UNIVERSITY OF NAIROBI

SCHOOL OF LAW

SECURING COMMUNITY OWNERSHIP AND CONTROL OF LAND RIGHTSIN KENYA: OPPORTUNITIES AND CHALLENGES

By:

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DECLARATION

I declare that this Project Report is my original piece of work and has never been submitted elsewhere for examination or any other learning institution for the award of any Degree Certificate or publication, by either me or any other person, whatsoever.

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DEDICATION

This work is dedicated to my immediate family Dad, Mum, Janet, Jimmy, Daniel, Judy and Gloria not forgetting my kids Ashley and Jewel together with all my nephews and nieces. I dedicate it to all the members of my extended family, relatives and friends as well and finally in loving memory of my beloved late brothers Victor Opundo and Collins Bulinda, who inspired us all to excel and reach for the sky. Their dream lives on…

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A heartfelt and very special thanks to my supervisor, Prof. Albert Mumma, thank you very much for walking with me through every step of the process. Despite your busy schedule, you always made time to discuss with me my progress and advise me on the way forward. Without your guidance and support this thesis would not have been completed.

To them all, I am grateful.

LIST OF CASES

LIST OF STATUTES

Aboriginal Land Rights Act of 1976 of Australia.

Constitution of Kenya 2010.

Constitution of Kenya 1969 (now repealed).

Constitution of the Republic of South Africa of 1996.

Extension of Security of Tenure Act 1997 of South Africa

Government Land Act Cap 280 Laws of Kenya (now repealed).

Land Act No 6 of 2012.

Land Registration Act No 3 of 2012.

Land Titles Act Cap 282 Laws of Kenya (now repealed).

National Land Commission Act No 5 of 2012.

Proposed New Constitution of Kenya of 2005.

Registration of Documents Act Cap 285 Laws of Kenya.

Registered Land Act Cap 300 Laws of Kenya (now repealed).

Restitution of Land Rights Act 1994 of South Africa

ABSTRACT

Ownership, use and management of land are highly emotive issues in Kenya and were one of the key drivers of the push for a new constitution. In fact going back in history, this was the main reason for the fight for independence. The general aim of the research was to show that the Kenyan people in their constituent power have perceived land as more than just property which readily converts to market value with relevant injuries being recompensed conclusively with awards of damages. The Constitution of Kenya 2010 sets out governing principles on *land policy*. Finite, yet socially, economically and culturally vital, land in Kenya has merited the declaration that it, "shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable.

The findings of this research show that public land, community land and private land are the three categorizations made in the constitution; and community land, a core sphere of this research, refers to land attached, historically, socially and for beneficial use, to a distinct population group: an ethnic community, a cultural community, or some other social interest-group. The Constitution, in its solicitude for social-group welfare, lays a foundation for policy, programming and juristic openings towards practical solution. Moreover this research will also show that a governance question so fundamental in a progressive constitutional order merits legal attention to: community interests and the land question; Kenya's experience in relation to community land; and comparative experience drawn from further afield.

The research makes a notable contribution by proposing ways of unbundling the property rights attached to land and by signalling lines of interpretation of the Constitution's intent in relation to the community's welfare.

ABBREVIATIONS

NLP- National Land Policy

RLA- Registered Lands Act

RTA- Registration of Titles Act

CLARA- Communal Land Rights Act

TLGFA- Traditional Leaders Governance Framework Act

CONTENTS

CHAPTER ONE

SECURING COMMUNITY OWNERSHIP AND CONTROL OF LAND RIGHTS IN KENYA: OPPORTUNITIES AND CHALLENGES

1.0 Introduction

Before the colonial rule, the local communities in Kenya had their own leadership structures that administered land rights among its members for certain activities such as farming, grazing, hunting and gathering. They lived in harmony and occasional fights over territorial claims were resolved by council of elders.[1]The colonial government therefore imposed alien land tenure relations and also introduced conceptual, legal and sociological confusion in traditional tenure systems which led to disruption of African customary land tenure system and laws.[2]

Customary law and rights were therefore treated as inferior to the private formal property rights based on English law which was introduced as the tenure for white settlers and was the most suitable tenure regime to ensure agricultural productivity.[3] This brought about a dualistic system of land law with English law applying to areas occupied by white settlers, and customary law applying to the areas occupied by the natives, the "native reserves".[4]

The areas which were occupied by the white settlers were more expansive, arable and habitable than the native reserves which brought about social and economic problems such as poverty, disease, famine and ethnic tensions in the native reserves.[5] The colonial government also initiated a policy of converting customary land tenure to individual private ownership. The Registered land Act[6] was purposely enacted to remove claims to land based on African customary land law while the Trust Land Act[7] and the land (Group representatives) Act[8] were meant to transition customary to individual tenure in areas where immediate individualization of land could not be undertaken.[9]

[1] Ibrahim Mwathane, 2012. Land policies in East Africa: Is there way and goodwill for Implementation? A paper presented to the International Conference on Land policies in East Africa held in Kampala, Uganda on 4-5 October 2012. Land Development and Governance Institute (LDGI), Nairobi, Kenya
[2] Kameri-Mbote, P., Odote, C., Musembi, C. and Kamande, W., 2013. Ours by Right: Law, Politics and Realities of Community Property in Kenya. Strathmore University Press, Nairobi.
[3] Ibid.
[4] The native reserves were majorly areas that were not immediately required for European settlement.
[5] Kameri-Mbote et al., 2013. Supra note 2
[6] Chapter 300 of the Laws of Kenya (Repealed by the Land registration Act of 2012)
[7] Chapter 288 of the Laws of Kenya
[8] Chapter 287 of the Laws of Kenya
[9] Kameri-Mbote et al., 2013. Supra note 2

This research will show that the land law in Kenya focuses on individualization of land rights at the expense of customary/community rights to land which has undermined indigenous culture and conservation systems, and destroyed traditional resource management institutions. Despite this it will show us how many local communities in Kenya have continued to manage land attributable to the resilience of customary tenure, which has withstood sustained subjugation, suppression and denial of juridical content in official parlance.[10] Kameri-Mbote et al. (2013)[11] perceives this as the assumptions regarding modernization or extinction of customary rights to land through formal law were not based on sound scientific theories.

The constitution of Kenya 2010 vests community land in communities identified on the basis of ethnicity, culture or similar community of interest.[12] It goes ahead to provide that any unregistered community land be held in trust by county governments on behalf of the communities for which it is held and later on defines community land to include: land held by groups under the Land (Group Representatives) Act; land lawfully transferred to a specific community by any process of law; land that is lawfully held, managed or used by specific communities as community forests, grazing areas or shrines; ancestral lands and lands traditionally occupied by hunter-gatherer communities; and land that is lawfully held as trust land by the county governments.[13]

In the subsequent chapters in the study, I shall give an in-depth analysis of the said provisions including select provisions in the new land legislation.[14]

[10] Okoth-Ogendo, H. W. O., 2000. The tragic African commons: A century of expropriation, suppression and subversion. Keynote address delivered at a workshop on Public Interest Law and Community-Based Property Rights organized by the Lawyers Environmental Action Team, Tanzania and the Centre for Environmental Law, USA, in collaboration with the World Resources Institute, and the International Association for the Study of Common Property, Arusha, Tanzania, 1.4 August 2000

[11] Kameri-Mbote et al., 2013. Supra note 2

[12] Article 63 (1)

[13] Article 63 (2)

[14] The new land legislation include the Land Act, No 6 of 2012, the National Land Commission Act, No 5 of 2012, the Land Registration Act, No 3 of 2012 and the Environment and Land Court Act No. 19 of 2011. It is worth noting that the Land Registration Act repealed the Indian Transfer of Property Act 1882, Government Land Act Cap 280, Registration of Titles Act Cap 281, Land Titles Act Cap 282 and Registered Land Act Cap 300 Laws of Kenya. The Land Act repealed the Land Acquisition Act, Cap 295 and the Wayleaves Act, Cap 292 Laws of Kenya.

1.1 Background of the Study

The concept of community land was well established in Kenya and other African countries before the colonial period where the local communities had their own traditional methods of marking out their territory and respected the rights of neighboring communities. They also had their own leadership structures which administered land rights among them as regards activities such as farming, grazing, hunting and gathering and disputes were resolved by panels of elders.[15]After the signing of the Treaty of Berlin[16], Kenya was now allocated to Great Britain which declared it as part of the British Empire, and therefore part of the King's territories where Crown or King could now deal with the land in the territory in such manner as he or she pleased.[17]

The British therefore created a legal and policy framework which brought about a system focused on allocation, exploitation, appropriation and expropriation of land and natural resources in the new Kenya. It enacted the East African (Lands) Orders in Council of 1895, 1897 and 1901, which were later re-enacted in the form of the Crown Lands Ordinances of 1902 and 1915. These Ordinances governed the allocation of land for agricultural, residential, commercial and other purposes and they defined crown land as: all public land within the East African Protectorate which for the time being is subject to the control of His Majesty. This led to massive expropriation of lands, belonging to the indigenous peoples, to white settlers where the local communities who may have occupied such lands were forcibly moved to what became known as the "native reserves",[18] to make room for white settlers. The hopes of the indigenous people of land ownership were extinguished by a landmark case which declared them "mere tenants of the crown of the land they occupy."

The colonial government therefore imposed alien land tenure relations and also introduced conceptual, legal and sociological confusion in the customary tenure systems which led to the disruption of African customary land tenure system and laws. This study has shown that towards the end of the colonial period, the government initiated a policy of converting customary land tenure to individual private ownership either as individual property or as group property (in the form of group ranches). The purpose of this was to increase security of land tenure and to also allow the development of a large, impersonal market in land, which

[15] Mwathane, 2012. Supra note 1

[16] In 1885, several European imperial powers met in Berlin, Germany, to discuss the partition of the African Continent amongst them. The meeting led to the signing of the Treaty of Berlin, under which arbitrary boundary lines were drawn on a map of Africa and territories thereby created allocated to the participating European powers.

[17] Paul N. Ndungu. Tackling land related corruption in Kenya. http://siteresources.worldbank.org/RPDLPROGRAM/Resources/459596-1161903702549/S2_Ndungu.pdf. Internet accessed June 8, 2013

[18] See supra note 4

was hoped to be characterized by distributive efficiency, to provide landowners with the opportunity to raise capital for investment by mortgaging their land.[19]

The Registered land Act[20] (now repealed) was enacted to remove claims to land based on African customary land law whereas both the Trust Land Act[21] and the land (Group representatives) Act[22] were meant to transition customary to individual tenure in areas where immediate individualization of land could not be undertaken.[23]

Customary land rights were undermined until the resistance movement cropped and in response to the violent uprising by the local communities, the British Government declared a state of emergency in 1952 which lasted for close to 10 years. The independent Kenyan Government inherited and adopted the entire set of colonial land laws that had been enacted to address the interests of the white settlers. It only made superficial amendments to the colonial laws, such that Ordinances were simply renamed "Acts", Crown was substituted with "President", Crown Land was renamed "Government Land", and where Crown referred to the British Monarch as an institution, which was substituted with "Government".

The study continues to show that the powers of alienating and allocating land in Kenya, previously vested in the British Monarch, were transferred to the President of independent Kenya and the substantive law applicable remained the English common law where land remained either in the hands of the former colonial masters or merely changed hands to the new ruling African elites. This led to many indigenous people earlier dispossessed of their land remaining landless even after independence and to obtain land, they had to go through the state which bred a culture of selective land allocation for political support by those in power.

[19] John Bruce, 2008. Kenya Land Policy: Analysis and Recommendations. A paper prepared for the United States Agency for International Development, Property Rights and Resource Governance Program under the Prosperity, livelihoods and Critical Ecosystems (PLACE) Indefinite Quantity Contract (IQC) Contract No. EPP-I-00-06- 00008-00, Task Order 002.
[20] Chapter 300 of the Laws of Kenya (Repealed by the Land registration Act of 2012)
[21] Chapter 288 of the Laws of Kenya
[22] Chapter 287 of the Laws of Kenya
[23] Kameri-Mbote et al., 2013. Supra note 2

1.2 Statement of the Problem

This study shows that customary tenure in Kenya has largely been neglected[24] and despite the neglect, it has also remained resilient[25] and continued to exist. In some parts of the country, we can see that the local communities have continued to own, manage and use land and land-based resources based on their customary practices and rules.

This research shows that land in Kenya is a major productive resource, and lack of control over it is a major limiting factor for productivity.[26] For centuries, traditional land tenure systems in Africa have made many black people temporary custodians of their land where the existing legal systems pertaining to access and use has also restricted them from exercising full authority over their land, as the state still holds the land in trust for the people. It has therefore been noted that, until recently, indigenous African land rights systems have been incorrectly presented by most foreign anthropologists, colonial administrators and nationalist idealists as static polar contrasts to western property rights systems.[27] These authors believe that since the indigenous land tenure systems assign land rights to the entire community, long-term investment and land improvements are discouraged as the system is susceptible to all forms of malpractice such as corruption and nepotism.

In Kenya, the first ever National Land Policy (NLP) and the Constitution of Kenya, 2010 recognizes lack of adequate legal attention and treatment for community land. In response, the two have made provisions for community land, and present an opportunity to craft new land laws for its management and protection. The NLP on the other hand notes that individualization of tenure has undermined traditional resource management institutions; ignored customary land rights; and led to widespread abuse of trust in the context of both the Trust Land Act[28] and the Land (Group Representatives) Act.[29]

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[24] For a discussion on the neglect of customary tenure in Kenya see, Migai- Akech, J.M., *Rescuing Indigenous Tenure From the Ghetto of Neglect: Inalienability and Protection of Customary Land Rights in Kenya*, (Nairobi, Acts Press, 2001).

[25] For an illuminating discussion on the resilience of customary tenure despite efforts to covert it, See generally Okoth, Ogendo, HWO," The Tragic African Commons: A Century of Expropriation, Suppression and Subversion," Keynote Address to African Public Interest Law and Community-Based Property Rights Workshop, Usa River-Arusha, Tanzania, published in CIEL/LEAT/WRI/IASCP, *Amplifying Local Voices for Environmental Justice: Proceedings of the African Public Interests Law and Community-Based Property Rights Workshop (*USA, CIEL, 2002).

[26] Arokoyo, J.O & Chikwendu, D.O. 1993. Land ownership and access to Farm inputs by rural Women in Nigeria. National Agricultural Extension and Research Liaison Services, Ahmadu University, Zaria, Nigeria.

[27] Migot-Adholla, S. and J. Bruce, 1994, 'Are indigenous African tenure systems insecure?' in J. W. Bruce and S.E. Migot-Adholla (eds), Searching for Land Tenure Security in Africa. Dubuque, Kendall/Hunt. pp. 1–14.

[28] Chapter 288 of the laws of Kenya

[29] Chapter 287 of the Laws of Kenya

The new constitutional dispensation was supposed to be a cure to this problem yet it has not done so. Land issues have remained emotive and contentious since the colonial period and have been an obstacle to social cohesion and to some extent economic growth.[30] It is therefore imperative that law should at the very least seek to cure the problem.

1.3 Aims of the Study

This study seeks to address and discuss the divergences in the Community Land Act, 2016 and its impact on public land, community land and private land in Kenya. Specifically, it also seeks to address the constitutional ambiguities and their effect as regards to communities' land rights.

This study in essence will make a case for public regulation of the use of private land, in effect, justifying public intervention in the regime of private property. It will also be able to identify several challenges which need to be addressed namely; constitutional entrenchment of private property rights in land, potential for abuse and misuse of the power, fragmented legal frameworks, failure of the laws to set standards for action, ignorance, institutional problems, and relegation of the traditional local control systems by modern formal systems.

1.4 Objectives of the Study

The study is designed to achieve the following interrelated specific objectives:

1. To determine the extent of the problem of communal land tenure in Kenya and extent to which categorization of land under the constitution impedes on the ownership of land by the local communities.
2. To determine the extent in which the National Land Commission and other select institutions are limited in resolving the issue in question.
3. To review the concept of absolute title in the new land regime and how the concept is also an impediment to resolving the problem.
4. To review the effectiveness of the institutional framework in addressing the land tenure problem in Kenya.
5. To put forth proposals and recommendations of best practice drawn from other jurisdictions on how the communal land tenure problem can be resolved in Kenya.

[30] P. Syagga, Public Land, Historical Land Injustices and the New Constitution; Constitutional Working Paper No 9 (Society for International Development, Nairobi 2010) <www.sidint.net> accessed on 19th October 2012. p.10.

1.5 Justification of the Study

Despite there being a consensus relating to resolving the myriad of land issues including the community land problem in Kenya, the issue has received little attention from the government. This study was premised on the view point that even though individual owners have sweeping ownership rights over the land they own, the unique characteristics of land as well as its crucial place in the life of humankind and other factors, make a compelling case for communal intervention into the regime of private land. This will necessitate the regulation of the use of such land in the communal interest and it will be undesirable to permit absolute rights of use in land, whether it is under public, communal or private ownership.

Despite having many studies undertaken by many scholars pertaining to the issue of land, not much has been done relating to the specific problem of communal land tenure. This study is important because it seeks to provide a solution to the problem in Kenya based on best practices and experiences from elsewhere and how they can be relevant and applicable in the Kenyan context. It is believed that this study will assist policy makers and the relevant government departments in coming up with policies that will inform the legal framework to resolve this particular problem.

1.6 Hypothesis

The study is based upon the following hypothesis:

1. The ownership land problem is not adequately addressed by the existing land laws. The tenure and categorization of land under the Constitution is an impediment towards resolution of the land tenure problem in Kenya.
2. The powers given to the National Land Commission are limited and the concept of indefeasible title remains an impediment in resolving the land tenure problem.
3. The lacuna in the existing land laws have to be addressed in order to resolve the land tenure problem in Kenya.

1.7 Research Questions

This study seeks to systematically answer the following questions:

1. What is the extent of the land tenure problem in Kenya and how does the entire tenure system and categorization of land under the Constitution of Kenya 2010 an impediment to resolving the problem?
2. To what extent are the institutions dealing with land limited in resolving the land tenure problem in Kenya?
3. To what extent is the concept of absolute title an impediment to resolving the land problem tenure in Kenya?
4. What can Kenya learn from other jurisdictions in resolving the land tenure problem?

1.8 Theoretical and Conceptual Framework

This study seeks to rely upon the concepts of ownership and entitlement. These concepts are within the property theory. The reason for advancing these two concepts is to show the basis for the land tenure problems which exist today; customary land tenure being one of them. The local communities governed themselves according to rules that would have been considered "legal" even if they were different in content from those of the colonial powers.[31] The English property law is underpinned by the idea that a person can acquire and secure exclusive enjoyment of a thing and also be able to transmit it to another[32] and this idea has introduced the concept of owner and non-owners of property. It is stated thus:

"…*the central assumptions that private ownership by individuals is the normal way in which things are held. This concept of ownership is made up of three elements: the right to manage things, the right to enjoy or consume them, and the right to dispose of them during life and upon death. And the use of the term right indicates that at its core, ownership is not a way of conceptualizing the relation between people and things but a relation between people that is, owners and non-owners."*[33]

Tom Ojienda[34]states that the ownership of a property depends on the rules that prescribe how ownership can be lost or acquired.[35] He continues that the aspect of title is a set of facts upon which a legal right and interest is founded. Ownership therefore has been simply

[31] W. C. Whitford, "The Rule of Law: Reflections on an Old Doctrine" (Vol 6 (2) East African Journal of Peace and Human Rights 2000) p.157.
[32] T. Murphy and Others, Understanding Property Law (4thedn Sweet & Maxwell, London 2004) p.60.
[33] Ibid, p.52.
[34] T. Ojienda, Conveyancing- Principles and Practice (Law Africa, Nairobi 2008) p.7.
[35] Ibid, p.9.

conceptualized as the right to a thing. Roman law for example has treated the idea as that right to use and to dispose of the property absolutely.[36]

On the contrary English law treats the issue of ownership as a form of possession. The notion of property has been viewed within the context of existence of ordered relations which entail the existence of norms to regulate human activities.[37] The norms of prohibition are the ones that are being referred to in that regard. It is therefore a fundamental principle which imposes a duty upon others not to interfere with the use of property owned by someone.[38]

The concepts of ownership and title can be questioned in several fronts. Firstly, **GJ Donneley**[39] acknowledges the many forms of ownership which are based on different cultures in the world. In the Kenyan context therefore, there are rules that governed ownership of land where the community members acquired rights to land which they would transmit to their descendants. They would acquire "titles" to land without any procedure of conveyance and documentation.[40]

The colonial government's first act was to declare all land crown land and enact laws that would facilitate administration of land within the colony. The case of ***Nyali Limited v The Attorney General***,[41] the court rightly observed that one cannot transplant an oak tree in Africa and expect it to retain the tough character that it has in England. This case illustrates that the application of English land tenure system in Kenya would not operate the same way as the tenure system in England. The problem of traditional land holders not having formal rights on the land they occupy brings into play their rights in relation to the concept of sanctity of title. The concept has been contested as not absolute. Legislation provides that registration of land should make the registered proprietor the indefeasible owner of the land.[42] Sanctity of title has been described as a mere phrase.[43]

The ten mile Coastal Strip is an example where the colonial regime recognized the claims of the Sultan of Zanzibar at the expense of those he managed to control through economic might

[36] Ibid
[37] R.S Bhalla, Concepts of Jurisprudence (Nairobi University Press, Nairobi 1990) 113.
[38] Ibid
[39] Intergovernmental Committee on Surveying and Mapping; Fundamentals of Land Ownership, Land Boundaries and Surveying< http://www.icsm.gov.au> accessed on 20/11/2012.
[40] A. Mumma, "The Procedures for Issuing Titles to Land in Kenya in Law Society of Kenya", in Land Law Reform in Kenya Volume 2 (Law Society of Kenya, Nairobi 2003).
[41](1955) All ER 643.
[42] The Registered Land Act Cap 300 Laws of Kenya (repealed), Registration of Titles Act Cap 300 Laws of Kenya (repealed) and the Land Registration Act of 2012 that replaced the repealed Acts have that provision. The new Act does not change that.
[43] See N. Sifuna, "Using Eminent Domain Powers to Acquire Private Lands for Protected Area Wildlife Conservation: A Survey under Kenyan Law" in Law, Environment and Development Journal (Vol 2/1 (2006) p.91.

and through arms. Land registration was only possible to his subjects whereas original inhabitants were turned to landless squatters on the lands they had lived for generations.[44] The concept of sanctity of such titles cannot be said to be absolute. This study anchors this proposition on the recommendation made by the Commission of Inquiry into the Illegal and Irregular Allocation of Land[45] which argued that the doctrine of sanctity of title embodied under the Registration of Titles Act and the Registered Land Act (now repealed) and other statutes is a myth and has fueled illegal and irregular allocations of land in Kenya.

Wade and **Megarry**[46] have supported this assertion by stating that no title is free from danger and that a better right may be established. The text provides for what is referred to as qualified indefeasibility which could be applicable in this study. It has been shown that even though registration makes one to enjoy predictable property rights, there exist contestations that would make the rights unpredictable. One of the reasons is historical injustices and perceptions of unfairness. Where there are contesting claims, the legal title does not therefore guarantee uninterrupted enjoyment.[47] Therefore this study is anchored on the proposition that issuance of land in such areas is irregular since it is contrary to Constitutional provision relating to privatization of trust land. Land titles were issued to people who were not residents of the land and this made the people in the said areas technical squatters in the land they owned.[48]

1.9 Literature Review

The problem of land tenure in Kenya has evoked a lot of comments by academics in their literature. The subject relates to the present customary land tenure problem, the literature to be reviewed essentially relate to the work that addresses the historical, political and legal events that have failed to address the problem. Contemporary literature includes articles, journals, reports, books and an internet web site relevant to the subject.

[44] J. Wakhungu and Others, Land Tenure and Violent Conflicts in Kenya in the Context of Local, National Regional Legal and Policy Frameworks (ACTS Press, Nairobi 2008) p.11.
[45] Government of Kenya, Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Land (Government Printer, Nairobi 2004).
[46] Megarry and Wade, The Law of Real Property (7th Edition Sweet and Maxwell, London 2008) pp.228-229.
[47] P. Kameri-Mbote and M. Akech, "Ownership and Regulation of Land Rights in Kenya: Balancing Entitlements with Public Trust" in University of Nairobi Law Journal (Vol 4 Issue 1 2008) p.9.
[48] Kenya Land Alliance, The National Land Policy in Kenya: Addressing Historical Injustices Issues Paper No 2 of 2004.

Patricia Kameri-Mbote[49] has addressed the development of private property to land in the context of the historical and legal perspectives. She argues that land tenure reform has resulted in the removal of land from the purview of the community to that of the state and the individual. She goes on and states that the process of land expropriation began in the colonial period where the acquisition of land rights for the settlers was mainly done through political processes that were followed by legal instruments giving the political acts the force of law.

She finally argues that the tenure reforms introduced in Kenya was not informed by the needs of agricultural production or ecosystem but the need for the colonial authority to entrench themselves firmly and maintain land rights without giving out any to the Kenyan natives. The independence government also maintained a commitment to the concept of private property rights to land and the individual as had been perpetuated by the colonial government.

John M Mwaruvie[50] discusses the genesis of the land question which began before the British invasion in Kenya and observes that the international agreements did not recognize the rights of the Africans and have made the problem persist for the last fifty years after independence. He has also proposed far reaching measures to address the problem but has not mentioned how it is to be done. This study therefore comes in to complement the paper by proposing a review of the current land laws to address the problem.

Dr. Karuti Kanyinga[51] focuses on the origins of the squatter land problem and traces the origins from the colonial land laws and policies that were developed by the colonial government. He asserts that the problem originated from the Swynnerton Plan of 1954 which was aimed at reforming tenure systems in the native reserves and replacing it with a system that entrenched private property rights. He also asserts that individualization of title was a means of containing the widespread Mau peasant resistance which according to them would ensure that the individualization of title would weaken the ideological base of the movement.

The paper shows how the reforms made by the colonial government was a failure and that the successive governments simply continued with the same policies and laws even though the government recognized that landlessness as a key obstacle to social and economic development.

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[49] P. Kameri-Mbote, Property Rights and Biodiversity Management in Kenya (African Centre for Technology Studies Press, Nairobi 2002).

[50] J.M. Mwaruvie, "The Ten Miles Coastal Strip: An Examination of the Intricate Nature of the Land Question at the Coast" in International Journal of Humanities and Social Science (Vol 1 No 20 December 2011).

[51] K. Kanyinga, Redistribution From Above: The Politics of Land Rights and Squatting in Coastal Kenya. Research Report No 115, NordiskaAfrikainstitutet Uppsala 2000 <www.apsanet.org> accessed on 15th July 2013.

The fallacies of equality and inequality have been elaborated by **Prof Patricia Kameri Mbote**[52] as she contends that even though there is a perception that the entire community owns land, access may only be limited to the person who has control over it.

From the above studies, it is evident that the idea of equality as expressed in the constitution is fallacious even though it provides for equitable access to land, the provision remains a platitude. This study shows that the classification and categorization that informed the drafting of the constitution is inadequate in resolving the land tenure problem in Kenya.

P. L Onalo[53] has mainly addressed the issues of land law and conveyancing. He underscores the fact that the Government of Kenya has made tremendous strides in the individualization of tenure in the country particularly in the rural areas. He appraises the insufficient effort tenure policies that were inherited at independence in relation to fair distribution of land taking into account communal poverty. This study seeks to provide a nexus between the problem and the limitation in the existing land laws in addressing it.

Linking the above studies by the scholars, it is evident that the idea of equality as expressed in the Constitution is fallacious and the problem of individualization of title still contribute to the customary tenure problem. Even though the Constitution provides for equitable access to land, the provision remains a platitude. Land categorization into private, public and community land also poses a problem. In that regard, as studies shown by the scholars, private land was registered in disregard of the aboriginal inhabitants hence the provision for categorization of land under the Constitution is contributes to exclusion of customary tenure in law.

The study enumerates several developments that have brought the land question into sharp focus.[54]Among the impacts identified as contemporary manifestations in the land question are landlessness and the squatter phenomenon. This study shows that the classification and categorization that informed the drafting of the Constitution is inadequate in resolving the community land tenure problem in Kenya. The quoted studies community land issues as part of historical land injustices and the policy framework proposes reform which will be imperative in this research.

[52] P. Kameri-Mbote, Fallacies of Equality and Inequality: Multiple Exclusions in Law and Legal Discourses. (University of Nairobi Inaugural Lecture 2013). p.22.
[53] P. Onalo, Land Law and Conveyancing in Kenya (Heinemann Kenya Limited, Nairobi 1986).
[54] Ibid, p.50.

Prof. Okoth-Ogendo[55]argues that the search for a tenure system enables a particular society to answer the question as to who holds what land and what interest in that land. He explores the process of European settlement in Kenya and how it shaped agrarian law. This work is an illustration of how land problem escalated during and after colonialism. It however does not address the specific issue of the community land rights and how the law can resolve it, which is the subject of consideration in this dissertation.

Tom Ojienda[56] has related the problem of landlessness to the process of adjudication that fails to secure the rights of the rightful claimants to land. According to him, the Kenyan property law then did not recognize customary tenure systems and the process of adjudication aims at promoting individual ownership only. He proposed a land law system that recognizes customary tenure as a viable form of land ownership.

He also proposes that reform would secure the rights of all those who are entitled to land albeit by reference to customary law. The paper was written before the enactment of a new constitution and land legislation. This study will therefore compliment the study in relation to the communal land tenure. The reforms envisaged in the article are inadequate in resolving the problem of landlessness which is addressed in this paper.

Clara Polsinelli[57] addresses the land question in terms of right to land and extends to right to house and adequate standards of living. She analyses the concept of land dispossessions within the African context during and after colonization. Though the article concentrates more on the land issues in terms of international law and human rights, it will assist this study in terms of best practice in dealing with the customary tenure. This study will seek to compliment the article by demonstrating how the Constitution could be used to resolve the problem. It will also seek to compliment with regards to the concept of indefeasible title and that is silent in the article.

[55]H.W.O. Okoth Ogendo, Tenants of the Crown: Evolution of Agrarian Law and Institutions in Kenya (ACTS Press, Nairobi 1991).
[56] T. Ojienda, "Customary Land Rights, Land Adjudication and Regime of Beach Plots in Law Society of Kenya," in Land Law Reform in Kenya Volume 2 (Law Society of Kenya, Nairobi 2003).
[57] C. Polsinelli, "Right to Land-Right to House and Adequate Standard of Living" in Human Rights Litigation and the Domestication of Human Rights Standards in Sub Saharan Africa AHRAJ Casebook Series Vol 1(International Commission of Jurists Kenyan Section, Nairobi 2007) p.147.

1.10 Focus and Scope of the Study

This study concentrates on community land tenure and its plight in relation to laws and institutional framework. The study relies within the context of the Constitution of Kenya 2010 and the new land legislation in Kenya. The reason why they are selected is the general expectation that Kenya would realize land reforms through them and in particular grapple with the community land issue. The Constitution as the fundamental law of the state has been selected because on one hand, it has expressly provided for the right to property and secondly has established how land is classified and thirdly has established the National Land Commission as one of the Constitutional Commissions.

1.11 Research Methodology

An analytical methodology is adopted in looking at the various international law instruments. The study will rely on both primary and secondary data;

(i) **Primary sources:** The Constitution of Kenya 2010 and other Acts of Parliament, as well as any other relevant treaties, resolutions of the United Nations, that will give more insight on the issues herein

(ii) **Secondary Data:** These include, Scholarly Journals, Thesis and Dissertations conducted on the subject, The Internet, books, References quoted in books, Papers presented at Conferences, periodicals and computer search.

The study will be both descriptive and prescriptive. Matters of legality will be descriptive, whereas matters of implications will be analytical. The final chapter, which will include the conclusion and recommendations will be prescriptive.

1.12 Chapter Overview

This study is divided into five distinct chapters:

Chapter 1

This chapter provides the context in which the study is set. It also provides the basis and the structure of the study by outlining the theoretical and conceptual framework, research questions, hypothesis, literature review, justification and objectives of the study.

Chapter 2

This chapter talks about accessing community land rights in Kenya. It goes ahead to review the rights of marginalized groups in Kenya and the governance of community lands. It also discusses the institutions that deal with land and the nexus with addressing the community land tenure problem in Kenya.

Chapter 3

This chapter outlines the legal and policy framework regulating community land in Kenya. It also gives other developments relating to customary land tenure, the constitutional imperatives for community land rights in Kenya and the policy foundations of community land rights in Kenya.

Chapter 4

This chapter contains the best practice and reform to resolve the communal land tenure problem. In this chapter the study takes a look at different jurisdictions and how they have done to solve the overall research problem. The study will therefore take a look at Australia and South Africa.

Chapter 5

It will contain a synopsis of the findings and the conclusions drawn from the study. The chapter will also make recommendations as to how the Constitution and legislation can be reformed to address the problem of community land tenure.

CHAPTER TWO

ACCESSING COMMUNITY LAND RIGHTS IN KENYA

2.0 Introduction

This chapter reviews the concept of community land rights in Kenya, its history and perpetuation in the new land laws. This will be done by a study of the repealed statutory provisions and the new ones. The chapter will also review the institutional framework and this will include the National Land Commission as well as the Ministry of Lands, Housing and Urban Development and the Judiciary. These are the State institutions that that deal with land in Kenya. The chapter will explore their viability in dealing with the problem of communal tenure in Kenya. The previous chapter has indeed proved that the problem exists. This chapter therefore explores the viability of the legislation and institutional framework in dealing with the land tenure problem in Kenya.

2.1 Ownership and Property Rights

Property rights like the right to land and housing and the access to these rights, forms an important aspect when seeking social and economic well-being since land is seen to have both a social and economic value and the importance of property has been recognized in the Constitution of Kenya 2010 with its provision in Article 40(1) which states that every individual has the right either individually or in association with others to acquire and own property of any description and in any part of Kenya.

Abraham Bell in his article 'A Theory of Property', states that a right signifies an affirmative claim in favor of one as against another in respect to a given situation, object or thing in which the right holder has an interest. Property is described by him as an aggregation of legal rights or as 'a bundle of rights'. Since a right, as we have seen, denotes an affirmative claim that one has against another, it therefore means that when one is granted rights over property, social relationships are established between these people and it therefore becomes necessary to protect these rights over property. When seeking to address the scope of rights that one has over land, the tenure system in place becomes evident and one will be able to identify who owns what interest in what land.

Land tenure system is according to this study defined as the legal, contractual or customary arrangements whereby individuals or organizations gain access to economic or social

opportunities through land.[58]**Williamson** defines land tenure to mean the structures and processes of delivering access and rights in land. Land tenure has different dimensions which are; people holding the rights over the land, the time period over which these rights are to be held and the space which denotes the physical dimensions of the interest held by the rights holder. The Constitution of Kenya 2010 has provided that land in Kenya shall be classified as either public, private or communal.[59]

2.2 The Concept of Community Land

The Constitution of Kenya 2010 states that a community shall be identified on the basis of ethnicity, culture or similar community of interest. Communal land tenure systems in this context is therefore used to define the form of land ownership practiced by the various African communities guided by customary law and which has evolved over time adopting new characteristics. The Community Land Act[60] defines a community as "a clearly defined group of users of land which may, but need not to be, a clan or ethnic community. These groups of users hold a set of clearly defined rights and obligations over land and land-based resources." What shall comprise of a community land has been defined in Article 63(2)3 of the Constitution.

The study notes that communal forms of land ownership in most cases is guided by the customary law of the various communities holding such forms of land and these customary laws and practices vary from community to community. Customary land-holding systems are the forms of land holding practices which are in most cases unwritten and practiced by the various communities under the scope of customary law. In these areas, the processes of adjudication, consolidation and registration which land is supposed to go through are not applied and thus land ownership operates in an informal context.

Ownership is used to define the relationship between an interest and the person to whom it is vested.[61] Ownership therefore exists where there is an interest and a person claiming that interest. Control on the other hand is concerned with either guaranteeing access or enforcing rights, regulating the use of common property resources, overseeing mechanisms for redistributing access and resolving disputes over claims to land. It is often located within a

[58]Land Rights in Informal Settlements: A case study in Nairobi
[59]Constitution of Kenya Article 61(2)
[60] Act No. 27 0f 2016, Section 2
[61]Bentsi Enchill, Do African Systems of Land Tenure Require a Special Terminology, Journal of African Law.

hierarchy of nested systems of authority, with many functions located at local or lower levels.[62]

Land under most customary settings can be seen as belonging to the clan or the community as a whole and access rights are granted to every member of the community. Access to land is seen to be related to the membership of a person in a given community or social group and thus the scope of the rights that can be enjoyed by a person is determined by the recognition of these rights by other members of the community or the society. Rights in this case are seen to be derived from the recognized membership that a person has within a social group and also his allegiance to the authorities who have the duty to regulate how property can be owned.

2.3 Historical Development of Community Land Rights in Kenya

The system of land ownership in the pre-colonial Kenya, that is, before colonization was largely communal and it was strictly guided by the customary law of the various communities. Land was owned and belonged to the whole community rather than individuals who only had access rights. The political authorities in the community exercised control rights over the land. Prof. HWO Okoth-Ogendo has referred to these lands owned by these communities as commons. The term commons in this context is used to identify ontologically well-organized land and associated resources available exclusively to specific communities, lineages or families operating as corporate entities.[63] In these African settings, it can be seen that land holding was a trans-generational asset and the management of the land was done at different levels of the social organizations and the use of the land was done in a function-specific manner. The coming of the colonialists brought the introduction of formal systems of land ownership since the British settlers took advantage of the nomadic nature of most African communities as a basis of claiming that Africans did not own any particular property and were completely oblivious to the idea of property ownership.

Several ordinances were enacted and this led to the dispossession of the indigenous population and the communal lands which they used to own was now converted into crown land and this was done by enacting the Crown Land Ordinance, 1915 which redefined Crown land to include land in actual occupation of native tribes and land reserved by the Governor for the use and support of members of native tribes and this as a result led to the taking of

[62]Ours by Right: Law, Politics and Realities of Community Property in Kenya-Patricia Kameri-Mbote, Collins Odote, Celestine Musembi and Murigi Kamande
[63]The Tragic African Commons: A Century of Expropriation Suppression and Subversion-HWO Okoth Ogendo

native rights of occupation of land and relegating them to tenants at the will of the Crown and this led to the creation of reserves for the native communities.[64]

The native communities faced many problems in the reserves which led to the formulation of the Swynnerton Plan[65] by the colonial government which recommended tenure reforms where African farmers would be provided with, in the first instance, economic size farming holdings which was to be secured through the consolidation of fragmented holdings or the enclosure of communal lands. The aspect of individualization was also introduced through the registration of the titles held by individual Africans effected by the Native Lands Registration Ordinance,1959, which introduced a registration system based on the English model and once registration of a piece of land had been effected, all rights and interests which were in existence under customary law were extinguished. The enactment of these legislations thus led to the subjugation of customary tenure systems.

It should be noted that these systems eventually led to the creation of different forms of ownership for different groups. Customary law was thus subjugated but the resilience of customary law led to the existence of a dualist system in the post-colonial Kenya. The post-colonial Kenya saw the enactment of the Registered Lands Act (RLA),[66] which dealt with the registration of land by the natives and it meant to simplify the process of conveyance and the ownership of these lands.

Under this Act, the first titled issued to a person could not be contested and this saw the dispossession of many Africans who did not adopt this system. The post-colonial Kenya also saw the emergence of two schools of thought; The Positivist school of thought and the Naturalist school of thought and this was due to the dualist legal regime in place. The positivist school of thought was of the idea that, in any situation involving the interpretation of the law, the approach which was to be adopted was the that one which considered the law as it is rather than what the law ought to be in a given situation. Customary forms of land ownership was thus considered and treated as extraneous since under this school of thought, anything which was not provided for in the RLA, was not to be considered.

In ***Obiero v Opiyo,***[67] the Plaintiff had been registered as the absolute proprietor of the title in question and no encumbrances were noted on the title. The defendant was the step-son of the plaintiff and was claiming title to the property under customary law and claimed that the

[64]See H.W.O Okoth-Ogendo, Tenants of the Crown: Evolution of Agrarian Law and Institutions in Kenya, Nairobi, Acts Press,1995
[65]A Plan to Intensify the Development of African Agriculture in Kenya, 1955-R.J.M Swynnerton.
[66]Cap 300, Laws of Kenya
[67][1972] E.A 227

plaintiff had obtained the title through fraud. It was held that even if the registration had been procured fraudulently, the plaintiff's title of first registration was indefeasible and subject to no encumbrances as the register reflected none and accordingly the title was free from all interests and claims. The naturalist school of thought advanced the idea that no legislature would have intended to create consequences as severe as those which flow from a positivist interpretation of the RLA and that the legislature meant to preserve the rights and interests under customary law.

In ***Samwel v Priscilla Wambui***[68] Justice Muli held that the purpose of registration must in all cases understood to be preservation of the family land and not to disenfranchise other members of the family who may not have gotten their names registered.

The Trust Lands Act[69] brought a trusteeship system where the former native reserve areas were now vested on the County Councils which were established and this Act and regulated the manner in which these lands were to be held and administered. Groups of persons holding land had their rights catered for under the Land (Group Representatives) Act[70] and this for the first time led to the catering of the rights of groups holding land which included ethnic and local communities. This system later experienced challenges of dispossession of the group members by those who represented them since they converted the land into private land without the knowledge of the other group members.

The Constitution of Kenya 2010 has taken cognizance of the challenges faced by the various communities and it has comprehensively dealt with land rights of various entities including that of communities. Several legislations have also been enacted and they were meant to address the endemic problem of access of land rights

2.4 Statutory Provisions on Community Land Rights

2.4.1 The Registration of Titles Act and Government Land Act (now repealed)

The incursion of the colonial authorities resulted to land registration and this was done by the laws that were put in place at that particular time.[71] The Crown Land Ordinance of 1915 allowed the Commissioner of Lands to cause subdivision of land within townships and the leases issued were 99 as well as 999 years. The Government Land Ordinance established two

[68]HCCC 1400
[69]Cap 288, Laws of Kenya
[70]Cap 287, Laws of Kenya
[71] S.C. Wanjala, "Problems of Land Registration and Titling in Kenya: Administrative and Political Pitfalls and Their Possible Solutions" in S.C. Wanjala (ed) Essays on Land Law: The Reform Debate in Kenya, (Faculty of Law, University of Nairobi, Nairobi 2000) p.86.

registers for registration of land, one in Mombasa and one in Nairobi. The provision of that law was that all leases for more than a year and agreements to lease or sell could be registered.[72]The law that operated for a long time after the said Ordinance was the Government Land Act.[73]

The Registration of Titles Act had its registries in Nairobi and Mombasa. The registries are still there after the enactment of the Land Registration Act of 2012 and still operate under the RTA. There is a delay in devolving the titles to the counties due to failure by Cabinet Secretary in charge of Lands, Housing and Urban Development to issue guidelines for the same as required by the law. There is therefore not anything substantial that has changed, one year since the enactment of the new laws.[74]

However, the Act provided that a certificate of title which was issued by the registrar be the conclusive evidence to be taken by a court of law that the owner was the absolute and indefeasible owner of the land. The title would not be subject to be challenged in a court of law except on ground of fraud or misrepresentation where he was proved to be party.[75]Under the Act, it was evident that leases for periods exceeding 12 months or less but contains a right to purchase the reversion was be effected by a registered instrument.[76]The Act covers a very large area of the country though many areas have now been converted to the regime or the repealed Land Registered Act that was enacted in 1963.[77]

2.4.2 The Registered Land Act

The purpose of this Act was to bring all the parcels registered under the previous statutes under it. It was enacted to confer absolute and indefeasible title to the registered land owner. Registration of land under this is first preceded by adjudication, and then consolidation. The registrar was supposed to register the persons in the adjudication register as the owners of the land.[78]Since there were few districts that had completed the process of adjudication by the time of the enactment of the Act, the country therefore had to do away with different registration systems operating concurrently. The Act did not replace all the other registration statutes immediately as it was meant to do.

[72] Ibid, p.87.
[73] Cap 280 Laws of Kenya repealed by the Land Registration Act of 2012.
[74] Interview with Sarah Chelimo Chief Land Registration Officer, Ministry of Lands Nairobi on 10th July 2013.
[75] The provisions are found in Section 23 of the Act.
[76] Sections 40 and 41 of the Act.
[77] Cap 300 Laws of Kenya (repealed).
[78] Ibid, Section 11

The rights conferred on registered proprietors were intended to transform the legal status from multiple customary claims to individual customary ownership that would secure credit for purposes of development. That position was upheld by **De Soto** who argued that the formal property rights hold the key to poverty reduction by unlocking the property held informally by the poor. According to him, it is better for land to be formalized to the extent of enabling one to acquire credit from banks so that if he does not bother to get it those who will, can proceed and invest to boost the economy as a whole.[79]

A contrary view has been held by an African scholar who rightly puts it that formalization of title without contextual understanding of the multiple interests in land could actually be a source of insecurity of title.[80]She alludes to that fact as follows:

"*...a market in land does exist in the absence of formal title, and informal transactions in land do take place in spite of formal title. This market in land is regulated primarily by informal social structures and only marginally, if at all, by formal official structures that are supposed to regulate land transactions*."[81]

There has been the issue of confusion and insecurity of tenure with respect to families who entrusted one member to be registered as a proprietor in trust for the rest. The registered proprietor had secured absolute title to the land which caused confusion and insecurity in many parts especially in the rural areas with respect to customary rights of the family members.[82]

The RLA has a key provision, in that, the issuance of private title to the individual vests absolute title upon them. The registration of a person as the proprietor of a lease vests unto him or her the absolute right that cannot be defeated and are to be held free form all other interests and claims.[83] In that regard therefore, the title was to be subject to encumbrances shown on the register but not subject to rights of people claiming as beneficiaries of land held in trust.

The Act also brought about exclusivity thereby extinguishing multiple rights in land. This study alludes that the problem of community land tenure was not mitigated by the enactment of that law since it removed the principle of multiple rights in land and absolute title enforced

[79] H. De Soto, The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else (Basic Books, New York 2000).
[80] C. N. Musembi, "Breathing Life into Dead Theories about Property Rights: De Soto and Land Relations in Rural Africa," Vol.28 (8) Third World Quarterly (Institute of Development Studies, University of Sussex 2006).
[81] Ibid, p.18.
[82] A. Mumma, "The Procedures for Issuing Titles to Land in Kenya in Law Society of Kenya," in Land Law Reform in Kenya Volume 2 (Law Society of Kenya, Nairobi 2003) p.48.
[83] Section 28 of Registered Land Act Cap 300 Laws of Kenya.

exclusivity. From the foregoing, it is evident that the laws that have always existed were exclusive in favor of registered proprietors and therefore were not favorable in addressing the customary tenure. The next part addresses the concept of absolute title and the judicial attitudes that hampered any resolution of the problem since in most cases the courts would rule in favor of the registered proprietor in exclusion of any other interest in the land.

2.4.3Absolute Title and Customary Land Rights

The positivist and the trust view approach will be considered in the right of the concept of indefeasible title and how the courts have not been able to address the issue. The subject has had a number of interpretations in the Kenyan courts. In general this study is of the view that customary land rights are not recognized as overriding interests in the Act.[84] There have been difficulties in the interpretation of the effects of registration on customary property rights and interests.[85] Section 28 of the repealed RLA is important in this respect. It provides that:

"*...the rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register."*

Upon registration of the land therefore, the registered proprietor becomes the absolute owner of the land together with all rights and privileges belonging thereto and not liable to be defeated except as provided for in Section 30 of the Act. The positivist approach takes the view that the law should be applied as it is and no extraneous factors should be considered or imported into the legal provisions irrespective of the consequences. On the other hand the trust view approach takes the view that despite the rigorous of the provisions of the RLA customary law concepts can be applied on the face of it.[86]

[84] See Section 30 of the RLA
[85] Mumma 2003, supra note 82
[86] T. Ojienda, Conveyancing- Principles and Practice (Law Africa, Nairobi 2008) pp. 117-125.

The High Court has held in some cases that customary claims are not extinguished by registration of land. An example of this is seen in the case of ***Mwangi Muguthu v Maina Muguthu***[87]where it was held that first registration of land was not a bar to creation of a trust.

On the contrary, the cases of ***Esiroyo v Esiroyo***[88]and ***Obiero v Obiero,***[89]it washed that first registration of land extinguishes customary claims, trust and rights over that land. The Court of Appeal has done very little to reconcile the two interpretations. What the Court advanced is that both customary property law and customary rights are ousted by registration, statute and Common Law. However, despite this scholars have argued that customary law remains resilient despite emphasis of private land within adjudicated areas.[90]

First registration remained a contentious issue in the sense that the RLA provides that the rights of a registered proprietor remains sanctified despite the fact that the registration could have been obtained by fraud or mistake perpetuated by the proprietor.[91] The provisions of the law therefore did not therefore mitigate the squatter land problem. **Tom Ojienda**[92]analyses the problems brought about by the law in terms of family disputes and wrangles in the courts. This study seeks to show that the problem of customary tenure was escalated by the injustice that was occasioned to people who had genuine customary claims.

This part shows that all the laws that were enacted did not solve the problem and the subsequent part will show that not much has changed and the problem still persists.

2.5 The Institutions

This part of the study views the institutions that deal with land and the nexus with addressing the community land tenure problem in Kenya. It seeks to answer the question as to their effectiveness in handling with the problem. It takes a look at the National Land Commission, the Ministry of Land and the Judiciary. This is in the wake of the new land laws, one that the Constitution has established the National Land Commission and the National Land

[87] HCCC No 377 of 1986 (unreported).
[88] (1973) EA 338.
[89] (1973) EA 338.
[90] B. D. Ogolla and J. Mugabe, "Land Tenure Systems and Natural Resources Management" in C. Juma and J.B` Ojwang (eds) In Land We Trust: Environment. Private Property and Constitutional Change (ACTS Press, Nairobi 1996) p.97.

[91] Section 143 of the Act.
[92] Ojienda 2008, supra note 86, pp.114-115.

Commission Act[93]that provides for the operations of the Commission and the Land and Environment Court Act[94] that has established the Land and Environment Court.

2.5.1 The National Land Commission

The National Land Commission is a constitutional commission given a wide mandate under the Constitution of Kenya 2010.The Commission of Inquiry into the Land Law System recommended that a National Land Authority be formed in order to vest the basic title to government land on it.[95] On the other hand, the Commission recommended the formation of a District Land Authority in order to manage trust land.[96] The aim of establishing a new institutional framework was to ensure that there is community participation in land administration, transparency and accountability and efficiency that had been lacking.[97]

The Commission was also provided for in the Proposed New Constitution of 2005 and the Constitution of Kenya 2010 under Article 67.[98]The Commission is given the mandate to initiate investigations on its own motion on historical land injustices and make recommendations for appropriate redress. The body to which the recommendation is to be made is not clear but could be the national government. The Commission is supposed to recommend a national land policy to the national government and also advise it on a programme for registration of title in land throughout Kenya.

The difference in provision with the Proposed New Constitution of 2005 is that the Commission was mandated to address the problem and not merely recommend for redress. The provision made was as follows:

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[93] Act No 5 of 2012.
[94] Act No 19 of 2011.
[95] Government of Kenya; Report of the Commission of Inquiry into the Land Law System of Kenya on Principles of a National Land Policy Framework, Constitutional Position on Land and New Institutional Framework for Land Administration. (Government Printer, Nairobi 2002) p.108.
[96] Ibid
[97] Ibid
[98] The National Land Commission is given the mandate to: (a) Manage public land on behalf of the national and county governments. (b) Recommend a national land policy to the national government. (c) Advise the national government on a comprehensive programme for the registration of title in land throughout Kenya. (d) Conduct research related to land and the use of natural resources, and make recommendations to appropriate authorities. (e) Initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress. (f) Encourage the application of traditional dispute resolution mechanisms in land conflicts. (g) Assess tax on land and premiums on immovable property in any area designated by law. (h) Monitor and have oversight responsibilities over land use planning throughout the country.

"*...initiate investigations on its own or upon a complaint from any person or institution on land injustices both present and historical and ensure appropriate redress*."[99]

In that regard, the provision had expressly mandated the Commission to ensure redress and not merely make recommendations. This provision changed in the Constitution. The mandate of the Commission is also spelt out in the National Land Commission Act.[100] The powers of the Commission given in the Act are the same as the ones provided for in the Constitution. However in addition to that the Commission is given the mandate to alienate public land on behalf of or with the consent of national and county governments. It is also supposed to monitor the registration of rights and interests in land and manage all unregistered trust land and unregistered community land on behalf of the county governments.[101]

However, the Commission is mandated to ensure that unregistered land in Kenya is registered within ten years since the commencement of the Act.[102] The Constitution mandates the Commission to advise the national government on a comprehensive programme for registration of title throughout the country. In that regard therefore, the issue is whether registration of all land in Kenya will help resolve the community tenure problem or will continue to escalate it. In instances where large parcels of land are registered in names of individuals, the issue would be whether the problem is resolved through tenure system in Kenya that gives rights to one and excludes all the others.

The Commission has the power to review all grants and establish their legality and propriety. In that regard, the Commission is supposed to make the review within a period of five years on its own motion or at the request of the national and county governments, an individual to establish their propriety. The restriction has only been made to public land and not to private or community land.[103]Revocation of title is to be done by the registrar upon direction of the Commission where there is impropriety or illegality of title.[104]

The bottom line is that though the Constitution empowers the Commission to carry out a wide range of reforms in land that would address problems including the problem of customary tenure, there are still many gaps and limitations in the constitution and the enabling law.

[99] Article 85 (2) (g) of the Proposed New Constitution of Kenya of 2005.
[100] Act No 5 of 2012.
[101] Ibid, Section 5 (2).
[102] Ibid, Section 5(3).
[103] Ibid, Section 14(1).
[104] Ibid, Section 14(5).

The National Land Commission Act provides for the recommendation to parliament for an appropriate legislation for the investigation and adjudication of claims arising out of historical injustices.[105]The issue with such a provision is what would happen if Parliament ignores recommendations by the Commission. This study is of the view that the Commission should proceed with the mandate provided for in the Constitution whether the enabling law is there or not.

2.5.2 The Ministry of Lands, Housing and Urban Development

The functions of the ministry as proposed in the land policy include giving policy direction to the National Land Commission, mobilizing resources for the land sector and facilitating the implementation of land policy reforms.[106]

Though the initiatives are good, they are not backed by any legal framework and therefore they are not as effective as they should be.

2.5.3 The Judiciary

The Constitution has expressly anchored itself in the judicial branch in Kenya and the courts are not supposed to resort to limiting technicalities in the administration of justice. This has opened the door for creativity and a broad based judicial approach to all issues.[107]Despite this there are potential factors that will remain uncertain in the mind of judicial officers. According to **J B Ojwang**, there is need for creative interpretation of the Constitution in the new dispensation especially on issues regarding environmental categories that have already been invoked by the local communities to dispute the rights of private land owners. There is also an anticipation that land title holders will demand for their property rights even where the titles were obtained irregularly.[108]

The National Land Policy proposed that a Land Court Division and District Land Tribunals be set up for dispute resolution.[109]The Constitution provides that courts shall be established to hear and determine disputes related to the occupation and title land.[110] Indeed, the Land and

[105] Ibid, Section 15.
[106] See Republic of Kenya Sessional Paper no 3 of 2009 on National Land Policy (Government Printer, Nairobi 2009) p.60.
[107] J.B.Ojwang, Ascendant Judiciary in East Africa: Reconfiguring the Balance of Power in a Democratizing Constitutional Order (Strathmore University Press, Nairobi 2013) p.28.
[108] Ibid, pp. 90-91.
[109] National Land Policy 2009, supra note 106
[110] Section 162 of the Constitution of Kenya 2010.

Environment Court Act[111] have already been enacted. The jurisdiction of the court is both original and appellate over disputes relating to land and environment.[112]

Though the Act provides that the court shall hear varied disputes relating to land and environment, the Constitution provides that the main dispute is title to land.[113]In that regard, the problems local communities face fall within the issues that the court can determine and address. The court is given powers to issue orders of specific performance, restitution, compensation, declaration and costs.[114]

2.6 Conclusion

This chapter has shown that despite a change in the law and minimizing of the registration regimes, the principles that hamper the resolution of the problem still persists. Though the courts are given powers to address the problem through the Constitution and the enabling statute, other substantive laws are limited and this would make the judiciary ineffective in dealing with the problem of customary or community land tenure. The chapter has also addressed the limitations in addressing the problem at hand from an institutional perspective.

[111] Act No 19 of 2011.
[112] Ibid, Section 13 (1).
[113] Section 13(2) of the Act provides that the court determines matters relating to environment planning and protection as well as other aspects in land including climate issues, title, tenure, compulsory acquisition and issues relating to public, private and community land.
[114] Ibid, Section 13 (7).

CHAPTER THREE

THE LEGAL AND POLICY FRAMEWORK REGULATING COMMUNITY LAND IN KENYA

3.0 Introduction

This chapter explores the issue whether the situation is different since there is a new legal framework on land. The framework includes the Constitution of Kenya 2010, the land laws of 2012 and the Community Land Act 2016 which are substantial and the institutional frameworks created under them. The system that is present for land registration is limited in addressing the problem.

This chapter shall seek to address the issue of the constitutional imperatives for community land rights in Kenya and in that regard therefore, this chapter will dwell on the different relevant laws to community land which shall culminate in the current classification and categorization of land under the Constitution to show how they have failed to resolve the existing problem of land tenure.

3.1 Relevant Land Laws Relating to Customary Land Tenure

This part will review land laws and some modern developments that relate to land and affect the community land tenure problem in Kenya. Over time there have been both legal and administrative changes that have taken place. The study has noted that legislation relating to land have frequently been enacted and changed, for example, the 1969 Constitution was repealed and the Constitution of Kenya 2010 promulgated which has a Chapter on Land and Environment.[115] There have also been various commissions of inquiries, task forces and committees which have been instrumental in political, social and economic development in Kenya.

The 1902 Crown Land Ordinance was enacted in order to facilitate for sale of land and to enable settlers acquire freehold titles and later on the 1908 Crown Land Ordinance amended the 1902 Ordinance to empower the Governor to reserve land required for the use or support of natives from disposal.[116] The 1915 Crown Land Ordinance redefined Crown lands to

[115] Chapter 5 which runs from Article 60-72.
[116] T. Ojienda and M. Okoth, "Land and the Environment," in P. L. O. Lumumba et al (eds) The Constitution of Kenya: Contemporary Readings (Law Africa Publishing (K) Limited, Nairobi Kampala Dar-es-Salaam 2011) p.159-160.

include lands that were occupied by natives.[117] This Act prohibited land alienation by Africans even if they had occupied the said lands or they had been allocated for their use.[118] Kenya was declared a colony in 1920 and all natives were rendered tenants at the will of the Crown.[119] This entailed that the colonial government had become the sole allocator of land rights and the position has remained the same after the attainment of independence to-date.

At independence, it was expected that the transfer of power would yield fundamental changes in land management which did not happen instead there was continuity of the policies that were established by the colonial authorities. The introduction of the **Swynnerton Plan** and agriculture legislation, for example, in the 1950s was a scheme of incorporating African elite into the principles of colonial agriculture with the aim of protecting their own interests.[120]The independent Bill of Rights was negotiated on the basis that the power transfer arrangement would therefore not dismantle or destabilize the settler economy.[121]The steps and measures taken by the new administration of Kenya after independence were therefore inadequate in resolving the issue of communal land tenure regime.

3.2 The Constitutional Imperatives for Community Land Rights in Kenya

The Constitution requires all laws relating to land to be revised, consolidated and rationalized within certain timelines. The Constitution specifically provides for the recognition of community rights to land and provides for the community land which is vested in communities identified on the basis of ethnicity, culture or similar community of interest.[122] Any unregistered community land is to be held in trust by county governments on behalf of the communities for which it is held. It defines community land to comprise: land lawfully registered in the name of group representatives under the provisions of any law; land lawfully

[117] Ojienda 2008, supra note 86, p.15.
[118] Ibid.
[119] For comprehensive analysis of the happenings of that period, see H.W.O Okoth Ogendo's Tenants of the Crown Evolution of Agrarian Law and Institutions in Kenya (ACTS Press, Nairobi 1991). The book provides a detailed account of the origin of agrarian law in Kenya. It also explores the institutions that impacted on property systems during the pre-colonial, colonial and post-colonial periods.
[120] Government of Kenya; Report of the Commission of Inquiry into the Land Law System of Kenya on Principles of a National Land Policy Framework, Constitutional Position on Land and New Institutional Framework for Land Administration. (Government Printer, Nairobi 2002) pp. 30-31.
[121] That could be seen through the drafting of the 1969 Constitution. Section 75 provided that "No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied.
(a) The taking of possession or acquisition is necessary for the interest of defence, public safety, public order, public morality, public health, town and council planning or development or utilization of property to promote public benefit and
(b) The necessity therefore is such as to afford reasonable justification for the causing of hardship that may result to any person having an interest in or right over property and (c) Provision is made by a law applicable to that taking of possession or acquisition for the prompt payment and full compensation.
[122] Article 63 (1)

transferred to a specific community by any process of law; any other land declared to be community land by an Act of Parliament; land that is lawfully held, managed or used by specific communities as community forests, grazing areas or shrines; ancestral lands and lands traditionally occupied by hunter-gatherer communities; and land that is lawfully held as trust land by the county governments.[123]

The constitution also predicates any disposition or use of community land on legislation specifying the nature and extent of the rights of members of each community individually and collectively.[124]The recognition by the Constitution that all land belongs to the people of Kenya[125] and that such land can be held by the people as communities[126] has sought to correct a historical fallacy that has existed in Kenya since the start of the colonial period. The Colonial Government, introduced laws and policies whose effect was to disregard communal approaches to land ownership and use and instead prefer private land tenure arrangements.[127]

3.3 The Foundations of Community Land Rights in Kenya

3.3.1 The National Land Policy

Before the National Land Policy of 2009, the current policy, while not articulated in a comprehensive national document, had been driven by a conviction that economic growth requires the transformation of customary land tenure to private ownership. Colonial laws and policies, gave false premium to private property rights to land, focusing all efforts towards individual ownership. This policy was utilized to give Europeans access and control to the most productive land in Kenya and to disinherit Africans from their land.[128] On attainment of independence, the laws and policies on land continued with this approach, viewing private property as the most economical mode of holding land.[129] The law gave very little attention to customary land holdings. Despite this, communities continued to own and use land according to their customary rules through communal arrangements. In pastoral areas, especially due to the modes of using land, communal ownership to land remained the preferred method of

[123] Article 63 (2)
[124] Article 63 (4)
[125] Article 61(1) Constitution of Kenya, 2010.
[126] Article 63(1) Constitution of Kenya, 2010.
[127] See J.M. Migai-Akech, Rescuing Indigenous Tenure from the Ghetto of Neglect (ACTS Press Nairobi, 2001) at p1; B.D. Ogolla and J. Mugabe, "Land Tenure Systems and Natural Resource Management" in JB Ojwang and C Juma (Eds.), In Land We Trust: Environment, Private Property and Constitutional Change(Initiative Publishers, Nairobi and Zed Books, London)(1996) 85–116 at page 95.
[128] For a discussion of the historical land policies and their application in Kenya; see generally, H.W.O. OkothOgendo Tenants of the Crown: Evolution of Agrarian Law and Institutions in Kenya, (Acts Press, Nairobi, 1991).
[129] See B.D. Ogolla, and J. Mugabe, Supra, note 127.

owning land.[130] In essence the country had a dual tenure arrangement, one recognized and given preference by the law and another existing in spite of the law. This policy was pursued with remarkable consistency by successive governments over the years, and the extent of its implementation has been impressive.

This led to a vast majority of commercial, residential, and arable land in Kenya (and much arid land as well) being brought under private individual ownership by a process of systematic first registration. This also led to many indigenous people earlier dispossessed of their land remaining landless even after independence. To obtain land, they had to go through the state which bred a culture of selective land allocation for political support by those in power, inefficiency and corruption leading to a clamor for land reforms and specifically the demand for a National Land Policy by a broad-based coalition of non-governmental organizations (NGOs), CSOs, and donors.

The adoption of the National Land Policy for Kenya in 2009 and the Constitution in 2010 sought to correct this error with the inclusion of communal tenure as a category of land ownership. It gives constitutional recognition to communities and enables them own and use land as communities. This marks the dawn of a new era in land ownership in Kenya, what has been titled the dawn of Uhuru.[131]

The NLP is very important for community land rights in Kenya as it repudiates the longstanding priority of land administration in Kenya, the conversion of customary land tenure into individual ownership and it designates all land in Kenya as Public Land, Community Land and Private Land.[132]

The policy defines community land as "land lawfully held, managed and used by a specific community as shall be defined in the Land Act".[133] Community on the other hand is defined as a clearly defined group of users of land, which may, but need not be, a clan or ethnic community. These groups of users hold a set of clearly defined rights and obligations over land and land-based resources.[134] The NLP particularly identifies subsistence farmers, pastoralists, hunters and gatherers as vulnerable groups who require facilitation in securing

[130] For a discussion of some experience with land tenure in pastoral areas, See I. Lenaola, "Land Tenure in Pastoral Lands", In J.B. Ojwang and C. Juma., (eds.) In Land We Trust: Environment, Private Property and Constitutional Development (Initiative Publishers Nairobi and Zed Books London) (1996) pp 231–257.
[131] Uhuru is the Swahili word for independence. For this depiction see C. Odote, "The Dawn of Uhuru: Implications for Constitutional Recognition of Communal Land Rights in Pastoral Land Rights" [2013] in Nomadic Peoples' Journal (Special Issue) pp 87-105.
[132] The National Land Policy supra note 106 p57
[133] Ibid. p63
[134] See the Glossary of terms section of the National Land Policy supra note 19

access to land and land based resources; participation in decision making over land and land based resources; and protection of their land rights from unjust and illegal expropriation.[135]

To secure community land, the local communities are encouraged to settle land disputes through recognized local community initiatives consistent with the Constitution[136] which adhere to the constitutional imperatives of non-discrimination, participation, equity and fairness. The NLP also details the land policy principles most of which are relevant for securing community land rights. They include: equitable access to land; secure land rights; access to land information; transparent and good democratic governance of land.

3.3.2The Constitution and the Nature of Land Classification in Kenya

The provisions on land and environment are found in Articles 60 to 68 of the Constitution of Kenya 2010. The principles of land policy have also been outlined and provides that land shall be held in a manner that is equitable, efficient, productive and sustainable and in accordance with the principles of equitable access and security of land rights among others.[137] Land has therefore been classifies as private, public and community land.[138]

According to Prof. Kivutha Kibwana, land tenure is the physical and proprietary relationship between individuals or groups to land rights.[139] Land administration by the colonial and post-colonial regimes have been seen to undermine the traditional management system in terms of access, control of land and land based resources.[140]

The tenure system was one which the president had exclusive powers to dispose of any rights in unalienated government land.[141] This kind of tenure is known as public tenure and has been defined to entail land that has been held by the government as a private owner.[142] The powers have been misused in many respects resulting in illegal and irregular allocation of land.

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[135] The National land Policy, supra note 106, p195-198
[136] The Constitution of Kenya 2010, Article 60 (1)
[137] The Constitution of Kenya 2010. See generally Article 60 where other principles of land policy have been enumerated. The most important in this research are what has been enumerated in (a) and (b), that is security in land rights and equitable access to land.
[138] Ibid, Article 61.
[139] K. Kibwana, "Spontaneous Settlement and Environmental Management in Kenya" in S. Wanjala (ed) Essays on Land Law: The Reform Debate in Kenya, (Faculty of Law, University of Nairobi, Nairobi 2000) p.109
[140] Republic of Kenya Sessional Paper no 3 of 2009 on National Land Policy (Government Printer, Nairobi 2009) p. 68.
[141] Section 3 of the Government Land Act Cap 280 Laws of Kenya (repealed)
[142] B. D. Ogolla and J. Mugabe, "Land Tenure Systems and Natural Resources Management" in C. Juma and J.B.` Ojwang (eds) In Land We Trust: Environment. Private Property and Constitutional Change (ACTS Press, Nairobi 1996) p.104.

Private land has been defined as land registered under freehold or leasehold tenure and any other land that is declared as such by an Act of Parliament.[143]The tenure emphasizes on indefeasibility of title except in cases of fraud where the proprietor is a party.[144]With the alienation of land from natives and registering them in individual proprietors, the Constitution has not been keen on the people who were left landless. The new Constitutional dispensation has perpetuated the status quo and limiting in addressing the land tenure problem whereas the law as it is perpetuates the English proprietary principles that were used to expropriate the African commons.[145]As **Okoth Ogendo** states:

"…*British colonial authorities promptly declared their colonies without settled forms of government as having no sovereign to hold title to land. This was followed in rapid succession by a series of laws which completely appropriated the African commons to the imperial power and made them available for allocation to colonial settlers in terms of English proprietary principles*."[146]

The new constitutional dispensation would at the very least seek to rectify the problem and acknowledge that there has been a problem but it has not solved it. The subsequent sub-topic will delve into legislations that were enacted after 2012 and also show that they have limitations in resolving the problem of communal land tenure in Kenya.

3.4 The Laws Relevant to Community Land

3.4.1 The Community Land Act 2016

The Community Land Act finally became law and provides a legal framework that provides for the recognition, protection and registration of community land rights; management and administration of community land; to provide for the role of county governments in relation to unregistered community land.[147]

[143] Article 64 of the Constitution of Kenya 2010. The Acts of Parliament include Government Land Act Cap 280, Registration of Titles Act Cap 281, Land Titles Act Cap 282 and Registered Land Act Cap 300 Laws of Kenya. They have been repealed by the Land Act of 2012.
[144] T. Ojienda and M. Okoth, "Land and the Environment," in P. L. O. Lumumba et al (eds) The Constitution of Kenya: Contemporary Readings (LawAfrica Publishing (K) Limited, Nairobi Kampala Dar-es-Salaam 2011) p.170.

[145] H W O Okoth Ogendo, "The Tragic African Commons: A Century of Expropriation, Suppression and Subversion" in Land Reforms and Agrarian Change in Southern Africa (Programme for Land and Agrarian Studies, School of Government, University of the Western Cape 2002) p.6.
[146] Ibid.
[147] Act Number 27 of 2016

This Act was enacted just 10 days before the constitutional deadline and it came into force to give effect to Article 63 (5) of the Constitution that provides on community land. The Act specifically provides for;

- The recognition, protection and registration of community land rights;
- Management and administration of community land;
- The role of county governments in relation to unregistered community land.

The Act also repealed the Land (Group Representatives) Act,[148] and the Trust Lands Act,[149] which formerly provided for community land. The urgency of relieving millions of Kenyans from being de facto tenants of the state was brought to the attention of the **Njonjo Land Commission** in 1999. A decade later, the new Constitution marked the turning point. It declared, 'All land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals' and announced classes of public, community and private land.[150]The Land Act, 2012 followed up with ground-breaking recognition that customary land rights have equal recognition with freehold and leasehold rights and may not be discriminated against.

The Community Land Act reiterates the prohibition against disposal of unregistered community land. This does not limit compulsory acquisition for public purposes to which all landholders are vulnerable. In general, the Community Land Act instructs counties to hold compensation for the affected community until it secures formal title.[151]

The study has noted that one of the problems with the Constitution is lack of clarity over what land is community land; particularly there are overlaps with public land. Yet, even after all this time, this study has found out that the Community Land Act has not delivered clarity on what constitutes registrable community lands, or if and when these will take precedence over public lands.

While the Constitution is clear on the limits of public land, the Land Act[152]on the other hand implies that not only government forests and wildlife reserves are public land, as the Constitution provides, but also buffer zones around them. The Community Land Act also makes clear that 'Any land which has been used communally, for public purpose ... *[is]*

[148] Cap 287
[149] Cap 288
[150] Article 61 of the Constitution of Kenya 2010.
[151] Section 22(1) (a)
[152] Section 12

public land vested in the national or county government, according to the use it was put for.'[153]

The challenges do not stop there. There are confusing provisions about registered community land being reserved 'for the promotion or upgrading of public interest' as decided by the community or national or county government.[154] It is unclear how much choice the community has about this. Nor is it clear whether this reserved land then becomes public lands.[155]

This study is of the opinion that the local communities will not feel their lands secured until these are safely under formal titles, this could take a long time especially if disputes between communities and government agencies arise as to what lands and resources may be included.

This research therefore stipulates that establishing formalization procedure is the main purpose of the Act. It asks communities to define and register themselves and await adjudication, survey, demarcation and registration.[156] Kenya began much simpler individual house and farm titling 60 years ago. With much larger estates to identify and demarcate and many more actors to satisfy, community titling will be yet slower. In the absence of community level government such as those instituted in Tanzania or South Africa as will be discussed on the next chapter, Kenyan communities will have to formalise themselves, their land rules, and land governance institutions from scratch. As many communities are pastoralists with overlapping rights to the same domains, this will often be contentious and as a result of this innovative guiding regulation is needed.

The Ministry of Lands has just made its job harder by clawing back powers and duties which could have been developed under county land management boards, which were abolished by the recent Land Laws (Amendment) Act.[157]

With the time taken to bring the Community Land Act into being, the study suggests that the will to help poor rural communities secure title to around half or more of Kenya's land area is ambivalent. It could well be the case that the law has only been enacted because of fear that failure to do so within the time stipulated by the Constitution, already extended once, would lead to the dissolution of Parliament.

[153] Section 13(2)
[154] Section 13 (3)(f)
[155] Section 26(2)
[156] Section 11
[157] Act No.28 0f 2016

3.4.2 Trust Lands Act

The Trust Land Act[158] provides for the management of trust land which consist of areas that were occupied by the natives during the colonial period and which have not been consolidated, adjudicated or registered in individual or group names, and native land that has not been taken over by the government. This Act vests all trust lands on local authorities or county councils which have since been abolished after the 2013 general election. In respect of the occupation, use, control, inheritance, succession and disposal of any Trust land, the Act grants every tribe, group, family and individual all the rights which they enjoy or may enjoy by virtue of existing African customary law or any subsequent modifications thereof.[159]

The Act details an elaborate procedure to be followed in case the government or the county council wants to set apart any part of Trust land for public purposes. The procedure inter alia, protects the rights of residents from expropriation of Trust land without compensation. However, as pointed out in Kameri-Mbote et al. (2013)[160] the record shows that this procedure has routinely been disregarded and the county councils in many cases have disposed of trust land irregularly and illegally.

3.4.3Land (Group Representatives) Act

The Land (Group Representatives) Act[161] can be seen as one of the exceptional statutes that recognized group tenure over land prior to the current land governance arrangements.[162] The Act provides for the incorporation of representatives of groups who have been recorded as owners of land under the Land Adjudication Act,[163] and for purposes connected therewith and purposes incidental thereto. The Act, for its purposes defines a group as a "tribe, clan, family or other group of persons, whose land under recognized customary law belongs communally to the persons who are for the time being the members of the group, together with any person of whose land the group is determined to be the owner".

This Act provides a very important basis for recognizing and protecting community land rights, and was the basis of registration of group ranches in many pastoral communities. A group ranch refers to a demarcated area of rangeland, to which a group of pastoralists who

[158] Chapter 288 of the Laws of Kenya
[159] Section 69, Chapter 288 of the Laws of Kenya
[160] Kameri-Mbote, P., Odote, C., Musembi, C. and Kamande, W., 2013. Ours by Right: Law, Politics and Realities of Community Property in Kenya. Strathmore University Press, Nairobi.
[161] Chapter 287 of the Laws of Kenya
[162] The current land governance arrangements here refer to the Constitution of Kenya, 2010"s provisions on land; the new legislations on land including the Land Act, Land Registration Act and the National Land Commission Act; the National Land Policy; and the continuing legal reforms in the land sector.
[163]Chapter 284 of the Laws of Kenya

graze their individually owned herds on it, have official land rights. However, group ranches set up under the Act suffered a number of setbacks as pointed out in Kameri-Mbote et al. (2013).[164] First, in many cases, the group representatives entrusted with the management of such group land disposed of group land without consulting the other members of their groups.[165] Secondly, the group representatives lacked the authority of traditional leaders leading to questions over their legitimacy and thirdly, government policy has tended to emphasize individual land rights over group ownership. These factors have led to defensive subdivision and individual titling of land within group ranches to avoid encroachment by government or other entities.

3.4.4 Land Registration Act

The Land Registration Act[166] gives provisions for revision, consolidation and rationalization of the registration of titles to land, in order to give effect to the principles and objects of devolved government in land registration, and for connected purposes. The Act applies to registration of interests in land under all the three land tenure regimes established by the constitution. The Act empowers the National land Commission, in consultation with national and county governments, to constitute land registration units at county level and at such other levels to ensure reasonable access to land administration and registration services. It details the procedure for division and systematic numbering of parcels of land in each registration unit.[167]

The Land registration act makes specific provisions for community land, subject to the legislation on community land to be made pursuant to Article 63 of the Constitution.[168] It defines a community as: a clearly defined group of users of land identified on the basis of ethnicity, culture or similar community of interest as provided under Article 63(1) of the Constitution, which holds a set of clearly defined rights and obligations over land and land-based resources. It requires a community land register to be maintained in each land registration unit. The community land register is to contain: a cadastral map showing the extent of the community land and identified areas of common interest; the name of the community; a register of members of the community; the user of the land; the identity of those members registered as group representatives; the names and identity of the members of

[164] See supra note 160
[165] Para 19, Sessional Paper No. 3 of 2009 on the National Land Policy
[166] Land registration Act (Number 3 of 2012)
[167] Section 6, Land Registration Act (Number 3 of 2012)
[168] Article 63 (5) requires Parliament to enact legislation to give effect to the constitutional provisions for management and utilization of community land.

the group; and any other requirement as shall be required under the law relating to community land.

The Registrar is to issue a certificate of title or certificate of lease, but is prohibited from registering any instrument purporting to dispose of rights or interest in community land unless it is in accordance with the law relating to community land. The Act, at section 10 grants the public access to information in the register either by electronic means or any other means.

3.5 Conclusion

This chapter has accessed the limitations of the current land statutes in resolving the problem of customary or communal land tenure in Kenya and has found out that with the enactment of the new land laws, much has not changed with regards to the concept of indefeasible title. The new land laws contain the concepts of indefeasible title and the protection of first registration even if done through fraud. Even though the judiciary is empowered to address the problem, it may not effectively do so considering the provisions of the other legislation as eluded earlier in this chapter.

CHAPTER FOUR

BEST PRACTICE AND REFORM TO RESOLVE THE COMMUNAL LAND TENURE PROBLEM

4.0 Introduction

This chapter will explore best practice in the context of resolution to the communal land tenure problem in Kenya. For best practice in resolving the problem, the jurisdictions to be considered are South Africa and Australia. The reason for selecting the two jurisdictions is to show the practice in dealing with the problem at hand through their constitutions and legislation, a practice that can be adopted in Kenya.

This chapter addresses the concern on the reform in the land sector in Kenya and how inefficient it has been in addressing the overall research problem in Kenya. For the first time, the Constitution has made provisions relating to land and the environment. The Constitution of Kenya 2010 provides that land shall be held, used and managed in an equitable, efficient and productive manner.[169]The two principles of equitable access to land and security of land rights are emphasized in the Constitution and they are to be achieved through a national land policy and through legislation.[170]

Even though equitable access of land is provided for, there is no clear framework for effectuating the provisions and therefore limited in resolving the problem of community land rights in Kenya because there is a challenge in defining the term 'community'. The other challenge is the anticipation by Article 63 of the Constitution which stipulates that land shall vest in and be held by communities on the basis of culture, ethnicity or community interests. It is however not clear what amounts to these community of interests.[171] There is also unpredictability of rights since the formal law has made individual land holding prevail at the expense of community rights where private rights are created without consultation with the communities who live in the trust lands.[172]The problem with the provisions of Article 63 of the Constitution is that over time other communities have migrated to live among others that dominate a particular area.

[169] Article 60 (1) of the Constitution of Kenya 2010. The provisions on land and environment are found in Articles 60 to 72.
[170] Ibid, Article 60 (1) (a) and (b) and Sub Section 2.
[171] P. Kameri-Mbote and others, Ours by Right, Law, Politics and Realities of Community Property in Kenya (Strathmore University Press, Nairobi 2013) pp.28-29.
[172] Ibid, 37.

The Constitution also provides for the right to property[173]where everyone has the right to own property either individually or in association with others in any part of the country. It also prohibits Parliament to enact laws that would limit the enjoyment or deprive a person the enjoyment of a right arbitrarily.[174] The right to property does not extend to properties that were illegally acquired.[175] At this stage it is imperative to consider other jurisdictions and how they were able to handle the problem.

4.1South Africa

The system of apartheid in South Africa established laws and systems that were discriminatory and this extended to land dispossessions. The policy led to a history of conquest and disposition, forced removals, and a racially skewed distribution of land and resources. Like in Kenya, the South African land tenure regime has for a long time been characterized by a dual tenure system with customary tenure derived from African customary law on the one hand and individual tenure based on the English law on the other.[176]

It is in this context that the South African constitution was promulgated in 1996 which provides for land tenure security among all South Africans, regardless of their social or economic status.[177]The Constitution of South Africa recognizes in the preamble that there is need to heal the divisions of the past and establish a society based on democratic values and human rights and social justice.[178]It provides that deprivation of property shall not be done except in law of general application and that no law shall arbitrarily deprive a person of the right to property since the State is mandated to take legislative measures to ensure conditions that will enhance equitable access of land.[179]

It also provides that if a community or an individual was dispossessed as a result of discriminatory practices and laws, then there is an entitlement to restitution of that property or to equitable redress. This was to be done through an Act of Parliament.[180] The land department of South Africa undertook measures to redistribute, reform tenure arrangements and resolve the issue of dispossessions by ensuring that disposed people get back their lands.

[173] Article 40 of the Constitution of Kenya 2010.
[174] Ibid, Sub Article 2.
[175] Ibid, Sub Article 6.
[176] Kameri-Mbote, P., Odote, C., Musembi, C. and Kamande, W., 2013. Ours by Right: Law, Politics and Realities of Community Property in Kenya. Strathmore University Press, Nairobi.
[177] Leap, 2005. Perspectives on Land Tenure Security in Rural and Urban South Africa: An analysis of the tenure context and problem statement for Leap
[178] The Preamble to the Constitution of the Republic of South Africa of 1996 <www.info.gov.za> accessed on 15th July 2013.
[179] Ibid, Article 25 (1).
[180]Ibid, Article 25 (7).

The difference between South Africa and other countries is that while she enacted laws that ensured redress of land alienations and dispossessions, others took over the land and held it in trust for the public whereas in others, the status quo remained.[181]

The South African constitution consists of an elaborate bill of rights which while guaranteeing existing property rights, simultaneously requires the state to take reasonable steps to enable citizens gain equitable access to land, promote tenure security and provide redress to those who were disposed of property as a result of past discriminatory laws and practices.[182] For the purpose of this research it has been noted that the South African government recently enacted two national laws that have major impact on people living in communal areas, while some provinces are attempting to develop more appropriate strategies for managing land use.[183] These laws are the Communal Land Rights Act (CLARA) and the Traditional Leaders Governance Framework Act (TLGFA), which will potentially impact on how the rural poor in South Africa hold land rights and how those rights are administered. The province of KwaZulu-Natal is also developing Land Use Management.[184]

The Community Land Rights Act[185] (CLARA) was enacted to give recognition and protection of communal land rights by transferring communal land rights to traditional communities, registering of individual land rights within communally owned areas, and using of traditional council or modified tribal authority structures to administer the land and representing the community as owner. The Act employs three broad strategies to achieve its objects.[186]

Critics have however claimed that CLARA does not provide for is either the criteria for determining what evidence counts in identifying an old order right or what processes should be followed for adjudicating multiple old order rights all competing for recognition as a new order right.[187] Indeed, CLARA has been the subject of a number of court cases questioning its validity and constitutionality.

[181] C. Polsinelli, "Right to Land-Right to House and Adequate Standard of Living," in Human Rights Litigation and the Domestication of Human Rights Standards in Sub Saharan Africa AHRAJ Casebook Series Vol 1(International Commission of Jurists Kenyan Section, Nairobi 2007) p.154.
[182] Constitution of the Republic of South Africa (No. 108 of 1996), at Article 25 (5)-(8)
[183] Leap, 2005. Perspectives on Land Tenure Security in Rural and Urban South Africa: An analysis of the tenure context and problem statement for Leap
[184] Ibid
[185] Republic of South Africa, 2004. Communal Land Rights Act, 2004 (Number 11 of 2004)
[186] Kameri-Mbote et al. (2013) , supra note 171
[187] See Leap (2005), supra note 183

The Restitution of Land Rights Act 1994[188]established the Commission on Restitution of Land Rights and a Lands Claims Court which provided for restitution to persons or communities that were affected by the colonial laws and sought to restore full enjoyment of their land.[189] The Act further defined right to land as including any right in land whether registered or unregistered which include among other interests customary interest and the person should have lived for a period of more than ten years by the time of dispossession.[190]Under the Act, the restitution would take the form of getting back the land and where that was not possible, a claimant was entitled to land owned by the State or benefit from programmes that were supported by the State.[191] The statute had provided that claims would only be done for a period of ten years. In 1998, only four per cent of the claims had not been finalized. The process faced the challenge of delays in producing relevant documents and budgetary constraints.

The Community Land Rights Act was also important since it was enacted to rectify the position where the apartheid regime in South Africa had failed to give recognition and protection to community rights.[192]South Africa is one of the few jurisdictions that successfully dealt with the issue of land dispossessions. Indeed the guiding document was the ***White Paper on South African Land Policy*** of 1997.[193]The policy recognized that settlement issues cannot be addressed without first addressing historical injustices. The responsibility was placed upon the Commission, the Lands Claim Court, the land owners, all levels of government and the claimants. In that regard therefore, the systems and procedures for claims were simplified to ensure success of the processes.[194]

The process of restitution similar to the one in South Africa has been recognized in Kenya in the National Land Policy.[195]It underscores that the issues which require special intervention include historical injustices and the Coastal land issues. One of the mechanisms for resolving the land issues is restitution. It provides thus:

"*...the purpose of land restitution is to restore land rights to those that have unjustly been deprived of such rights. It underscores the need to address circumstances which give rise to*

[188] Act No 22 of 1994 <www.info.gov.za> accessed on 15th July 2013.
[189] See the Preamble to the Act.
[190] Article 1 of the Act.
[191] See Section 35 of the Act.
[192] Kameri-Mbote et al 2013, supra note 2, p.124
[193]<www.polity.org.za/polity/govdocs/white_papers/landwp.html> accessed on 9th August 2013.
[194]Ibid, Article 3.17.
[195]Republic of Kenya Sessional Paper no 3 of 2009 on National Land Policy (Government Printer, Nairobi 2009) p.42.

such lack of access, including historical injustices. The Government shall develop a legal and institutional framework for handling land restitution."[196]

4.2 Australia

Land in Australia was declared Crown lands and the Aboriginal communities lost their land and their rights ignored.[197]The government recognized the rights that they had on their original lands before colonization. The procedure for returning of the northern territory of the Aboriginal land was done through the Aboriginal Land Rights Act of 1976.[198] The Act applied to the Crown lands that were vested in the Northern Territory.[199]This Act generally recognized the Aboriginal rights to land and was a way forward in dealing with historical land problems in Australia.

The problem of customary land rights in Australia can be traced to 1963 when seven clans of Yolgnu in the Gove Peninsular of the Northern Territory of Australia objected to the mining license that the Australian Government granted allowing bauxite to be extracted from their traditional land.[200] They brought a Federal Court case, ***Milirrpum & Others v. Nabalco Pty Ltd***,[201] to establish ownership of the land in accordance with traditional Aboriginal law. The Court ruled, in 1971, that their traditional relationship to land could not be recognized under Australian common law. Consequently that they did not hold a right to control access and could not prevent or permit mining on their traditional land.

The government of Australia later on commissioned **Justice Woodward** to conduct an inquiry into appropriate ways to recognize Aboriginal land rights. In his findings presented in 1974, Woodward found that a land base was essential to enable Aboriginal economic development and proposed procedures for claiming, holding and dealing with traditional Aboriginal land.[202] He held that mining and other development on Aboriginal land should proceed only with the consent of the Aboriginal landowners. He argued that "…*to deny*

[196]Ibid, p.43.
[197] C. Polsinelli, "Right to Land-Right to House and Adequate Standard of Living," in Human Rights Litigation and the Domestication of Human Rights Standards in Sub Saharan Africa AHRAJ Casebook Series Vol 1(International Commission of Jurists Kenyan Section, Nairobi 2007) p.156.
[198] See Kameri-Mbote et al 2013, supra note 2, p.122. The Act can be found in www.austlii.edu.au accessed on 10th August 2013...
[199] Section 3A of the Aboriginal Land Rights (Northern Territory) Act.
[200] Dodson, M., Allen, D. and Goodwin, T., 2008. The role of the Central Land Council in Aboriginal Land dealings. In: Reconciling customary ownership and development. Making land work, Volume Two case studies. http://www.ausaid.gov.au/Publications/Documents/MLW_VolumeTwo_CaseStudy_6.pdf. Accessed June 6, 2013.
[201] Milirrpum v Nabalco Pty Ltd (1971) 17 FLR 141. http://www.scribd.com/doc/136206534/Gove-Land-RightsMilirrpum-v-Nabalco-Pty-Ltd-1971-17-FLR-141. Internet accessed June 14, 2013
[202]Ibid.

Aborigines the right to prevent mining on their own land is to deny the reality of their land rights", and "*that the right to withhold consent should be over-ridden only if the Australian Government determined that the national interest required it*."[203]

Consequently, the concept of aboriginal title was adopted by **Brennan J.** of the High Court of Australia in ***Mabo v. Queensland***[204] where he said that native title included the recognition of rights and interests unknown to common law: rights not necessarily analogous to common law rights "are assumed to be fully respected".[205]

Review of policies and laws that have enhanced the increase of injustices are a main point of concern and a policy issue that the government committed to achieving. The policy also provides that the government shall establish suitable mechanisms for restitution and specify the periods for doing the same.[206] As part of best practice, the process of resolving injustices and addressing the rights of the people who had been dispossessed was carried out in this manner in South Africa.

Though Kenya proposed the same in the policy, it was not effectuated through the law. Even though the Constitution of Kenya 2010 makes provision for the National Land Commission and gives it mandate to resolve historical land injustices, there are limitations to achieving the same as observed earlier in this paper.

4.3 Conclusion

This chapter addressed the reforms within the land sector and pending policies that need to be addressed by the government. With regards to the limitations identified, this study proposes that the Constitution of Kenya should be amended to remove the classification of land. The land legislation should be amended to remove the concepts of absolute title and the issue of protection of first registration. Kenya should learn from South Africa and Australia and enact robust legislation that will address the issue of restitution for the local communities who are the subject of this study.

[203] Dodson et al. (2008), see supra note 200
[204] Mabo v. Queensland No. 2 1992 (Cth). http://foundingdocs.gov.au/item-did-33.html. Internet Accessed June 14, 2013
[205] Ibid.
[206] Republic of Kenya Sessional Paper no 3 of 2009 on National Land Policy (Government Printer, Nairobi 2009) p.42.

Karuti Kanyinga has proposed that tenure reforms should not only focus on agricultural productivity but should go beyond and address social restructuring, polarization and exclusions.[207]

[207] K. Kanyinga, Redistribution From Above: The Politics of Land Rights and Squatting in Coastal Kenya. Research Report No 115, NordiskaAfrikainstitutet Uppsala 2000 <www.apsanet.org> accessed on 15th July 2013. p.123.

CHAPTER FIVE

RESEARCH FINDINGS, CONCLUSION AND RECOMMENDATIONS

5.0 Introduction

This final chapter will delve into the findings, make conclusions and then recommend the way forward regarding the resolution of the overall research problem. The work has given a case for limitation of the land laws in resolving the problem. In that regard, the study has asserted that classification and categorization of land under the constitution, the concept of and the institutional framework hamper the resolution of the problem under the new constitutional and legal dispensation.

In that regard therefore, the hypotheses have been proven. The land problem has not been adequately addressed by the new Constitution of Kenya 2010 and the new land legislations. The powers given to the National Land Commission also are inadequate in addressing the problem. There is therefore a lacuna in the law that has to be addressed if the land problem is to be effectively resolved.

5.1 Findings

The research has established that there is a deficiency in the land laws that relate to land as far as resolution of the community land tenure is concerned. There is also a deficiency with the institutions and are limited and therefore not able to resolve the overall research problem. The study also found out that the judiciary seems to have the necessary powers to address the land tenure problems through the Constitution and the enabling Acts of Parliament but the provisions of other land laws make it unable to resolve the problem. The Constitution has classified land into private, public and community. This classification is limiting in resolving the problem of community land rights in Kenya since the Constitution recognizes lands that were made private legally despite historical injustices. The Constitution has also created the Community Land Act and the National Land Commission with powers that are not sufficient in addressing the problem.

5.2 Conclusion

The study has made a case for resolving the problem through review of the limitations within the land laws. The research has also noted that the successive governments in Kenya have not been able to adequately deal with the problem at hand. It has established the origins, perpetuation of the problem and the efforts made to resolve it. The objective of the study was to review the extent of the customary rights to land and how the categorization of land under the Constitution impedes on resolution. The assumptions in the study were that the current land laws are inefficient in addressing the problem. The second assumption was that the powers given to the National Land Commission are limited and that there are gaps within the land legislation that need to be filled if the problem is to be adequately addressed. The study has proved these assumptions and has made recommendations to that effect.

The recommendations are to the effect that the Constitution and the selected land legislative framework have limitations which need to be addressed if the current problem of community land tenure is to be effectively dealt with. The study draws best practices and concludes by stating that the country should resolve the problem and ensure that there is equitable access to land and security of tenure for livelihood security, peace and development.

5.3Recommendations

This study recommends the following in view of the foregoing discussions.

5.3.1 Reforms to the Constitution of Kenya 2010.

The study is of the view that the Constitution should be amended to ensure that the National Land Commission is given adequate powers to address the problem of injustices and have the capacity to address the communal land tenure problem. Article 60 of the Constitution provides that the land in Kenya shall be managed in an equitable manner within the principles of equitable access. The prevailing circumstances relating to land tenure in Kenya and the escalation of the problem as advanced by this thesis therefore recommends that classification of land under Articles 61 to 64 should have been silent.

Since the Constitution provides for equitable access of land, that cannot be achieved considering injustices that have made many communities landless. It recognizes private land as land registered by any person under freehold tenure and leasehold tenure. Laws and policies that have been in place have catalyzed the communal land tenure problem. By giving

classifications, the Constitution excludes communities who otherwise are entitled to the land dispossessed from them through the laws and policies. There is a currently inequality in land distribution escalating the overall research problem and leaving a few with large tracts that almost lie idle.[208] The Constitution should at the very least be able to resolve this.

5.3.2 The Concept of absolute/indefeasible title.

Land laws should be amended to delete the concepts of sanctity of title and indefeasible title. The law should make it clear that the concepts are relative and not absolute. The institutions should be strengthened though the Constitution and legal framework. In that regard, the National Land Commission should be empowered to address the problem. What is provided currently is that the Commission should not only recommend redress of historical injustices but should be given capacity to handle the problem.

South Africa established a Commission and a Land Claims Court that had been given adequate powers to handle historical dispossessions. The process which took few years has been hailed by scholars as by and large successful.[209] Kenya could be able to learn from that. The Constitution put in place mechanisms for restitution of land as well as tenure reforms that do not only focus on agricultural productivity but address exclusions and social restructuring. The enabling laws of the Land Commission should give it clear guidelines as to how the redress of the communal land tenure problem ought to be addressed. By doing this, redress of the customary rights problem will not be left at the whims of the executive of the government of the day.

5.3.3 Documentation of Genuine Communities

The law should establish mechanisms of identifying genuine landless communities. The legal and administrative framework should be put in place to document, investigate and determine all historical land dispossessions and ensure that they are resolved. Therefore the laws in place currently should be reviewed to be in tandem with the National Land Policy that has given a clear guideline as to how the problem should be resolved.

[208] P. Syagga, Land Ownership and Use in Kenya: Policy Prescriptions from an Inequality Perspective<www.marsgroupkenya.org> accessed on 28th November 2012. p.292.
[209] An example is P. Syagga Public Land, Historical Land Injustices and the New Constitution; Constitutional Working Paper No 9 (Society for International Development, Nairobi 2010) <www.sidint.net> accessed on 19th October 2012.

The law should also provide for mechanisms to repossess and redistribute idle land that is kept for speculative purposes and given to communities.[210] There is also need to ensure that there is sustainability in legal and policy framework to ensure that the problem is resolved and does not keep recurring again. Vesting rights through the law will not be enough and therefore there is need for proper education for the people and sensitization on the implications in order to avoid conflict in the processes and in resolution of the problem.

[210] See J. Mwaruvie, "The Ten Miles Coastal Strip: An Examination of the Intricate Nature of the Land Question at the Coast," in International Journal of Humanities and Social Science (Vol 1 No 20 December 2011). The author of the paper proposes that it should be given to people who are willing to develop for the sake of the general wellbeing of Kenyans. The problem with that is that land could be taken by private developers whose aim is profit at the expense of the right of squatters.

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