006, and involving various stakeholders and overseen by the continents experts on land matters is a very comprehensive document that has borrowed immensely from internationally accepted practices in land governance. Other policies like the APRM had been applied since the mechanism encompass all aspects of governance. The AU F&G has an enormous wealth of literature on land question in Africa, the challenges and the possible solutions to these challenges.

The AU has been using other internationally accepted guidelines and framework e.g the FAO VG. The AU is non-bidding but due to its endorsement by the AU Assembly of heads of state and government, popular public participation and contribution by key stakeholders from the five Africa RECs grants it the legitimacy to act as a continental benchmark for, member countries that intend to undertake land reforms and formulation of a NLP.

### **5.2.2 Nature of Land related conflicts in Kenya**

The history of land associated conflicts in Kenya can be traced from the colonial era. The Kenyan Land question that was characterized by ineffective land laws, a few of which are mismatched, Hence leading to a intricate land administration and management system. The land question has manifest itself in a lot of ways such as disintegration, collapse in land administration, disparity in land ownership and poverty. This has resulted in environmental, social, economic and political problems including aggravation in land value, squatting and landlessness, disinheritance of some groups and individuals, urban squalor, neglect of agricultural land, land tenure insecurity and conflict. The AU F&G has been very crucial in the drafting of the Kenya NLP (Sessional paper No. 3 2009) which has further contributed to the chapter on land in the current Kenya constitution 2010. And subsequently playing a critical role in the drafting and enactment of the Land Act 2012.



### **5.2.3 Role of The African Union Framework and Guidelines on Land Policy in resolving land related conflicts**

The AU F&G, through its contribution to the Development of a NLP, Current Kenyan Constitution 2010 and the enactment of the Land Act 2012, have been critical in addressing various challenges alleged to be the triggers of Land conflicts,. Issues touching on land governance, resolving historical injustices on land, improvement of land tenure, access and security, will be very influential in preventing land related conflicts especially during the election period. Other common conflicts arising from environmental dilapidation, and improving the institutions that are mandated with land management and administration, will be instrumental in preventing and resolving land related conflicts. Kenya land reform process, has heavily borrowed best practices from the AU F&G.

### **5.3 Recommendations**

The AU F&G is an evidence of a good continental policy on land that is essential for countries to use in their formulation of their NLP as international accepted best practices, for land governance and land polices that spur economic growth and improve social and political interactions. If these guidelines are adopted and implemented rather than being documented, the frequent land related conflicts witnessed in Africa will improve and secure the livelihood of the African People,

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