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THE TREATIES THAT RENDERED THE MAASAI LANDLESS

by

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DECLARATION

This research project is my original work and has not been presented to any other institution of higher learning.

Rose Tolony Ruto **14th November 2005**

Prof. Okoth-Ogendo

(Supervisor)

14/11/05

(Date)

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I would also wish to register my appreciation for the Professor's persistence and resilience in reading and re-reading my several drafts which culminated in my present project.

Secondly, I would like to thank Justice Paul Kihara Kariuki, the former Kenya School of Law Principal for encouring me to join the University of Nairobi to pursue the LLM Course, which although time demanding and extremely exhausting became the most enjoyable period of my entire study life.

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ABSTRACT

TREATIES THAT RENDERED THE MAASAI LANDLESS

Focus of the Study

My proposed study aims to look at the legal mechanisms, such as agreements, for example, the 1904 and 1911 agreements termed as treaties which provided for the Masaai to move into specific reserves in Laikipia and Loita plains far from land open to European settlements. These agreements were to remain in force so long as the Maasai race existed. Secondly Ordinances were introduced through which the British colonisers systematically expropriated Kenyan land, for example, the 1915 Crown Lands Ordinance which defined Crown lands to include land occupied by Africans and all land reserved for use of any tribe.

Furthermore the same laws denied Africans the right to acquire land, whether they occupied it or it was reserved for their own use; and to ensure administrative and economic control of land, colonial government established native reserves into which indigenous people were lived. Large tracts of the most fertile agricultural land was set aside for exclusive occupation of white settlers, eventually rendering the natives landless; particularly, the Masaai as a result of the two treaties. The legality of these treaties formed a bone of contention in 1913 Ole Njogo Case when the Maasai instituted legal proceedings for breach of the 1904 agreement by the colonial administration. Now a peculiar feature of the Maasai claim is that the agreements were signed under duress, which in itself is a ground for invalidating the

treaties. Nevertheless, whereas the treaties were signed with the British colonial administration, request for return of the land has been directed to both the British government and the Kenyan government.

Conceptual Approach

The conceptualization aims to address some questions such as, how valid are the Maasai treaties at both domestic and international law? If the two treaties are null and void what recourse do the Maasai have? From whom are the Maasai entitled to claim? Recommendation on the future of Kenya's land policy taking into account Maasai's and other marginalized tribes' Land Restitution Question.

Methodology

Survey Areas

No survey will be carried out during the course of this study.

Method of Study

Only Secondary sources of information will be used to address the issues noted above.

DEDICATION

This project is dedicated to my children, Vicky, Tony, Grace and Ricky, as well as, my deceased husband who before he passed on bought me a present with a caption which read *"may all the dreams you're dreaming turn into dreams come true!"*

CHAPTER ONE

1 INTRODUCTION

1.1 Historical Background of the Study

The Industrial Revolution in Europe was at its highest peak in the 18th Century and Britain had been for a long time the main supplier of manufactured goods and investment capital to Europe, the Americas and the Far East. During the said period Britain obtained most of its raw materials from America. However, prohibitive tariffs and fluctuations of supply became of great concern. Secondly, America started manufacturing their own goods which they sold locally consequently denying Britain her main market for her manufactured goods. Hence, new markets for their manufactured goods and source of raw materials had to be found. As a resullt European countries held a major Conference in Berlin in 1885 named the Berlin Conference in order to discuss the way ahead on the predicament that had befallen them. At the end of the Conference, they decided to divide Africa among themselves in order to find new markets for their finished goods and obtain raw materials for their industries in Europe. Therefore in 1886, there was a scramble for Africa by the British, French, Belgians, Germans and Italians in order to ameliorate the situation in Europe and to extend their power overseas.

When the British colonialists came to Kenya after the Berlin Conference of 1885, they had to develop and safeguard their strategic and economic interests and in order to do so, they had to acquire effective control over the area. The kind of control needed was not one that merely protected British traders from unfair competition by nationals of other European powers, but one that gave both the traders and the imperial government the power to acquire title to and deal with the land resources of the region. The declaration of protectorate status over East Africa on 15th June 1895 did not solve this problem.[1] In fact the Law Officers of the Crown had argued as early as 1833 that a protectorate was a foreign country and therefore such status gave the imperial power little more than political jurisdiction over the territory.

1.Tenants of the Crown - by Prof H W O Okoth Ogendo

Rights over land in these circumstances could only be acquired by conquest, agreement, treaty or sale with the indigenous people. As a result the Foreign Office asked the law officers for their advice. They gave their advice on 13th December 1899 that the Foreign Jurisdiction Act 1890 gave Her Majesty power of control and disposition over waste and unoccupied land in protectorates where there was no settled form of government and where land had not been appropriated either to the local sovereign or to individuals.

The Law Officers' opinion was converted into law through the 1901 and 1902 East Africa Orders in Council. These Orders gave the Commissioner power to make Ordinances for peace, order and good government of all people in the Protectorate and established a High Court with full criminal and civil jurisdiction over all persons and matters of the Protectorate.

Hence the above noted Orders in Council saw the entrenchment of British authority in East Africa. All waste and unoccupied land were deemed to belong to the Crown. The Imperial British East African Company,(I B E A C) was established to administer the region under the British jurisdiction on behalf of the Crown. However by June 1895, the company was criticised as being inefficient and as a result the territory formerly administered by the Company was declared a Protectorate; and named the East Africa Protectorate.[2]

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2. Tenants of the Crown by Prof H W O Okoth-Ogendo

During the same period Kenya became a British Protectorate and in 1920 became a British Colony but the Sultanate of Zanzibar remained a Protectorate. One of the earliest acts of imperial control executed by the British in Kenya was the assertion of sovereignty over land occupied by indigenous people under the doctrine of eminent domain. This concept is derived from the Roman *dominium eminens* which means sovereignty over territory

1.2 Development of Land Tenure Law in Kenya - 1915 -1938

As was the case elsewhere in colonial Africa, one of the earliest acts of imperial control executed by the British in Kenya was the assertion of sovereignty over land occupied by indigenous people by introducing laws based on English laws that enabled them disposses the indigenous Africans, like the Maasai, their ancestral land. Hence, this was an important concern of the 1915 Crown Lands Ordinance which included native reserves as part of Crown Lands. However, this move was criticised in Britain. Consequently, the Committee of the Legislative Council that had been asked to report on the final Bill justified the move as follows:

"...It must be remembered that many if not most of the native tribes have no individual or even tribal tenure of land as tenure is generally understood in England, and it is of the utmost importance that the land in the reserves or occupied by native tribes should be definitely vested by statute in the Crown, thereby giving the Crown power to afford the natives protection in their possession of such land.... If such lands are vested in the Crown it will be possible for the Crown to regulate their occupation in the interests of the natives and finally to evolve a system of tenure for the natives thereon giving them real and definite right to land."[3]

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3. Tenants of the Crown - by H W O Okoth-Ogendo

However, the spurious nature of their claim of giving the natives real and definite right to the land soon became evident when the colonial courts declared that the effect of the Crown Lands Ordinance, 1915, coupled with the change from protectorate to colony status in 1920, was to render Africans mere tenants at the will of the Crown in the case of *Isaka Wainaina Wa Githomo and Kamau Wa Githomo -v- Murito Wa Indangara (2) Nanga Wa Murito (3) Attorney-General.*[5]

The facts of the case were:

One Wainaina wa Githomo and another, both Kikuyu, claimed that they were entitled to possession of a piece of land in Kabete, which they alleged had been the subject of a trespass by one Murito wa Indangara, and another, also Kikuyu. The plaintiffs' claim rested on derivation of title by purchase from the Ndorobo before colonial settlement. In the alternative the plaintiffs' alleged that the defendants had been tenants at will on the shamba and that such tenancy had been determined by notice.

On these facts the Attorney-General of the colony asked to be made a party and subsequently the plaintiffs were instructed to reframe their claim as follows:

'that "subject to any rights of His Majesty by statute or otherwise." they were now simply claiming a declaration "that as against the defendants they are entitled to the possession and beneficial occupation of the said shamba".

However, Chief Justice Barth framed the issue differently that '*having regard to the rights of the Crown are the plaintiffs entitled to bring this action?".* In holding that the plaintiffs were not so entitled the Chief Justice declared:

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5. (1922-23) 9 KLR 102

"In my view the effect of the Crown Lands Ordinance, 1915 and the Kenya (Annexation) Order-in-Council, 1920 by which no native private rights were reserved, and the Kenya Colony Order-in-Council, 1921... is clearly, inter alia, to vest land reserved for the use of a native tribe in the Crown. If that be so then all native rights in such reserved land, whatever they were ... disappeared and natives in occupation of such Crown Land became tenants at the will of the Crown of the land actually occupied which would presumably include land on which huts were built with their appurtenances and land cultivated by the occupier - such land would include the fallow..." [6]

As a result of the Barth judgement the ghost of native rights was finally laid to rest, albeit in a misconceived way. Hence any land occupied by the natives found suitable for European settlement could be taken by ordinary administrative action.

However, a new wave of insecurity and frustration was evident in the African areas, particularly in Kavirondo and the Kikuyu country. Consequently, the Colonial Office realised that the settler himself would have no security in his land unless some form of stable property arrangements were found within the African reserves. This resulted in the development of legal structures mainly to ensure the maintenance of law and order in the African reserves between 1921-1939; by raising the juridical status of the reserves, firstly, by formal gazettement in 1926. Secondly, by bringing them within a statutory system of administration in 1930 and thirdly, by taking them out of the juridical claws of settlerism altogether in 1938, when reserves were severed from Crown lands and transferred to a Trust Board set out specifically for that purpose. This was carried out through two legislative enactments. The first was the Native Lands Trust Ordinance 1938 under which all areas formerly known as 'native reserves' were re-designated 'native lands' and removed from the Crown Lands Ordinance, 1915. Secondly, by an amendment to this latter Ordinance, additional lands for future use, called variously 'native reserves', temporary reserves' and 'native leasehold areas', were made available out of Crown lands.

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6 Supra - 5 - p 4

The anactment of the two Ordinances was because the 1926 reserves' gazettement did not solve the problem of ensuring that the title of the natives to beneficial occupation of their land was indefeasibly secured. Africans continued to be denied both rights in the land and control over its administration. They remained tenants at will of a demanding and unsympathetic landlord.[7]

The loss of land which belonged to indigenous people did not occur in Kenya solely. In Swaziland, South Africa, Zimbabwe and Namibia, large tracts of land were expropriated. Indigenous communities were forced into reserves (or Bantustans) or to less productive areas resulting in breakdown of community resources and hence famines and widespread poverty.[8]

The same calamity befell Australia, when on May 13, 1787, a fleet of 11 ships left Portsmouth, Britain under the command of Captain Arthur Philip. On Board were 1,350 people, 780 of whom were convicted criminals; the rest were children and four companies of marines.

It was the first of the three crucial fleets that formed the basis of British colonisation of Australia. The fleet docked at Sidney Cove on the morning of January 26, 1788. Within three years, jails in Britain were empty with two other consignments of convicts being shipped to the newfound land. Then the first shipment of free settlers arrived into the sub-continent in 1783 giving way to Van Diemen's Land then Tasmania Colony, later renamed Australia. As a result of colonisation, the Maori of Australia lost their beautiful lands to the settlers like the Maasai of Kenya.[9]

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7. Tenants of the Crown - by Prof H W O Okoth-Ogendo

8. The Tragic African Commons - by Prof H W O Okoth-Ogendo

9. The Standard - Interactive - October 16, 2004.

1.3. Current Land Tenure System in Kenya

As a result of colonisation there are three basic land tenure systems in Kenya. These are governments lands, trust land, and private land. Government land is vested in the President who, on behalf of the government, has power to make grants or disposition of any estates, interests or rights in or over unalienated or unutilized government land. Some of the President's power to allocate government land are defeated under the provisions of the Governments lands Act[10] which vests in the government powers akin to those of private land owner.

Trust Land is land held under trusteeship by various county councils for the local communities under the Constitution of Kenya, who reside on and use the land pursuant to their traditional laws and rights, but have no registered interest in. The land is administered under the provisions of the Trust lands Act,[11] which empowers the county councils to promulgate by-laws regarding land use and human activities.

To date, most of the trust lands have been adjudicated and registered under private tenure, thereby removing them from the jurisdiction of county councils.

Private or individual land can be owned under the provisions of the Registered land Act,[12] consequent upon the processes of adjudication and consolidation of private rights in land. Registration of land ownership under the statute creates a freehold interest known as the absolute proprietorship, which is a relic of feudalism.

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10. Chapter 280 of the Laws of Kenya (Revised edition, 1984)

11. Chapter 288 of the Laws of Kenya (Revised edition, 1978)

12. Chapter 300 of the Laws of Kenya (Revised edition, 1978)

1.4 Status of Customary Land Tenure

In terms of juridical hierarchy, customary law, which the Maasai apply, is the lowest in rank. In fact in accordance with the Judicature Act Chapter 8 ot the Laws of Kenya, customary law can be applied in our courts if it is not repugnant to justice and morality. In 1979, Prof Okoth-Ogendo noted:

"customary law" qua positive law is dying; it is in fact dead in a lot of substantive law areas... Customary "law" now belongs to social and cultural history, and those principles of it as reflect the way of life of Africans being to sociology and anthropology".

The Professor was persuaded by the rate in which legislatures in Africa were churning out statutes based on Anglo-American precedents, that indigenous law, in all areas, *'would soon be lying in a juridical morgue, waiting to be buried beneath unyielding legislative tombstones.'*[13]

However, in the case of Virginia Edith Wambui Otieno -vs- Joash Ochieng, Ougo and Omolo Siranga[14] Mr Kwach:

"referred to the common law as the customary law of England. The Judgment of Bosire, J. he claimed, had re-asserted the proper place of the African customary laws which were in effect binding on the courts. In Mr Kwach's world, customary law supervenes over common law."

The court noted that subsection 2 of section 3 of the Judicature Act[15] provides:

"(2) The High Court , the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases

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13. The Tragic African Commons. A Century of expropriation, suppression and subversion by Prof. H W O Okoth-Ogendo
14. Court of Appeal at Nairobi (Nyarangi, Platt and Gachuhi, JJ.A) - 13th February 1987 Civil Appeal Case No. 31 of 1987 - Casebook on Kenya Customary Law by Eugene Cotran.
15. Chapter 18 of the Laws of Kenya.

according to substantial justice without undue regard to technicalities of procedure and without undue delay".

In dismissing the case the court discussed Section 3(2) of the Judicature Act in detail and noted that:

"Looking at the sub-section, we ask ourselves: what does "guided" mean? The word "guided" which is not an altogether easy term to understand in our judgment means led by something and so courts must have in mind as the guiding light, as the principal law, the African customary law. If, however, there are circumstances pertaining to a case to which African customary law does not apply, a court should feel free to apply common or statutory law."

In this case, Virginia Edith Wambui Otieno appealed against a decision by Bosire J that the judge *inter alia* "misdirected himself in law and in fact in holding that the Luo customary law is applicable with regard to the burial of the deceased and in failing to find that the duty of burying the body of the deceased is on or lies with the plaintiff as the personal representative of the deceased and her family."

"Also in failing to hold that the Luo Customary Law relating to the family home and burial of the deceased was repugnant to justice and morality is inconsistent with or in conflict with the applied law and the written law of Kenya."

However, the court held that:

"The place of customary law as the personal law of the people of Kenya is complementary to the relevant written laws. The place of the common law is generally outside the sphere of personal customary law with some exceptions. The common law is complementary to the written law in its sphere. Now suppose that exceptionally there is a difference between the customary and the common law in a matter of a personal law. First of all, if there is clear customary law on this kind of matter, the common law will not fit the circumstances of the people of Kenya. That is because they would in this instance have their own customary laws."

The court further noted that:

"From this review it emerges that generally speaking the personal laws of Kenyans is their customary laws in the first instance. Common law is not the primary source, but it may be resorted to if the primary source fails.

We can, therefore state that in the course of developing a jurisprudence which ultimately will have a Kenya identity, the courts are enjoined to turn to African customary law as well as to the applied common law, to decisions of the English courts and courts of Commonwealth countries."

In fact Prof Okoth-Ogendo is now convinced that indigenous law, including those principles that define the structure and content of the Commons, will not succumb so easily to suppression or subversion. He used a metaphor that:

'indigenous law, long regarded as a dangerous weed, simply went underground where it continued to grow despite the overlay of statutory law that was designed to replace it'.[16]

Resilience and persistence of customary law is evident in two major ways.

First, current analyses of African social formations reaffirm that indigenous values and institutions still provide the only meaningful framework for the organisation of economic and spiritual livelihoods in sub-Saharan Africa. A sense of community prevailed from which developed an elaborate system of reciprocal duties and obligations among the family members. This is manifest in the concept of *ubuntu - umuntu ngumuntu ngabantu* a dominant value in a South African traditional culture. This concept encapsulates communality and the inter-dependence of the members of a community. In *S -vs- Makwanyane and Another*[17] Mokgoro J noted that:-

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16. The Tragic African Commons: A century of expropriation, suppression and subversion by Prof Okoth-Ogendo.

17. Constitutional Court of South Africa - March 2004

"ubuntu ... metaphorically expresses itself in 'umuntu ngumuntu ngabantu'. describing the significance of group solidarity on survival issues so central to the survival of communities."

Langa D C J[18] noted that it is a culture which "regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights."

It is this system of reciprocal duties and obligations that ensured that every family member had access to basic necessities of life such as food, clothing, shelter and healthcare.

Pre-colonial African society in which these rules were developed, was based on an agricultural subsistence economy characterised by self-sufficient joint family organisation.

Secondly, empirical evidence shows that whether regarded as a 'law' or not, indigenous norms and structures, particularly in respect of land relations, continue to operate as sets of social and cultural facts which provide an environment for the operation of state law.[19]

In a South African case of *S -vs- Baloyi (Minister of Justice and Another Intervening)*[20] the court held that :

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18. Constitutional Court of South Africa - March 2004

19. The Tragic African Commons: A century of expropriation, suppression and subversion by Prof H W O Okoth-Ogendo

20. Supra 18 - page 16

"...indigenous law is part of our law. Section 39(2) of the Constitution imposes an obligation on courts to develop indigenous law so as to bring it in line with the Constitution, in particular the rights in the Bill of Rights. In *Carmichele -vs- Minister of Safety and Security and Another*[19] this court considered the obligation to develop the common law and held that "where the common law deviates from the spirit, purport and objects of the Bill of Rights the courts have an obligation to develop it by removing that deviation."

The *Carmichele* case applies equally to the development of indigenous law so that where a rule of indigenous law deviates from the spirit, purport and objects of the Bill of Rights, courts have an obligation to develop it so as to remove such deviation.

Hence in case of *Nonkululeko Letta Bhe and Anelisa Bhe* the court noted:

"... the Magistrate must have regard to what is fair, just and equitable and must have particular regard to the interests of the minor children and any other dependants of the deceased."

In this case the Magistrate had appointed the father of the deceased's father as the sole heir of the deceased estate in accordance with "Black law and custom" to the exclusion of the deceased's two illegitimate daughters and their mother.

The Constitutional Court noted that the customary law that the deceased's father wished to rely was unconstitutional and held:

"...Nonkululeko Bhe and Anelisa Bhe are the only children of the deceased. They are both minors. The deceased had no other dependants. In addition the two minor children and their mother have been occupying the property with the deceased until his death. ... In all the circumstances, it would be just and equitable that the estates of the deceased devolve according to the Intestate Succession Act. Both minors are to be declared the sole heirs."

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19. Supra 18 - p 16

Furthermore, in *Alexkor Limited and The Government of the Republic of South Africa -vs- The Richtersveld Community and Others*, the appeal court held that:

"...the terms of the Annexation Proclamation do not purport to terminate any right over the annexed territory. It found that the majority of colonial decisions favoured an approach that a mere change in sovereignty is not meant to disturb the rights of private owners and appeared to favour the approach by the Privy Council that:

'In inquiring, however, what rights are recognized, there is one guilding principle. It is this: The courts will assume that the British Crown intend that the rights of property of the inhabitants are to be fully respected. Whilst, therefore, the British Crown, as Sovereign, can make laws enabling it compulsorily to acquire land for public purposes, it will see that proper compensation is awarded to every one of the inhabitants who has by native law an interest in it; and the courts will declare the inhabitants entitled to compensation according to their interests, even though those interests are of a kind unknown to English law...' "

The court adopted the rule that *indigenous rights to private property in a conquered territory were recognised and protected after the acquisition of sovereignty and concluded that the rights of the Richtersveld Community survived annexation.*

In this case the Richtersveld Community under the provisions of the Restitution of Lands Act (the Act.)[20] claimed restitution of their land. The claim was dismissed by the Land Claims Court. That court also dismissed an application for leave to appeal. The Supreme Court of Appeal granted leave, set aside the order of Lands Claims court and granted relieve to the respondent (the Richtersveld Community).

1.5. Conclusion

It is evident from the above analysis that African Customary Law has resurrected from statutory juridical morgue and so the Maasai can continue to be guided by it to counter injustices, like the loss of their plains exercised upon them by the colonialists with relish.

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20. Supra 18 - p 16

Consequently, Chapter 2 aims to examine the status of the treaties while Chapter 3 focuses on case law such as the Ole Njogo Case, as well as, comparative cases from other jurisdictions which were under British colonial reign. Chapter 4 makes recommendations on the restoration of the Maasai's land whilst Chapter 5 makes recommendations on the future of land tenure question in Kenya and finally the conclusion which summarises the discussion on the Masaai's landlessness and hope for an amicable settlement of their plight.

CHAPTER TWO

2. Legal Mechanisms through which the Maasai Lost their plains

2.1. Introduction

When the British came to Kenya after the 1885 Berlin Conference mainly for economic reasons during the industrial revolution in Europe, they found few humans who lived in small Iron-age communities, in many social systems speaking several languages. Some were small Kingdoms, like in Uganda. Due to harsh climatic conditions and upheavals, caused by wars and slavery, most of them were only interested in survival and not development. Hence, colonial powers were able to establish themselves effortlesly in their countries. However, some tribes, like the Masaai of Kenya were well established and very wealthy, in fact they provided a formitable force colonialists had to subdue at all costs. Who then are these people?

2.2. The Maa Speaking People of Kenya

The Maa Speaking people are predominantly from the Rift Valley in the East African region, although due to their tradition and languages, their birth place point to the Nile Valley, somewhere in the Sudan-Uganda border a place called *El Bagaza.*[1] They comprise the I/maasai (Maasai), II Sambur (Samburu), II Jemus (Nchamus) and I/Molo (Ilmolo). They depend on livestock keeping, grazing, nomadism and utilisation of natural resources for both themselves and their livestock.

2.2.1. The Importance of Pastoralism to the Maasai

Pastoralism is a way household manage land, labour and capital. It is a demanding occupation, requiring the ability to withstand physical hardships, walk for long distances, enter into alien territories without fear and work as a team with large number of people and livestock. The importance of livestock to the Maasai lies not only in the provision of food, but also in its social and ritual function.

The livestock are the source of milk, meat, blood and fat for human consumption as well as the provision of income through the sale or barter of animals and their produce including hides and skins, manure, wool and horns.[1]

2.2.2. What did the Settlers think of them

This was the scene the white settlers found when they reached and penetrated the Maasai land in 1904, from the Coast. At that time 48 settlers had expressed interest to settle in East Africa. Therefore when they reached the Maasai region which was evidently a fertile land and conducive to agricultural activities, they had to think of ways and means to move the Maasai so that they could occupy their land. It was obvious that the Maasai with their *roving habits and warlike traditions were not desirable neighbours for the white settlers and that their presence along the recently constructed railway was hardly consistent with their public interest.*[2]

The white settlers did not come across major resistance at this time because by 1890, Mbatian, the Maasai Oloibon (the ritual expert) had died leaving his succession in dispute between his two sons - Senteu and Olonana who were divided among two rivaling sections of the community.

Secondly, the community was being affected by natural calamities such as east coast fever, rinderpest, draught and famine. Consequently the British colonialists decided to support one who would obviously feel obliged to co-operate with them. As a result they supported Olonana as being the hereditary Chief of the Maasai people. It should be noted that the *Oloibon* was a mere traditional medicine man who had no responsibilities or administrative role, nevertheless Olonana succeeded him.

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1. The Strategic Plan on the Anglo-Maasai Agreements/Treaties, the Historical Injustices and the Dispossession of the Maasai Ancestral Land" by the Working Task Force for the MAA Speaking Communities - September 2004.

2. Nation Newspapers - Monday September 6 2004 - Legal Week.

2.2.3. The Fearless and Warlike Maasai

The colonial administration was apprehensive of the Maasai whom they perceived as fearless and warlike. Then as now the Maasai were semi-nomadic people moving with their cattle and households wherever they went. The colonial administration viewed them as impediments to national development and wasteful of available resources. To make the colony economically productive in the view of the colonial authorities, was through the granting to the incoming settlers secure rights in productive land. This could only be done through acquiring land from the Maasai.

In 1903 the then British Commissioner for Kenya Sir Charles Elliot, told Westminster that the Maasai would pose a problem to the settlement of whites, especially in the Laikipia region which was to become part of the white settlement area.

However, Elliot had wanted the Maasai to live alongside white farmers despite their warlike behaviour *"to enable them copy"* the cattle ranching tradition from the white settlers but this did not happen. Elliot was put under pressure to move the Maasai and this forced him to resign and pave way for Sir Donald Stewart, the man who signed the first Anglo-Maasai treaty in August 1904 with Laibon Lenana.

2.3. The Maasai Treaties

In 1904 the colonialists acquired Maasai land by signing an agreement which provided for the Maasai to move into specific reserves in Laikipia and Loita plains far from land open to European settlements. The agreement was to remain in force so long as the Maasai race existed. Hence on 15th August 1904, the Maasai were tactfully induced into signing an agreement with the colonial administration with Olonana representing the Maasai state as a sovereign power and Governor Sir, Donald Stewart acted on behalf of the Crown as their Representative. In accordance with the terms and conditions of the Agreement, the Maasai were said to have decided of their ...own free will... that "it was for our best interests to remove our people flocks and herds into definite reservations away from the railway line and away from any land that may be thrown open to European settlement under this agreement."

However, the settlers failed to honour this agreement because they considered certain areas reserved for the Maasai to be necessary for their occupation and therefore often trespassed and occupied the same. Consequently, the colonial administration entered into another agreement with the Maasai in 1911, thereby moving them to other reserves in Mara from Laikipia.

2.4. The Maasai Movement

After Signing the 1911 treaty, the Maasai had to move to their new location in Mara.6 .About 11,200 Maasai people and their 22 million herds of cattle were moved across the railway line southwards to two reserves in Kajiado and Narok districts measuring 4,770 and 4,350 square miles each south of the railway line to pave way for the white settlers in the deserted areas which were less fertile and infected by livestock diseases. In fact the Deputy Commissioner called Jackson noted in a White Paper on the Maasai that:

"...let those who advocate taking the Kedong Valley and the south of it visit the country in the dry weather. *No sane European would accept a free gift of 500,000 acres in such a place.* Why, then, try to force such a place on the Masaai? Higher ground, and considerable area of it, is absolutely necessary, and it is impossible to deny that the Maasai are entitled to it."

The newspapers of the day described the final departure of the Maasai from Laikipia plains as the "*biggest exodus of men, animals and beasts*". But the death of the Maasai and their animals along the way was hardly noticed and today remains as a footnote in the tiny notes scribbled by colonial officials and in a final report blames the Maasai for "moving too fast" as Kenya witnessed the unprecedented relocation of a tribe to pave way for colonial white settlement.[3]

In September 1911, the governor reported that the first group of Maasai had managed to get past the Mau Escarpment with their stock but 'had experienced a

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3. Nation Newspapers - Monday September 6 2004 - Legal Week

good deal of rain and cold', and some had decided to go back to Laikipia. The governor also noted that it would be unfair to expect 90,000 head of cattle to cross over Mau at the present.

It was at Mau Escarpment, as the Maasai crossed over with their animals that disaster struck. The movement which was coordinated by the Department of Agriculture and based on propaganda that Maasai Laibon Lenana had, as part of his 'death wish in 1911' said he wanted the Maasai united in one territory, was a disaster. The Naivasha Provincial Commissioner, Mr John Ainsworth, scribbled in one of his field notes that he noticed a considerable mortality among the sheep and saw a considerable number of bodies due to fever and pneumonia. However, on September 19, 1911, the Secretary of Native Affairs reported that *"many deaths of the lambs are due to 'worms'* "but failed to report the deaths of the Maasai people.

Subsequently, the movement was temporarily halted and the Maasai ordered back to the Northern Reserve; at which time the Maasai elders led by Murket Ole Nchoko[4] although the British mispelled his name to read Ol Ole Njogo) filed a suit to challenge the 1911 move by the British Crown which was evidently a breach of the 1904 Agreement.

2.5. Conclusion

As a result of the 1904 and 1911 Anglo-Masai Agreements, the MAA community lost their lush grazing lands and suffered both human and animal loss due to diseases they encountered in alien territory. Therefore Chapter Three aims to examine the legality of the Agreements as well as relevant case law from Kenya and other jurisdictions to justify whether or not the Maasai should have lost their plains and be subjected to inhuman treatment from which they have not recovered to date; the majority of whom are now vagabond and of no fixed abode.

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4. The Strategic Plan on the Anglo-Maasai - Agreements/Treaties the Historical Injustices and the dispossession of the Maasai Ancestral Land by the Working Task Force for the MAA Speaking Communities.

CHAPTER THREE

3. Legality of the Maasai Treaties

3.1 Introduction

The expression 'treaty' is used as a generic term to cover a multitude of international agreements and contractual engagements between States. These international agreements are called by various names including treaties, conventions, pacts, declarations, charters, concordats, protocols and covenants. They may be quasi-legislative or purely contractual. They may lay down rules binding upon States concerning new areas into which international law is expanding, or they may codify, clarify and supplement the already existing customary international law on a particular matter.

The law of treaties has now been codified in the Vienna Convention on the law of Treaties which came into force on 27th January 1980. By 1990 around 60 States were parties.

Article 2(1)(a) of the Vienna Convention on the Law of Treaties defines a treaty for the purposes of the Convention, as:

"...an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments, and whatever its particular designation".

To qualify as a 'treaty' therefore, the agreement must satisfy the following criteria:

Firstly, it should be a written instrument or instruments between two or more parties. Secondly, these parties must be endowed with international personality. Thirdly, it must be governed by in ternational law and finally, it should be intended to create legal obligations[1]. Tribes are not included in this definition.

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1. HLT Publications on Public International Law - 16th Edition - Edited by Robert Maclean, LLB, LLM.

It is now essential to examine whether or not the Anglo-Masai agreements satisfied the requirements of treaty status.

3.2. The Masai as a Sovereign State

The legality of the Maasai Treaties of 1904 and 1911 is not a new issue in the legal dome but has been a subject of contention for a while albeit dormant. The said agreements have been questioned before on the basis of the lack of power of the traditional chiefs to dispose of land. This formed the bone of contention in 1913 when the Maasai instituted legal proceedings for breach of the 1904 agreement by the colonial administration by trespassing onto their reserved land in Laikipia. In the 1913 case of Ole Njogo & Others -vs- the Attorney General & Others, the Court of Appeal for Eastern Africa upheld the colonial government's assertion that the two agreements were treaties as recognized under international law.

In this regard the definition of the 1969 Vienna Convention on the Law of Treaties does not include agreements entered between States and Tribes.

Secondly, the Convention does not have a retroactive effect, but because it spells out established rules the Convention may be applied to agreements pre-dating the Convention, for example, *Namibia (South West Africa)Case*[2] the Convention's rules were applied when rejecting the claims of the Empire of Ethiopia and the Republic of Liberia. In this case Ethiopia and Liberia were former members of the League of Nations, under whose Mandate the Government of the Union of South Africa administered South West Africa. They sought a declaration from the Court, that the mandate was still in force and that South Africa had violated its obligations under it by, *inter alia,* failing to promote ... moral well being and social progress of the inhabitants of the Territory.

From the above definition a treaty must be between States. The question that arises under these circumstances is '*were Maasai regarded as a State'.* Under international law, a State must *inter alia* possess a territory.

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2. International Law - 2nd Edition by Rebecca M M Wallace - Printed by Sweet and Maxwell.

State territory is that defined portion of the surface of the globe which is subject to the sovereignty of the State. A State without a territory is not possible, although the necessary territory may be very small ... The importance of State territory lies in the fact that it is the space within which the State exercises its supreme authority".[3]

Historically, the need to demonstrate the existence of a valid title became imperative during the *"Age of Discovery"* when the European powers set sail in quest of new lands. Discovery alone was not sufficient to establish a superior title. Occupation was also necessary.

Occupation gives a state original title to territory. It is the means of establishing title to territory which is *terra nullius*, that is owned by no one and therefore susceptible to acquisition. However, settlement by *natives* was of no consequence provided the indigenous peoples were not administratively so well organised that they could be said to have a recognisable government. In the *Western Sahara Case*[4] it was said that state practice of the late nineteeth century was such as to indicate:

"...that territories inhabited by *tribes or peoples having a social and political organisation were not regarded as terrae nullius.* It shows that in the case of such territories the acquision of sovereignty was not generally considered as effected unilaterally through 'occupation' of *terra nullius* by original title but through agreements concluded with local rulers ... such agreements with local rulers ... whether or not considered as an actual 'cession' of the territory, were regarded as derivative roots of title, and not original titles obtained by occupation of *terra nullius.*

Consequently, in the Ole Njogo case although held long before the Western Sahara one was of the same view that a treaty could be entered into with a tribe such as the Maasai, which was under active administration of a protectorate government.

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3. International Law - by Rebecca M. M.. Wallace

4. I C J Rep. 1975

The court considered such societies with a centralised authority, administrative machinery and a judicial system to qualify for statehood or at least the status of being a subject of international law and capable of treaty making. It further stated that in the case of protectorates such as Kenya where there had been no complete annexation by the protecting state, some signs of sovereignty remained with the native authorities.

The said agreements having been held to be treaties, a municipal court had no authority to adjudicate on the matter as both parties before the court were subjects of international law. Hamilton C J said:

"In my opinion there is here no legal contract as alleged between the Protectorate and the Masai Signatories of the agreement, but the agreements are, in fact treaties between the Crown and the representatives of the Masai a foreign tribe living under its protection. ... I hold therefore on the issue before me that the acts of the Defendants complained of by the Plaintiffs are in fact acts of State which are not cognizable by a Municipal Court."

And in dismissing the case on 26th May 1913 at Mombasa High Court, the judge noted:

"The Crown acting through its Commissioner first made one treaty with the Masai, and subsequently, acting through the Governor, modified that treaty by another, and I cannot do better than adopt to the present case the concluding words of Lord Kingsdown in giving judgment in the Privy Council in the case of Secretary of State for India -vs- Kamachee Boye Shahaba XIII Moore 22" that:

'It may have been just or unjust, politic or impolitic, beneficial or injurious, taken as a whole, to those whose interests are affected. These are considerations into which this court cannot enter. It is sufficient to say that even if a wrong has been done, it is a wrong for which no Municipal Court of Justice can afford a remedy"

Under international jurisprudence, such a case could not be determined within a municipal jurisdiction but had to be filed, heard and determined in a court of international jurisdiction. Hence the case was lost on technical grounds. The judgment centred on the status of a Protectorate, in which the Crown exercised powers by virtue of the Foreign Jurisdiction Act, 1890. The judge noted that:

"The Crown claimed that British East Africa was not actually British territory and therefore the Masai were not British subjects with any attendant rights of recourse to British law. But British East African being a protectorate in which the Crown has jurisdiction is in relation to the Crown a foreign country under its protection and its native inhabitants are not subjects owing allegiance to the Crown but protected foreigners who in return for that protection, owe obedience... "

The judge also stated that:

"...if East Africa, which includes the land of the Masai, is technically a foreign country,a native inhabitant of that country would also be technically a foreigner in relation to the protecting State."

What the court emphasized was that the Masai was a sovereign State capable of entering into a treaty with another sovereign power. However, the Maasai sovereignty had never been recognised because the Crown had assumed ownership of minerals and granted rights in the land and its annexation. The British settlers were evidently not temporary visitors but had come to stay.

Furthermore, the decision of the court did not conclude the question whether a treaty could be made with a tribe because if the Maasai had some vestigial sovereignty left, after the Crown took control of their country, then a treaty could be made with them. It was held that the Maasai still retained some element of sovereignty and treaties could therefore be made with them, even though they would not be governed by international law; but according to the judge..."*by some*

Rules analogous to international law, and have similar force and effect to that held by a treaty, and must be regarded by Municipal Courts in a similar manner." Obviously the judgment was absurd because *"a tribe of savages and of nomadic habits with a social system based on military ideals"* can hardly be considered to be a tribe with a stable, centralised authority, administrative machinery and a judicial system which qualified for statehood or capable of making a treaty. There was only one good ground that the court could hold that the Maasai retained a residual sovereignty, that the ultimate or radical title to their territory was still vested in them in accordance with the 1902 Order in Council and the 1915 Crown Lands Ordinance.

After the judgment, the Maasai were given conditional leave to appeal to the Privy Council in Britain. However, the Plaintiffs did not appeal because it was rumoured that they were threatened with drowning in the sea if they sailed to Britain to appeal.

3.3. Validity of Treaties

The Vienna Convention stipulates five grounds on which the validity of an agreement may be challenged. The five grounds concern Non-compliance with municipal law requirements, error, fraud and corruption, coercion, and *jus cogens.*

It should be noted that although the Vienna Convention was promulgated in 1969,and has no retroactive effect it is still applicable to the Maasai agreements in accordance with the *Namibia (South West Africa) case* noted above.

3.3.1. The 1904 Treaty was Signed under Coercion

My claim that the Masai signed the 1904 treaty under coercion is not without foundation. Although 1904 treaty noted that the Masai decided of their *"...own free will ... that it was for our best interest..."* the poor Masaai did not move to their new infertile and hostile location freely. In fact the Deputy Commissioner called Jackson noted in a White Paper on the Maasai, which fell on deaf ears, that:

"... let those who advocate taking the Kedong Valley and the south of it visit the country in the dry weather. No sane European would accept a free gift of 500,000 acres in such a place. Why, then, try to *force* such a place on the Masai?"

Hence the Maasai were *forced* and did not move to their new location by their own free will as alleged by the colonialists.

3.3.2. The 1911 Agreement was signed under Fraud

In 1911,the settlers decided to expand the lands they already had, and viewed Laikipia, where the Maasai had been moved to, as the best option. As a result the 1911 Agreement was signed to facilitate that purpose. However, the Maasai were tricked that it was the *'death wish'* of their paramount chief Olonana that they move to the same place. But in reality the British Home Office had asked Stewart in a letter sent shortly after he reported in Nairobi to *"sequestrate"* the Maasai in a single reserve.

3.3.3. The 1904 and 1911 Agreements against the Jus Cogens Doctrine

Jus cogens refers to peremptory norms of international law. Article 53 of the Vienna Convention provides:

"A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

Rules which might be categorised a *jus cogens* are those prohibiting genocide, slavery and use of force. Consequently, the Anglo-Masai treaties were in conflict with Article 53 because the Masai were forced to sign them and as such void *ab initio.*

3.4. Comparative Experiences

As a result of the Anglo-Maasai Treaties of 1904 and 1911, the Maasai lost their plains. Now they are confined to arid and semi arid areas as a consequence of historical injustice. The same injustice was suffered by indigenous people in other parts of the world, for example, the Indians in America. For instance, in 1868, the Sioux Tribe signed a Treaty of Fort Laramie with the American Government under which they gave up their lands but like the Maasai who insisted on retention of Kinangop in Laikipia for their circumcision rituals, the Sioux tribe insisted on the retention of the sacred Black Hills, at the Great Sioux Reservation. Each constituent tribe of the Sioux Nation signed the treaty separately. In return, the Government promised that the land would belong to the Sioux Nation forever, that a supermajority would be required for any future concessions and that the Government would remove any non-Indian intruders from the reservation. However, when General George Armstrong Custer discovered gold in the hills he wanted the area confiscated. but the Indians resisted. This led to the Indian wars of the Great Plains, including the Battle of Little Big Horn and the massacre at Wounded Knee. The Indians were finally defeated in 1877. As a result the Government confiscated the Black Hills and most of the Great Sioux Reservation contrary to what had been agreed upon in the Treaty of Fort Laramie in 1868.

The Sioux people never recognized the validity of this action and made demands for the return of their land, or at least the portion of the Great Sioux Reservation containing the Black Hills. In 1920, the tribe obtained a special jurisdictional statute permitting suit against the Government. However, in 1942, the Court of Claims dismissed the claim in an opinion, similar to the Ole Njogo case, remarkable for its lack of clarity on the basis of the dismissal. They appealed. The Supreme Court affirmed the dismissal of the case but awarded the Sioux Nation $122 million, but each of the tribes refused to accept the money in favour of the return of their land. The account has now grown to over $300 million.[5]

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5. United States Court of Appeals for the Federal Circuit: Tenth Anniverary Commemorative Issue -Spring 1992

By the late nineteenth century, practically all Native Americans in the United States were living on reservations a condition brought about by land-hungry whites and supported by the United States government.[6]

3.5. The Current Maasai Environment

The Maasai are currently located in areas which are totally alien to them and cannot sustain their livelihoods. They wander everywhere in search of pasture for their livestock. It is not uncommon to see the Maasai in the streets of Nairobi with their cattle in search of pasture due to landlessness. Hence, they must prove that they signed the agreements under coercion and fraud and against the *jus congens doctrine*, as such the treaties are *void* under international law as noted under Articles 50, 51 and 54 of the Vienna Convention.[7] The Maasai may proceed to institute legal proceedings to claim their lost plains or be compensated adequately like the Sioux Indians.

3.6. Conclusion

The MAA community lost their lands through illegal and fraudulent means and hence have a right of restitution of their land and resources which were confiscated, occupied, used and damaged without their free and informed consent. Consequently, Chapter 4 aims to explore the appropriate party from whom the Maasai may lodge a claim.

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6. United States Court of Appeals for the federal Circuit. Tenth Anniversary Commemorative issue - Spring 1992..

7. Supra. 3 - p 21

CHAPTER FOUR

4. From Whom are the Maasai Entitled to Claim?

4.1. Introduction

Indigenous people have a right of restitution of their land, territories and resources which they owned, occupied, or used under customary law and which were fraudulently confiscated from them by colonialists on the pretext that their lands were *terra nullius*. They have suffered for so long. As a result ways and means must be addressed to end their suffering by resolving their landlessness. The worst hit of these people are the MAA speaking communities and whose landlessness must be addressed with the urgency it deserves whether or not the treaties which rendered them landless are void or not. Consequently, in order to address the question *from whom are the Maasai entitled to claim?*, it is imperative to discuss the law governing succession of treaties in general.

4.2. The Vienna Convention

In 1978 the International Law Commission produced the Vienna Convention on the Succession of States in Respect of Treaties. The Convention reflects predominantly the views of the "newer" state and as such represents progressive development rather than a codification of existing law. Essentially, the *"clean slate'* view is favoured with respect to successor states, that is, a state is not to be tied by its predecessor. The obligations maintained by a state's predecessor by way of *multipartite or bipartite agreements are not automatically incumbent on a state.* A state has the option of assuming the treaties of its predecessor. It is not required to do so. The continuance of a bipartite treaties depends upon agreement, either express or implied, between the parties, that is, the succeeding state and the other contracting state.

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1. Supra. 3 - p 31

There is, however, an exception to this general rule. It does not apply in respect of treaties establishing boundaries, territorial regimes and to those imposing restrictions on a territory for the benefit of another state. To apply the clean slate principle in such instances would prove too disruptive. Accordingly, a successor state is bound by such treaties to which its predecessor has been a party. In the event of states uniting or separating, the Convention stipulates that treaties continue in force for the territory concerned unless the parties have agreed otherwise, or the result would be inconsistent with the object and purpose of the treaty and would radically change the conditions for its operation.

Under Article 11 of the German Unification Treaty West and East Germany took the position that international treaties of the Federal German Republic would remain in effect, and that rights and obligations arising therefrom would also apply in the former German Democratic Republic. Any adjustments necessary are to be negotiated between the new German government and the respective contracting state. Under Article 12, international treaties of the German Democratic Republic were to be reviewed with the contracting states as to their applicability, modification or termination with due regard to interests of the contracting states and contractual obligations of west Germany and the European Communities.

4.2.1. The Issue of State Succession

Whereas the 1904 and 1911 treaties were signed with the British colonial administration, request for return of the land has been directed both at the British government and the Kenyan government. Some questions that need to be addressed arise in this regard. From whom are the Maasai entitled to claim? The general practice of colonial governments since 1945 has been to secure by special agreements, the transference or transmision upon former territories of these rights and obligations arising from treaties and other international agreements contracted for or applied to their former territories.

This was normally done through the exchange of diplomatic letters between the colonial government and the newly independent state. Typical examples of such letters are the cases of Nigeria and Ghana, former British colonies.

After granting independence to Nigeria through the exchange of letters between the United Kingdom and the government of Nigeria, which were concluded on October 1, 1960, the position was agreed as being that all obligatiokns and responsibilities of the government of the United Kingdom which arose from any valid international instruments were assumed by the newly established Government of the Federation of Nigeria.[2]

The effect of such transference agreements which were made in similar terms in the case of Ghana was that the rights and benefits enjoyed by the British Government by the application of such international instruments was henceforth enjoyed by Ghana.

4.2.2. Succession in relation to the Maasai Treaties

In the Maasai case any agreement with the colonial administration would have become an agreement with the new government if Kenya had made such an agreement with the British colonial administration as provided by the Vienna Convention, and hence the proper party to approach would have been the Kenya government. However, Kenya, Uganda and the then Tanganyika, unlike Nigeria and Ghana did not enter into transference agreements and therefore they made declaration of a different nature, with a reserved attitude towards such devolution of treaties. It is evident from their actions that they preferred to inherit a *"clean slate"* from their colonisers.

Furthermore, in the event of such a claim the two agreements would not be viewed as treaties because the Maasai now form part of population of an already existing

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2. Nation Newspapers - Legal Week, Monday September 6, 2004

state and are, in all respects subject to its jurisdiction. This would be the position because unlike when Kenya was a protectorate with some sovereignty still vested in the natives with the capacity to contract an agreement with international standing, Kenya is now a fully independent state and can only enter into an international agreement with another subject of international law and not a tribe under its control.

The policy of these countries was that pre-colonial agreements were to remain valid for the transitional period of about two years after independence to determine which of the treaties stood terminated. This being the position that Kenya took, it is only legitimate that an agreement purporting to be an international agreement between a tribe within a given state and the state itself cannot be valid as a treaty.

It follows that a purported agreement between the British colonial administration and the Maasai cannot be valid as against the incumbent Kenyan state now in the same position as the former owing to the fact that the Maasai tribe are not a separate sovereign entity, but part of Kenyan population.

4.3. Can the Maasai claim against the United Kingdom?

If the Ole Njogo holding of 1913 is considered trite law, that at the time of conclusion of the 1904 and 1911 agreements, the Maasai were in a position to make a treaty at international law, that treaty would still not be valid now owing to fundamental change of circumstances. It is a principle of customary international law as relates to treaties that a fundamental change of circumstances which have occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, serves to lead to avoidance of the treaty.

At the time of the conclusion of the agreements the British colonial administration had control over the Kenyan territory and had the capacity to deal in the same. Since independence, sovereignty was passed to the government of Kenya with the British Government losing all territorial jurisdiction over Kenya, which had the

consequence of vesting territorial jurisdiction in the Kenyan government. For this reason, there was fundamental change of circumstances since the agreements were concluded. The doctrine of *rebus sic stantibus* may be invoked to terminate a treaty. The operation of this doctrine, which literally means *"things remaining as they are"*, rests on the assumption that a treaty may be denounced if circumstances change profoundly from the one prevailing at the time of the treaty's conclusion. In the *Fisheries Jurisdiction*[3] *Case* Iceland challenged the court's jurisdiction to hear the dispute between herself and Britain and Germany on the grounds that there had been fundamental change of circumstances since the conclusion of the 1961 Exchange of Notes, which contained *inter alia* a compromissory clause providing for reference to the International Court of Justice in case of a dispute.

Furthermore, even if the British government was willing to give back the expropriated land to the Maasai, there exists a supervening impossibility of performance as relates to the capacity of the British government's power to convey parcels of land in Kenya to the community.

4.4. Can the Maasai Claim againt the Kenya Government?

The Maasai cannot claim from the Kenya Government because in the first instance, Kenya did not inherit any treaties that the British government had made but preferred to inherit a *'clean slate'*. Secondly, even if Kenya had inherited the British government's treaties, an international treaty between a tribe within a given state and the state itself cannot be valid as a treaty. It is, as noted above a principle of customary international law as relates to treaties that a fundamental change of circumstances which have occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, serves to lead to avoidance of the treaty. At the time of the signing of the 1904 and 1911 treaties, the Masai were treated as a sovereign state, however currently the Maasai tribe are not a separate sovereign entity but part of Kenyan population, as a result they have no *locus standi* to institute legal proceedings against their own Government in the International Court of Justice.

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3. I C J Rep. 1973

4.5. Claims based on aboriginal title

Aboriginal title (or native title as it is also called) is a right to land, one vesting in a community that occupied the land at the time of colonization. Once such a title is established, the claimants may vindicate their land or, if it had been expropriated without adequate reimbursement, claim compensation.

Aboriginal title has been invoked by various indigenous peoples in post-colonial states around the world. Initially, these groups who are usually the poorest and most marginal in society, sought to reclaim their ancestral lands but thereafter they used aboriginal title as a basis for asserting even broader rights to culture and self-determination. Apart from communities in Namibia and Botswana, which have intimated that they might result to this doctrine to fend off government attempts to appropriate full control of their land, aboriginal title has not been invoked in Africa because the settler population was relatively small and where the colonizing powers eventually withdrew, indigenous peoples did not suffer dispossession on a scale comparable with the inhabitants of the Americas and the Antipodes,[4] except the Maasai of Kenya.

However, the Maasai's land restoration is as remote as it was in 1913, when the Court of Appeal held in the Njogo case that the Maasai had no right to claim their land back as they had willingly, and without duress, ceded it to the colonialists. But since it has become evident that the 1904 and the 1911 treaties were *void ab initio*, they should be treated as such, and the Maasai may borrow a judicial leaf from determinations of various cases made *inter alia* in South Africa, Australia and Canada encapsulated in *Richtersveld Community and Others*[5] *Case, the Mabo and others -v- Queensland*[6] *and Sioux and the Black Hills*[7] *cases which concerned claims for the restitution of their indigenus lands expropriated by land greedy whites.*

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4. http:/www.firstpeoples.org/land-rights/southern-africa/summary/oborig.-2htm
5. Supra 4
6. High Court of Austratia 1992
7. American Univerity Law Review - Spring, 1992

In order to sustain an aboriginal title case, the Maasai must prove that before their lands were expropriated, they lived according to a set of traditional laws and customs, especially those governing tenure and use of land like, *inter alia,* the Meriam people in the *Mabo case*. In *Mabo -v- Queensland* the court held that native title has its origins in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. Accordingly, legislation did not entail extinguishment. Proof of a traditional law serves two functions. First, it is accepted that a native title rests on an indigenous legal system, whose proof tends to establish both the connection between the claimant community and its land. Secondly, the existence and continuity of the community, because the title will not survive if the community dies out or its members abandon their laws.

The *Mabo* case concerned the annexation of the Murray Islands by the Crown as part of the Colony of Queensland in 1879. The Murray Islands lie between Australia and New Guinea in Torres Strait and by the Proclamation of 18 July 1879, Queensland Government annexed the Islands as part of the mainland under the Colonial Boundaries Act 1895 and Queensland Coast Islands Declaratory Act 1895. The plaintiffs who were Murray Islanders and members of the Merian people did not question the annexation but claimed rights in specified parcels of land on the Islands on the alternative basis that they held the land under traditional native title, their possessing usufructuary rights over the land or their owning the land by way of customary title. They contended that their rights were of a kind that had been enjoyed by the Merian people since time immemorial and therefore not extinguished at any time by the Crown. The court *inter alia* held:

"Upon the annexation of the Murray Islands to Queensland, the radical title to all the land in those islands vested in the Crown in right of Queensland.

The traditional title of the Meriam people to the Murray Islands, being their rights to possession, occupation, use and enjoyment of the Islands, survived annexation of the Islands to Queensland and is preserved under the law of Queensland.

The traditional title of the Meriam people to the land in the Islands has not been extinguised by subsequent legislation or executive act and may not be extinguished without the payment of compensation or damages to the traditional titleholders of the Islands."

and the court declared:
"...the Meriam people are entitled as against the whole world to possession, occupation, use and enjoyment of the lands of the Murray Islands."

Furthermore in *Alexkor Limited and the Government of the Republic of South Africa -vs- The Richtersveld Community and Others*, the court adopted the rule that indigenous rights to private property in a conquered territory were recognised and protected after the acquisition of sovereignty and concluded that the rights of the Richtersveld Community survived annexation.

However, in Canada, where the law is much clearer and better developed on aboriginal title, courts have said that aboriginal title is not absolute but lies at an intersection between indigenous laws and the received system of colonial law and as such may be infringed by government only if justifiable. For instance in furtherance of a legislative objective that is compelling and substantial and if it is consistent with the special fiduciary relationship between the crown and aboriginal peoples. The court concluded that aboriginal right is protected by Section 35(1) of the Constitution Act of 1982. However, as a specific aboriginal right is a true property right with economic implications as it is a right to land.

Secondly, courts in Canada and Australia have declared that aboriginal title is not part of the English common law in the narrow sense of that term. Rather, it is an equitable principle of constitutional common law, provided that whoever asserts an aboriginal title must prove that they were in exclusive occupation of the land in question at the time of colonization, for example, in the leading Canadian case, of *Delgamuukw -v- British Columbia.*[8] In this case, the claim was initially based on

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8. From Delgamuukw to Richtersveld - Are land Claims in Canadian and South Africa law comparable? by Gerrit Pienaar, B Jur et Com LLB LLD - Faculty of Law, North-West University (Potchefstroom)

the historical use and ownership and jurisdiction over the territory but was subsequently transformed into a claim for aboriginal title over the land in question. The court did emphasize the importance of retaining a common-law perspective, but paid careful attention to the native economy, culture and religion. Due consideration was also give to the claimants size, its manner of life, material resources, technology and the nature of the land itself. As a result, a community that engages in a contemporary economic activity can successfully assert native title, provided that it maintains a substantial connection with its land and provided that it observes, as far as possible, laws and custom derived from ancestral traditions. *Although the court held that aboriginal* title is not absolute, and may be infringed by both the federal and provincial governments when justified the court did appreciate fiduciary relationship between the government and the aboriginal peoples.

4.6 Conclusion

As a result, *inter alia,* of the Mabo, Richtersveld and Delgamuukw, the Maasai's aboriginal title is still intact as it was in 1904 when they signed their lands away. Consequently, their landlessness must be resolved as soon as possible. Chapter five therefore aims to explore the current land distribution in Kenya and make recommendations on the future land policy, whilst taking into account land needs of the Maasai and other marginalized communities in the country.

CHAPTER 5

5. Concluding Remarks

5.1. Introduction

An important issue arising from the Maasai land question is the fact that land redistribution in the country has been inequitable since independence. Most of the largest estates and farms, which were owned by the settlers are still owned individually especially by the black elite that replaced the white settlers and colonialists. It is an unfortunate scenario where those who shed blood for the land, such as the Mau Mau, were not, and have never been considered. This analysis concludes by looking at some outstanding issues which along with the Maasai question, will need to be resolved. Recommendations on policy issues to be incorporated in the National Land Policy, which is currently being formulated, have been made to facilitate and enhance equitable land management in the country.

5.2 Major Land issues that need to be addressed in Kenya

There are four points to ponder about the issue of land in Kenya. Firstly, Kenya lacks coherence in the laws that govern land. Furthermore, the existing laws have been subject to abuse by the rich and mighty. For example, under Government Lands Act Cap 280 of the Laws of Kenya the Government can dispose off public land in three ways. One of the ways is disposing land for "special purposes". That law does not succinctly or explicitly state what these "special purposes" constitute, and hence it is upon the Commissioner for Lands to decide.

Secondly, Kenya lacks a National Land Policy now under preparation. Lack of a policy guideline to guide the management of land and its redistribution means that the government is incapacitated to handle the issues of land. A land policy like any other policy, is a government statement of how it intends to deal with an issue. Lack of it, then means disaster in the issue of land management.

Thirdly, commissions on the issue of land come and go, such as, the Njonjo Land Commission and the recent Ndung'u Commission which managed to come up with reports. Unfortunately, political expediency takes centre stage. These reports are in the majority of cases shelved and gather dust while Kenyans await to see what they contain. Although the Ndung'u Commission Report has now been released, no action has so far been taken on the recommendations made.

Fourthly, the issue on absentee landlords is rampant especially in the areas of coast province.

5.3. A Big Step Towards New Land Laws in Kenya

For the first time in Kenya's history, the government has started a process that might finally settle the "land question."

The current attempt goes beyond all previous attempts, most of which have at best amounted to "fire-fighting" commissions were merely established to investigate critical developments in the land sector. Although the process of enacting an all-embracing National Land Policy began late last year, experts are upbeat that the Government is serious in seeking a final solution this time round.

During one of the workshops, the general view was that if the process was sincere and embraced the views, needs and aspirations of the majority of Kenyans, it could result in the final settlement of the so-called "colonial question".

Professor Okoth Ogendo urged the national steering committee not to shy away from contentious issues but address them "in all their nakedness".

Evidence of the "colonial question" recently came to the fore when members of the Maasai community staged street demonstrations, demanding restoration of land they ceded to the British colonial government under the Anglo-Maasai treaties of 1904 and 1911.

5.4. Importance of National Land Policy in Kenya

Experts say that for continued peace and harmonious living in the country, it is most critical that the National Land Policy making process spells out a land tenure system agreeable to most Kenyans. As the process of formulating a National Land Policy gathers momentum, a number of hitherto critical issues need to be sufficiently addressed. The vibrant participation of members of the public and other interested actors in the Presidential Commission of Inquiry into the Land Law System of Kenya ('Njonjo Commission') and the subsequent Constitution of Kenya Review Commission produced a firm and exciting basis upon which the National Land Policy must find its fundamental points of departure. For the on-going National Land Policy Formulation Process to adequately respond to the current needs of the Kenya population, the key issues which must be addressed and guided are Sovereignty Over Land, Classification of Land, Land Tenure Systems, Land Based Resources, Productive and Sustainable Use of land, Equitable Management and Development of Land, Land Rights Delivery and Effective Settlement of Land Disputes,[1] discussed in detail below.

5.4.1. Principles Regarding Sovereingty over Land.

One of the most fundamental issues which land policy must clarify is the question of sovereign control of land resources. Kenya, along with all former British colonies, has inherited a body of theory which regards this issue as an intergral part of political jurisdiction and concern four issues. These are, the location of radical title, the power of compulsory acquisition, the scope of the regulatory power of the State, and the system of derivation of title,[2] analysed below.

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1. The Sunday Standard - February 27 2005 - Supplement on The National Land Policy in Kenya - Kenya Land Alliance.
2. The Njonjo Commission Report.

5.4.1.1. The Location of Radical Title

The importance of the issue as to where ultimate or radical title should be located, is that this is what determines the derivation, security and the integrity of land rights. The land regime established by the colonialists was premised on the assumption that the indigenous occupants and users had no ownership rights over the land. This was done through vesting of the ultimate ownership and control of land (radical title) in the state and was achieved through the 1902 and 1915 Crown Lands Ordinances which defined Crown Lands to include almost all the land in the territory. The *raison d'etre* for this was not difficilt to find; the colonial government sought to have a free hand to control and alienate indigenous lands, unencumbered by any legal obligations. The land reserved for African occupation was, on the other hand, severed from the colonial sovereign and transferred to a Trust Board set specifically for that purpose. Trust Boards were eventually abolished giving rise to county councils and the radical title vested in them.

However, upon the attainment of political independence, the people thought that a fundamental change in the property regime would be initiated. This was not to be. The post-colonial government chose continuity. Thus Crown Lands were simply renamed Government Lands and the power, hitherto enjoyed by the Governor in respect to such land was transferred to the President. This remains the situation to date. In effect therefore, the ultimate owner of all public land in Kenya is the President and not the people. Also, the executive arm of the state through the Ministry of Lands and Housing has the exclusive power to make all important decisions over the administration, disposal, allocation, use and development of all public land without being required by law to consult peoples' representive organs such as the National Assembly and the Local Authorities.

Furthermore the 1954 *Swynnerton Plan* complicated matters further by introducing a new form of land holding called "absolute proprietorship". One effect of the registration of any part of Trust land in absolute proprietorship is that it does not extinguish radical title held by the county councils in respect of such land but it merely vests in the registered person the absolute ownership of the land.

The Swynnerton Plan[3] was based on the assumption that with the opening of the land markets through the process of individualization and titling, the customary land holding would rapidly collapse and land transactions through sales or mortgages would increase. This did not happen and hence the current push to open public land to private investment and the resultant market forces. The central thrust of this neo-liberal economic thought is to create an atmosphere conducive to free market forces and encourage foreign investment and generally privatise landownership. What this means is that land ownership and management will be opened to the market forces. The likely impact would be to make it possible for land to be concentrated in the hands of the few who have the requisite purchasing power. The victims in this scenario will be the poor and other vulnerable groups who do not have the capacity to compete with the owners of capital.

Policy Statement

Consequently the policy statement in Government Land and Trust land should state that:

. all public land should vest in, and held of, a national institution, on behalf of the people of Kenya, created by legislation and entrenched in the Constitution.

. Public Land will only be granted on leasehold whose term shall be based on the use to which the land in question is to be put. At the end of leasehold the land shall automatically revert to the national institution on behalf of the people of Kenya.

. all commons vested in county councils should vest in and be held of community based institutions created by legislation and entrenched in the Constitution.

5.4.1.2. The Power of compulsory acquisition

The power of compulsory acquisition is concerned with the issue as to whether the State should have the power to extinguish or acquire any title or other interest in land for public or any other purpose.

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3. Searching for Land Tenure Security in Africa Edited by John W. Bruce and Shem E.Migot-Adholla

The power of compulsory acquisition is derived from the feudal notion that as a sovereign, the State holds the radical title to all land within its territory. However, Section 75 of the Constitution provides *inter alia,* that no property or interest of any description may be compulsorily acquired unless the taking is necessary in the interest of defence, public safety, public order, public morality or the promotion of the public benefit. However, full compensation must be paid.

Policy Statement

Due to the fact that compulsory acquisition is such an important power, it should be delinked from issues relating to the location of radical title. Its exercise should therefore be guided by the following principles:

. the power of compulsory acquisition should vest only in the State.

. a uniform set of principles for the determination of compensation should be applied to all categories of land acquired irrespective of their tenure status.

. where the public purpose or interest justifying the compulsory acquisition fails, the law should provide for the original owners or their descendants, of the property or interest to be given first option of restitution upon the refund of the compensation.

5.4.1.3. Scope of the regulatory power of the State

The regulatory power of the State is derived from its residual duty to ensure that propriety land use does not sabotage the public welfare. Its purpose, therefore, is to suppress or limit the use of private property while in the owner's hands, in order to protect public welfare from dangers arising from its misuse. Currently the country has no clear land use policy to guide development.

Policy Statement

The regulatory power of the State is no longer merely an incident of political sovereingty. Its legitimacy is now derived from the Constitution. Its exercise therefore should be guided by the following principles.

. The State should regulate the use of land in the public interest.

. Regulate land use by establishig uniform standards which override proprietary land use practices which all landowners, occupiers and holders of interests in land would be required to comply with.

5.4.1.4. Derivation of Title

The issue of derivation of title relates to the modalities through which land rights of whatever category, are created, acquired or otherwise originate from radical title.[4] Derivation, *per se,* is not a problem but the security of such rights. There is need therefore for institutions to be established by legislation and entrenched in the constitution from which all land rights will originate at both national and community levels to ensure that systems of derivation of land rights confer adequate security.

Policy Statement

To ensure that all systems of derivation of land rights confer adequate security, attention should be paid to the following principles:

. all land rights should originate from either a national institution depending on the category of tenure, such as customary land rights.

. the relevant national institution to formulate uniform rules which must apply retrospectively to govern such rights.

. Customary land tenure should be recorded and incorporated into a framework law designed to facilitate the orderly evolution of customary land law.

. there is need to develop a clear pastoral land use policy which would recognise land and promote pastoralism as a viable economic activity with adequate linkages with other sectors.

. recognition of customary practice whereby the communities enter into reciprocal arrangements for the use of each other's land and resources particularly in time of drought and other natural calamities.

5.4.2. Historical Claims

The rights founded on historical claims based on colonial or recent expropriations are at present a serious phenomenon in Kenya. These claims could receive legitimacy as a result of pressures being exerted by representatives of certain communities particularly the Maasai, the Pokot, the Sengwer, the Endorois, the Pokomo, the Orma, the Ogiek, the Talai, the Bajuni, the Bone and the Miji-kenda communites. These communities make the point that they have systematically been dispossessed not only by the colonial regime (that is, Sultanate of Zanzibar and the British Government) but also in recent times through land market transactions and the process of land adjudication,consolidation and registration, and in the case of the Rift Valley, the resettlement programme. Though not always expressly articulated, such claims are part of the cinder„ which keeps igniting ethnic clashes in the Rift Valley and the Coast provinces.

Policy Statement.

In order to resolve these claims, considerations should be given to the following principle:

. As part of the process of tenure reform, mechanisms be provided for investigation and resolution of historical claims by communities especially in the coast and Rift Valley Provinces.

6. Conclusion

If the above recommendations are formulated into law land problems that have been experienced hitherto will be a thing of the past particularly for the marginalised communities, such as the Maasai whose land was expropriated by fraudulent means by the British colonialists.

The suffering of the Maasai people must come to an end. From the above discussion they have a good cause of action. Consequently, like the Sioux Indians in America, the Maasai must file a suit to claim their land back or be compensated adequately because customary land rights were not extinguished when their plains were expropriated as discussed above.

Secondly, they can rely on the *Richtersveld Community Case* to prove that they deserve restitution of some land from the Kenya Government even though the rights under which they held the land were customary, we have proved under the *S M Otieno and Analisa Bhe cases* that customary law rights subsist alongside, if not superior to both statutory and common law. Nevertheless, as a result of the recent development around the coastal region where the Government allocated land to the landless, the Government ought to buy some of the ranches and allocate to the Maasai people too.

APPENDIX 1

Agreement, dated10th August, 1904, between His MAJESTY'S COMMISSIONER for the EAST AFRICA PROTECTORATE and the CHIEFS of the MASAI TRIBE.

We, the Undersigned, being the Lybon and Chiefs (representives) of the existing clans and sections of the Masai tribes in the East Africa Protectorate, having, this 9th day of August, 1904, met Sir Donald Stewart, His Majjesty's Commissioner for the East Africa protectorate and discused fully the question of a land settlement scheme for the Masai, have, of our own free will, decided that it is for our best interessts to remove our peoplle, flocks, and herds into definite reservations away from the railway line, and away from any land that may be thrown open to European settlement.

We have, after having already discussed the matter with Mr Hobley at Naivasha and Mr Ainsworth at Nairobi, given this matter every consideration, and we recognize that the Government, in taking up this question, are taking into consideration our best interests.

Now we, being fully satisfied that the proposals for our removal to definite and final reserves are for the undoubted good of our race, have agreed as follows:-

On the north, by the Loroghi Mountains.

On the west, by the Laikipia (Ndoror) Escarpment.

On the south, by the Lesuswa or Nyam and Guaso Narok Rivers.

On the east, by Kisima (approximate)

And by the removal of the foregoing sections to the reserve we undertake to vacate the whole of the Rift Valley, to be used by the Goverment for the purposes of European Settlement. Further, that the Kaptel, Matapatu, Ndogaland, and Sigarari

sections shall remove into the territory originally occupied by them to the south of Donyo Lamuyu (Ngongo), and the Kisearian stream, and to comprise within the area the Donyo Lamuyu, Ndogaland, and matapatu Mountains, and the Donyo Narok, and to extend to Sosian on the west.

In addition to the foregoing, Lenana, as Chief Lybon, and his successors, to be allowed to occupy the land lying in between the Mbagathi and Kisearian streams from Donyo Lamuyu to the point where both streams meet, with the exception of land already occupied by Mr Oulton, Mr McQueen and Mr Paterson.

In addition to the foregoing, we asked that a right of road to include certain access to water be granted to us to allow our keeping up communications between the two reserved areas, and, further, that we be allowed to retain control of at least 5 square miles of land (at a point on the slopes of Kinangop to be pointed out by Legalishu and Masakondi), whereat we can carry out our circumcision rites and ceremonies, in accordance with the custom of our ancestors.

We ask, as a most important point in this arrangement, that the Government will establish and maintain a station on Laikipia, and that officers whom we know and trust may be appointed to look after us there.

Also that the Government will pay reasonable compensation for any Masai cultivation at present existing near Nairobi.

In conclusion, we wish to state that we are quite satisfied with the foregoing arrangement, and we bind ourselves and our successors, as well as our people, to observe them.

We would, however, ask that the settlement now arrived at shall be enduring so long as the Masai as a race shall exist, and that European or other settlers shall be allowed to take up land in the Settlements.

In confirmation of this Agreement, which has been read and fully explained to us, we hereby set out marks against our names as under:-

LENANA, Son of Mbatian, Lybon of all the Masai.

MASAKONDI, Son of Arariu, Lybon at Naivasha.

Signed at Nairobi, August 15, 1904:

LEMANI, Elmura of Matapatu.
LETEREGI, Elmura of Matapatu.
LELMURUA, Leganan of Kapte.
LAKOMBE, Elmura of Ndogalani.
LISIARI, Elmura of Ndogalani.
MEPAKU, Head Elmoran of Matapatu.
LAMBARI, Leganon of Ndogaland.

Naivasha, representing Elburgu, Gekunuku, Loita, Damat and Laitutok:-

LEGALISHU, Leganan of Elburgu.
OLMUGEZA, Leganan of Elburgu.
OLAINOMODO, Leganan of elburgu.
OLOTOGIA, Leganan of Elburgu.
OLIETI, Leganan of Elburgu.
LANAIRUGU, Leganan of Elburgu.
LINGALDU, Leganan of Elburgu.
GINOMUN, Legana of Elburgu.
LIWALA, Leganan of Gekunuki.
LEMBOGI, Leganan of Laitutok.

Signed at Nairobi, August 15, 1904:-

SABORI, Elmura of Elburgu

We, the undersigned, were interpreters in this Agreement:-

C W HOBLEY (Swahili).
MWE s/o LITHUGU (Masai).
LYBICH s/o KERETU (Masai).
WAZIRI-BIN-MWYNBEGO (Masai).

I, Donald Stewart, K.C.M.G., His Majesty's Commissioner for the East African Protectorate, hereby agree to the foregoing, provided the Secretary of State approves of the Agreement, and in witness thereof I have this 10th day of August 1904, set my hand and seal.

D. STEWART.

We, the undersigned officers of the East Africa Protectorate Administration, hereby certify that we were present at the meeting between His Majesty's Commissioner and the Masai at Naivasha on the 9th August 1904, and we further heard this document fully explained to them, and witnessed their marks affixed to same:-

C.W. HOBLEY, Acting Deputy Commissioner.
JOHN AINSWORTH, His Majesty's Sub-Commisioner, Ukamba.
S.S. BAGGE, His Majesty's Sub-Commissioner, Naivasha.
J.W.T. McCLELLAN, Acting Sub-Comissioner, Naivasha.
W.J. MONSON, Acting Secretary to the Administration.

I, Donald Stewart, K.C.M.G., His Majesty's Commissioner for the East Africa Protectorate, hereby further agree to the foregoing parts of this Agreement concerning Kapte, Matapatu, Ndogalani, and Sigarari Maai, provided the Secretary of State approves of the Agreement, and in witness thereof I have this 15th day of August, 1904, set my hand and seal.

D. STEWART.

We, the undersigned officers of the East Africa Protectorate, hereby certify that we were present at the meeting between His Majesty's Commissioner and the Maai at Nairobi on the 15th August 1904, and we further heard this document explained to them, and witnessed their marks affixed to same:-

C.W. HOBLEY, Acting Deputy Commissioner.
JOHN AINSWORTH, His Majesty's Sub-Commissioner, Ukamba.
T.T. GILKINSON, Acting Land Officer.
W.J. MONSON, Acting Secretary to the Administration.

I, the undersigned, hereby certify that I translated the contents of this document to the Masai Lybich, who, I believe, interpreted it correctly to the Masai assembled at both Naivasha and Nairobi.

JOHN AINSWORTH, His Majesty's Sub-Commissioner.

However, the settlers failed to honour this agreement because they considered certain areas reserved for the Maasai to be necessary for their occupation and therefore often trespassed and occupied the same. Consequently, the colonial administration entered into another agreement, noted below, with the Maasai in 1911, thereby moving them to other reserves in Mara from Laikipia.

APPENDIX II

Agreeemt of 1911

We, the undersigned, being the Paramount Chief of all the Masai and his regents and the representatives of that portion of the Masai tribe living in the Northern Masai Reserve, as defined in the agreement entered into with the Late Sir Donald William Stewart, Knight Commander of the Most Distinguished Order of Saint Michael and Saint George, His Majesty's Commissioner for the East Africa Protectorate, on the ninth day of August One thousand and nine hundred and four, and more particularly set out in the Proclamation of May thirtieth One thousand nine hundred and six and published in the "Official Gazette" of June first one thousand nine hundred and six, do hereby on our own behalf and on behalf of our people, whose representatives we are being satisfied that it is to the best interest of their tribe that the Masai people should inhabit one area and should not be divided into two sections as must arise under the agreement aforesaid whereby there were reserved to the Masai tribe two separate and distinct areas of land enter on our own free wlll into the following agreement with Sir Edouard Percy Granwill Girouard, Knight Commander of the Most Distinguished Order of Saint Michael and Saint George, Member of the Distinguished Service Order, Governor and Commander in Chief of the East Africa Protectorate, hereinafter referred to as the Governor.

We agree to vacate at such time as the governor may direct the Northern Masai Reserve which we have hitherto inhabited and occupied and to remove by such routes as the Governor may notify to us our people, herds and flocks to such area on the south side of the Uganda Railway as the Governor may locate to us the said area being bounded approximately as follows and as shown on the attached map.

On the south by the Anglo-German frontier;

On the west by Ol-orukoti Range, by the Amala River, otherwise called Ang-are-dabash or Eng-are-e-'n-gipai, by the eastern and northern boundaries of the Sotik Native Reserve, and by a line drawn from the most northerly point of the northern boundary of the Sotik Native Reserve to the south-western boundary of the land set aside for Mr. E. Powys Cobb on Mau;

On the north by the southern and eastern boundaries of the said land set aside for Mr. E. Powys Cobb, and by a straight line drawn from the north-eastern boundary of the said land to the highest point of Mount Suswa otherwise called Ol-doinyo Onyoke;

On the east by the Southern Masai Native Reserve as defined in the proclamation dated June eighteenth One thousand nine hundred and six, and published in the "Official Gazette" of July first One thousand nine hundred and six.

Provided that nothing in this agreement contained shall be deemed to deprive the Masai tribe of the rights reserved to it under the agreement of August ninth one thousand nine hundred and four aforesaid to the land on the slopes of Kinopop whereon the circumcision rights and ceremonies may be held.

In withness whereof and in confirmation of this agreement which has been fully explained to us we hereby set our marks against our names as under:-

Mark of SEGI, son of Ol-onana (Lenana), Paramount Chief of all the Masai.

Mark of OL-LE-GELESHO (Legalishu), Regent during the minority of Segi, head of the Molelyan Clan, and chief spokesman (Ol-aigwenani) of the Il-Kitoip (Il-Merisho) are-grade of the Purko Masai.

Mark of NGAROYA, Regent during the minority of Segi, of the Aiser Clan.

Mark of OL-LE-YELI, head of the Mokesen Clan of the Purko Masai, an one of the spokesmen (Ol-aigwenani) of the Il-Kitoip (il-Merisho) age-grade of the Purko Masai.

Mark of 0L-LE-TURERE, head of the Mokesen Clan of the Purko Masai.

Mark of OLE-LE-MALIT, one of Masikondi's representatives, of the Lughumae branch of the Aiser Clan of the Purko Masai.

Mark of OL-LE-MATIPE, one of Masikondi's representatives, of the Lughumae branch of the Aiser Clan of the Purko Masai.

Mark of OL-LE-NAKOLA, head of the Tarosero Clan of the Purko Masai.

Mark of OL-LE-NAIGISA, head of the Aiser Clan of the Purko Masai.

Mark of MARMAROI, uncle and personal attendant of Segi.

Mark of SABURI, the Prime Minister of the late Chief Ol-onana (Lenana) and principal elder of the Southern Masai Reserve.

Mark of AGALI, uncle of segi, representing the Loita Masai.

Mark of OL-LE-TANYAI of the Tarosero Clan, chief spokesman (Ol-aigwenani) of the Lamek (Meitaroni) age-grade of the Purko Masai.

The above set their marks to this agreement at Nairobi on the fourth day of April nineteen hundred and eleven.

A.C. HOLLIS,
Secretary, Native Affairs.

OL-LE--MASIKONDI, head of the Lughumas section of the Aiser Clan; chief elder of the Purko Masai, called in the former treaty Ol Oiboni of the Purko Masai

OL-LE-BATIET, head of the Aiser Clan of the Purko Masai on Laikipia, Olaigwenani of the age known as Il Merisho.

The above set their marks to this agreement at Nairobi on the fourth day of April nineteen hundred and eleven.

A.C. HOLLIS,
Secretary, Native Affairs.

OL-LE-MASIKONDI, head of the Lughumas section of the Aiser Clan; chief elder of the Purko Masai, called in the former treaty Ol Oiboni of the Purko Masai.

OL-LE-BATIET, head of the Aiser Clan of the Purko Masai on Laikipia, Olaigwenani of the age known as Il Merisho.

The above set their marks to this agreement at Rumuruti on the 13th day of April nineteen hundred and eleven.

E.D. BROWNE,
Assistant District Commissioner, Laikipia.

Witnesses:

A.J.M. COLLYER.
D.C. Laikipia.

His Mark: OL-LE-LENGIRI, of the Aiser Clan Purko Masai.
His Mark: OL-LE-GESHEEN, head of Tamsero Clan of Purko Masai.
His Mark: OL-LE-SALON, brother of Ol-le-Kotikosh, as a deputy for Ol-le-Kotikosh.

The above set their marks to this agreement at Rumuruti on 19th day of April, 1911.

E.D. BROWNE,
Assistant District Commissioner i/c Laikipia.

We, the undersigned certify that we correctly interpreted this document to the Chief, Regents and Representatives of the Masai who were present at the meeting at Nairobi.

A.C. HOLLIS,
OL-LE-TINKA, of the Il-Aiser Clan.

We the undersigned certify that we correctly interprete this document to the Representatives of the Masai at Rumuruti.

A.J.M. COLLYER,
District Commissioner,

OL-LE-TINKA. His Mark.

In consideration of the above, I, Edouard Percy Cranwill Girouard, Knight Commander of the Most Distinguished Order of Saint Michael and saint George, Member of the Distinguished Service Order, Governnor and Commander in Chief of the East African Protectorate, agree on behalf of His Majesty's Government but subject to the approval of His Majesty's Principal Secretary tribe the area on the south side of the Uganda Railway as defined above and as shown on the attached map, which area is coadunate with the Southern Masai Native Reserve and to further extend the existing Southern Masai Native Reserve by an addition of an area as shown on the accompanying map the approximate boundaries being on the south the Anglo-German Frontier, on the west the eastern boundary of the aforesaid Southern Masai Reserve, on the north and east by the Ugana Railway zone from the Athi River to Sultan Hamud Railway Station thence in a line drawn from the said station to the north-west point of the Chiulu Range thence along the Chiulu Range to the south-eastern extremity thereof thence by a straight line to the meeting point of the Eng-are Rongai and the Tsavo Rivers thence by the Eng-are Rongai River to the Anglo-German frontier and to undertake on behalf of His majesty's Government to endeavour to remove all European settlers from the said areas and not to lease or grant any land within the said area (except such land as may be required for

BIBLIOGRAPHY

Books/Occasional Paper Series/Newspaper Articles

1. Elements of Land Law - Second Edition by Kevin Gray - Published by Butterworths - 1993.

2. Tenants of the Crown - By Prof H W O Okoth-Ogendo - 1991

3. The Standard Newspapers - Interactive - October 16, 2004

4. The Tragic African Commons - By Prof H W O Okoth-Ogendo - 2002

5. Casebook on Kenya Customary Law by Eugene Cotran

6. The Strategic Plan on the Anglo-Maasai Agreements/Treaties, the Historical Injustices and the Dispossession of the Maaai Ancenstral Land - by the Working Task Force for the MAA Speaking Communities - September 2004

7. Nation Newspapers - Legal Week - Monday September 6, 2004

8. H L T Publications on Public International Law - 16th Edition - Edited by Robert Maclean, LLB, LLM - 1993

9. International Law -2nd Edition by Rebecca M M Wallace - Printed by Sweet and Maxwell

10. United States Court of Appeals for the Federal Circuit; Tenth Anniversary Commemorative Issue - Spring 1992

11. American University Law Review - Spring 1992

12. From Delgamuukw to Richtersveld - Are land claims in Canadian and South African law comparable? by Gerrit Pienar, B Jur Et Com LLB LLD - Faculty of Law, North-West University (Potchefstroom)

13. Supplement on the National Land Policy in Kenya - Kenya Land Alliance - The Sunday Standard - February 27 2005

14. The Njonjo Commission Report

15. Searching for Land Tenure Security in African - Edited by John W. Bruce and Shem E. Migot-Adholla

16. Agreement dated 10th August 1904 between His Majesty's Commissioner for the East Africa Protectorate and the Chiefs of the Masai Tribe.

17. Agreement of 1911 dated 9th August 1911

18. Constitutional Protection and Aboriginal Title in Commonwealth African Countries by Albert Barume 2002

19. The Legalist - Mabo 1 - Native Land Rights V. Real Property Rights.

20. Indigenous Mind

21. Treaties with Minnesola Indians

22. Nineteenth Annual Conference of Charities and Correction Timeline and Sources by Michael Williams

23. A Primer on Alaska Native Sovereignty - By Douglas K. Mertz

24. Confusion persists over meaning of 'indigenous' by Chander Mehra - Tuesday April 11, 2000

Statutes

1. Government Lands Act Chapter 280 - 1984

2. Trust Lands Act Chapter 288 - 1978

3. Registered Land Act Chapter 300 - 1978

4. The Judicature Act Chapter 18

5. General Allotment Act or Dawes Act (1887) - U S A

6. Indian Removal Act ((1824) - Chapter CXLVIII - U S A

Cases

1. Isaka Wainaina Wa Githomo and Kamau Wa Githomo -v- Murito Wa Indangara(2) Nanga Wa Murito(3) Attorney-General (1922-23)9 KLR 102

2. Virginia Edith Wambui Otieno -v- Joash Ochieng, Ougo and Omolo Siranga - Court of Appeal at Nairobi (Nyarangi, Platt and Gachuhi, JJ.A) 13th February 1987 Civil Appeal Case No. 31 of 1987

3. S -v- Makwanyane and Another - Constitutional Court of South Africa - March 2004

4. S-v- Baloyi (Minister of Justice and Another Intervening) - Constitutional Court of South Africa - March 2004

5. The Western Sahara Case - I C J Rep. 1975

6. The Fisheries Jurisdiction Case - I C J Rep. 1975

7. Richtersveld Community and Others -v- Alexkor Ltd (2001)3 SA 1293 (LCC) Case - Constitutional Court of South Africa -March 2004

8. Mabo and Others -v- Queensland - High Court of Australia 1992

9. Sioux and the Black Hills - American University Law Review - Spring, 1992

10. Delgamuukw -v- British Columbia (1993)5 WWR 97

11. Ol Le Njogo and Others -v- The Attorney General and Others, (known as the Masai case). Court of Appeal - 7 December 1913.

12. The King -v- The Earl of Crewe - Ex parte Sekgome - C A (1910) KB p 576

13. Carmichele -v- Minister of Safety and Security and Another - Constitutional Court of South-Africa - September 2003

14. Nonkululeko Letta Bhe and Anelisa Bhe - Constitutional Court of South -Africa September 2003