EASEMENTS AS A MECHANISM FOR CONSERVING WILDLIFE HABITAT OUTSIDE PROTECTED AREAS IN KENYA

BY

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DECLARATION

I, **GITAHI GLADYS NYOKABI,** declare that this thesis is my original work and it has not been presented for a degree in any other University.

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To my children, Achieng Nyabungu and Kwach Jaduar, with love.

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ABSTRACT

Conservation of wildlife in Kenya is carried out mainly by establishing and maintaining protected areas in the form of national parks and reserves in which land use is restricted to ensure protection of the wild fauna and flora and their habitat. Outside the protected areas are lands that do not enjoy the same protection as protected areas but none the less contain important wildlife habitat and are critical to the continued viability of the protected areas. These lands are under a lot of pressure from development and population increases, resulting in the land being rapidly converted to agriculture among other uses. Change in land use outside protected areas causes loss of wildlife habitat and threatens even the viability of protected areas.

The enactment of Kenya's framework law on the environment, the Environmental Management and Co-ordination Act, 1999 has provided an opportunity to protect the environment and natural resources using various instruments. The Act provides for the use of environmental easements as a mechanism to conserve natural resources by imposing a restriction on the use of the land.

This thesis examines the use of easements as an incentive-based mechanism and how they can be applied to conserve wildlife habitat outside protected areas by protecting it from conversion to other incompatible uses. It also examines how appropriate institutional frameworks and incentives can support the application of easements in Kenya. It argues that the use of land use laws and regulations that rely on policing and punishment for enforcement are inadequate for protecting wildlife habitat outside protected areas. Instead, environmetal easements are a viable and more appropriate mechanism that can be used with appropriate incentives to encourage landowners to conserve wildlife habitat outside protected areas.

Key Words: Property Rights, Easements, Wildlife Habitat, Conservation.

LIST OF ABREVIATIONS

AWF	African Wildlife Foundation
CBD	Convention on Biological Diversity
EIA	Environmental Impact Assessment
EMCA	Environmental Management and Coordination Act
ITPA	Transfer of Property Act of India
KLCT	Kenya Land Conservation Trust
KWS	Kenya Wildlife Service
LCB	Land Control Board
NEMA	National Environment Management Authority
NET	National Environment Tribunal
PCC	Public Complaints Committee

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CHAPTER 1

INTRODUCTION

1.1 Background

Kenya is one of the few countries in the world that are richly endowed with wildlife resources of immense diversity of mammals, bird species and reptiles. The wildlife is spread across a spectrum of habitats. These include coastlands, acacia grasslands, semi-arid savannah, the cold moor lands of Aberdare and Mount Kenya as well as swamps, springs, lakes and rivers. In order to ensure continued existence of the wildlife resources, the government of Kenya has set aside huge areas of open space as protected areas. These areas are in the form of designated National Parks, Sanctuaries and Game Reserves. These designated protected areas occupy eight percent of Kenya's total land area and enjoy varying levels of protection and permissible land use. For example human settlement is prohibited and access to these areas is regulated.[1]

At present, Kenya's protected areas comprise of four marine parks, five national sanctuaries, six marine national reserves, twenty two terrestrial national parks and twenty eight terrestrial national reserves spread in various parts of the country.[2] Outside the protected areas are vast lands owned either as communal land, private land or public land. These lands are important for wildlife conservation. They contribute to the viability of protected areas by providing important wildlife habitat and enabling the migration of wildlife between protected areas.

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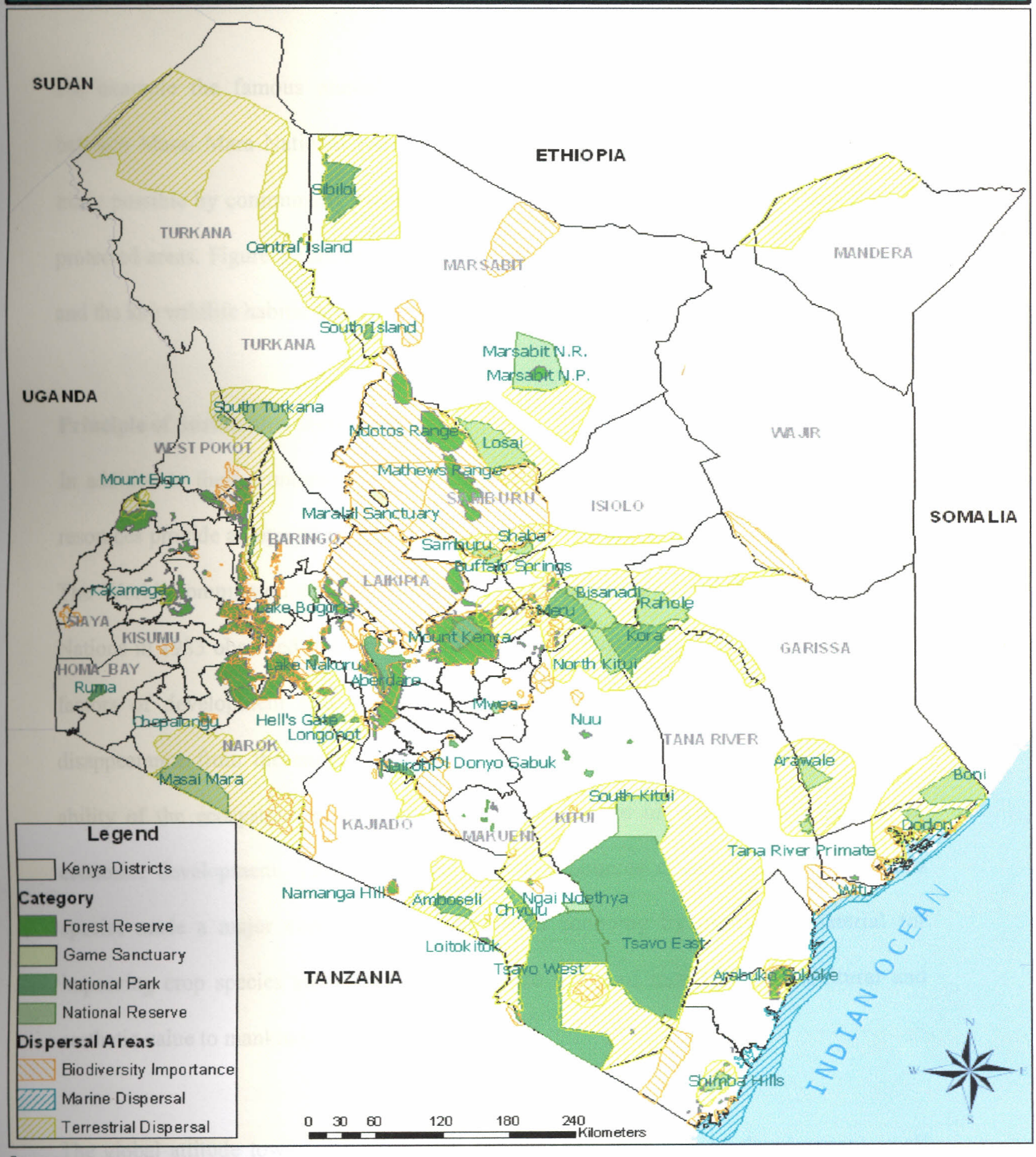
[1] Wildlife (Conservation and Management) Act Cap 376 Laws of Kenya (No 1 of 1976) Government Printer: Nairobi.

[2] Kenya Wildlife Service (KWS), *Strategic Plan 2005-2010* (KWS) (2005) p15.

Kenya Protected Areas and Dispersal Areas



Sources:
AWF, KWS,
KIFCON, Survey of Kenya

AWF Spatial Lab
Mar-04

For example the famous annual migration of Wildebeests (Connochaetes taurinus) between Masai Mara National Reserve and the Serengeti National Park in Tanzania is made possible by communally owned lands which provide open space between the two protected areas. Figure 1 (above on page 2) shows designated protected areas in Kenya and the key wildlife habitat areas outside them (referred to in the map as dispersal areas).

Principle of Sustainable Development

In addition to their economic value as the foundation of the tourism industry, wildlife resources provide an opportunity to meet other needs in future such as genetic resources. The World Commission on Environment and Development established by the United Nations in 1983 observed in its report to the General Assembly in 1987 that the various factors of development had contributed to a huge increase in the rate of species disappearance from the earth. The report noted that the loss of species impaired the ability of the ecosystem to function and had a negative impact on the potential for economic development. This is because genetic resources obtained from the various species made a major contribution to the world economy by providing material for improving crop species and drugs in addition to being of moral, ethical, cultural and aesthetic value to mankind.

The global attitude towards development has changed from one of development at all cost (Which resulted in a lot of pollution and overexploitation before the early seventies) to one of increased consideration to the earth's ability to renew itself and to provide resources continually to humankind. Thus the concept of sustainable development

emerged in the 1980s being defined as development that ensures that the needs of the present generation are met without compromising the ability of future generations to meet their own needs. The report of the World Commission on sustainable development recommended that species and their ecosystems should be conserved while at the same time being exploited for development.[3] As a member of the international community and being so richly endowed with diverse species of wild flora and fauna, it behoves Kenya to observe the principle of sustainable development by ensuring that wildlife resources continue to be conserved for the present and future generations.

The concept of sustainable development in relation to nature had been adopted earlier in the World Charter for Nature in 1982[4] which recognizes nature as a key factor in development. The Charter notes that civilization is rooted in nature and that nature has provided mankind with the opportunities for development. The life of mankind depends on the uninterrupted functioning of natural systems.[5] It is important to ensure that decision making processes as well as planning and implementation take into account the proper function of natural system. This serves as a long term measure to meet the needs of humankind.[6]

International Legal Obligation for Kenya to Conserve Wildlife Habitat

As a member of the international community of states, Kenya is under the law of treaties bound by international agreements to which she is a party. Kenya is a party to several

[3] The World Commission on Environment and Development *Our Common Future* (1987) Oxford University Press: Oxford New York pp.147-167.
[4] World Charter for Nature, 28 October 1982, A/RES13717, 22 ILM 455 (1983)
[5] *Ibid* at preamble, 1 (a) and (b).
[6] *Ibid* at article II.

conventions that deal with conservation of wildlife resources including those dealing with trade in illegal killing and trade in species of wildlife as well as conservation of wildlife habitat.[7]

Kenya is also a party to the Convention on Wetlands of International Importance Especially as Waterfowl Habitat (Ramsar Convention).[8] The convention recognizes wetlands as important habitat for many species and especially water fowl. It enables states to designate wetlands in their territories as important for habitat conservation. In compliance with the specific requirements of the convention, Kenya has designated key wetland areas as 'Ramsar sites' and committed to among other things the development of policy and legislative frameworks for management of the wetland resources.

The Ramsar Convention is focused on wetlands *per se* but there are other conventions to which Kenya is a party and which address other types of wildlife habitat beyond wetlands. These include the Bonn Convention[9] which defines habitat as "any area in the range of a migratory species which contains suitable living conditions for that species." And the Protocol Concerning Protected Areas and Wild Fauna and Flora in the Eastern African Region adopted in Nairobi in 1985.[10]

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[7] These include Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, U.S.T. 1087, 993 U.N.T.S. 243; 12 I.L.M. 1085 (1973); Lusaka Agreement on Cooperative Enforcement Operations directed at Illegal Trade in Wild Fauna and Flora Sept 8, 1994 (1996) (Reprinted in United Nations Environment Program (UNEP), *Selected Texts of Legal Instruments In International Environmental Law* (2005)pp. 528-533.

[8] Convention on Wetlands of International Importance Especially as Waterfowl Habitat Feb. 2, 1971, 11 I.L.M. 963 (1975).

[9] Bonn Convention on the Conservation of Migratory Species of Wild Animals, 1979, 19 ILM 15 (1980).

[10] Nairobi Convention for Eastern African Region, 1985, Nairobi Protocol Concerning Protected Areas and Wild Fauna and Flora in the Eastern African Region, 21 June 1985, (Reprinted in United Nations

The Convention on Biological Diversity (CBD) is a major convention that contains broad provisions on habitat conservation. The CBD recognizes the importance of habitat to the existence of biological diversity and provides that the conservation of biological diversity rests in the in-situ conservation of ecosystems and natural habitats. It also underscores the importance of maintaining and recovering viable populations of species in their natural surroundings.[11]

The term habitat as used in the CBD means the place or type of site where an organism or population naturally occurs.[12] The state parties to the CBD undertake to identify components of biological diversity that are important for conservation and sustainable use and in particular ecosystems and habitats. The ecosystems and habitat of priority include those that contain high diversity, large numbers of endemic or threatened species, or wilderness; those that are required by migratory species; and those with social, economic, cultural or scientific importance. Ecosystems and habitats that are representative, unique, or associated with key evolutionary or other biological processes are also considered important.[13]

The CBD makes provision for state parties to establish protected areas to conserve biological diversity and to manage biological resources outside the protected areas with a view to ensuring their conservation and sustainable use.[14] The protected areas are

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Environment Program (UNEP), *Selected Texts of Legal Instruments In International Environmental Law* (2005).

[11] Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 79, 143; 31 I.L.M. 818 (1992) preamble.

[12] *Ibid* at article 2.

[13] *Ibid* at article 7.

[14] *Ibid* at article 8.

geographically defined areas that are designated or regulated and managed to achieve specific conservation objectives. The convention also calls on state parties to use economically and socially sound measures that act as incentives for the conservation and sustainable use of components of biological diversity.[15]

Kenya is also a party to the African Convention on the Conservation of Nature and Natural Resources.[16] The convention provides for the conservation of wildlife habitat which it refers to as conservation areas.[17] The parties are to ensure conservation of species and their habitats within the framework of land use-planning and sustainable development.

Some areas of wildlife habitat are considered so important that they are designated natural world heritage sites under The Convention Concerning the Protection of the World Cultural and Natural Heritage Sites.[18] The convention considers areas that constitute the habitat of threatened species of animals and plants as of outstanding universal value as heritage sites. It provides that every state has the duty of ensuring that any such heritage is identified, protected and conserved and transmitted to the future generations.[19] As a party to the Convention Concerning the Protection of the World Cultural and Natural Heritage sites, Kenya has an obligation to the international community to conserve these areas and to protect them from degradation and to ensure

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[15] *Ibid* at article 11.
[16] African Convention on the Conservation of Nature and Natural Resources, July 11, 2003, CAB/LEG 24.1 July 2003; reproduced at <http://www.africaunion.org/root/au/Documents/Treaties/treaties.htm> (accessed Dec 3, 2008).
[17] *Ibid* at article v.
[18] UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov.16 1972, 27 UST 37, TIAS 8226, 11 ILM 1358 (1972).
[19] *Ibid* at Article 4.

their continued viability as Natural Heritage Sites. Such interventions may require dealing with activities or issues arising inside the protected areas as well as with activities taking place outside the protected areas and which have a potential impact on the viability of the heritage site.

At the regional level, Kenya is a party to the East African Treaty[20] that also requires state parties to collaborate in the conservation of wildlife resources. The treaty recognizes the importance of collectively managing the wildlife resource to ensure sustainable utilization in the Community. In particular, attention is given to the conservation of wildlife outside protected areas. Some of the measures contemplated in the treaty include harmonization of policies on conservation of wildlife inside and outside of protected areas and use of common management plans for trans-border protected areas.

At the national level Kenya has enacted various laws to govern wildlife resources and their habitat. The principle legislation is the Wildlife (Management and Conservation) Act.[21] There are other legislations that apply to the management of other resources that affect wildlife conservation directly or indirectly. These include legislation on water management, forests, and agriculture as well as laws relating to land use planning. The Environmental Management and Coordination Act (EMCA)[22] which addresses environmental management also deals with matters affecting wildlife conservation.

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[20] The Treaty for the Establishment of the East African Community Act 2000 (No. 2 of 2000 Kenya Gazette Supplement No. 46(Acts No. 5) Government Printer; Nairobi.

[21] Wildlife (Conservation and Management) Act (No. 1 of 1976) Cap 376 Laws of Kenya.

[22] Environmental Management and Coordination Act, 1999 (Kenya Gazette Supplement No. 3 (Acts No. 1 of 2000).

1.2 Statement of the Problem

Kenya enacted the Environmental Management and Coordination Act, 1999 (hereinafter EMCA) in 1999 as a framework legislation to provide for environmental management. EMCA provides for environmental easements as a mechanism to be used to facilitate the conservation of the environment by imposing one or more obligations on the use of land. Despite the provision for the use of environmental easements in EMCA, easements have not been used for conservation. Environmental Easements have the potential to avail land for conservation of wildlife habitat outside protected areas but the potential has however not been realised.

1.3 Justification

Wildlife is an important component of the human environment. The World Charter for Nature promulgated by the United Nations General Assembly proclaims that every form of life is unique and should be respected regardless of its worth to man. The Charter requires that man should be guided by a moral code of action to accord respect to other organisms of nature.[23] Wildlife plays an important role in Kenya's economy. It is the main basis of tourism industry that is the main foreign exchange earner. The Tourism industry provides employment opportunities for many people in Kenya. In 2007 for example, it was the leading foreign exchange earner in the economy earning an estimated 65.4 billion Kenya shillings. [24]

While the protected areas provide opportunity for wildlife based tourism, the parks

[23] The World Charter for Nature *supra* note 4 para.3 (a).
[24]Republic of Kenya *Economic Survey 2007* Kenya National Bureau of Statistics Ministry of Planning and National Development Government Printer, Nairobi.

themselves rely on the land surrounding them for their continued viability. Land outside protected areas is exposed to land use change. This is in the form of fragmentation of landholdings and fencing, conversion of wildlife habitat into agriculture, overstocking and overgrazing of livestock. These changes modify the characteristics of the landscape resulting in loss of wildlife habitat. The most significant cause of habitat loss is agricultural expansion as it results in the conversion of native habitats into croplands.[25]Loss of wildlife habitat is the main threat to wildlife outside protected areas and to biodiversity in general and is already being experienced outside many protected areas in Kenya.[26]

It is the view taken by this thesis that loss of wildlife resources which comprise also wildlife habitat outside protected areas can undermine Kenya's economic development. The loss of wildlife species, if not halted, threatens sustainable development. Loss of wildlife resources will not only negatively affect the current economic use of wildlife as a source of tourism business but would also extend to the genetic resources available from wildlife that could be used in various sectors of the economy including agriculture. Research on the value and benefits of nature has only covered a very small proportion of the animal species and the species of wild fauna and flora hold the key to a lot of discoveries that could provide resources for medicines, improved productivity in

[25] Vitousek, P.M., Moneey, H.A., Lubchenco, J., and Melillo, J.M., 1997, Human Domination of Earth's Ecosystems. 277 Science Journal pp. 494-499.

[26] For an ecological perspective of the land use changes taking place outside protected areas see for example Helen Gichohi , 'The Ecology of a Truncated Ecosystem the Athi-Kapiti Plains', (Ph.D. dissertation, University of Leicester) (1996); David Western & J Ssemakula, 'The Future of the Savanna Ecosystems: Ecological Islands or Faunal Enclaves?' (1994), African Journal of Ecology, 19, (1), (2) at 7-19; Esikuri, E. E. 1998 'Spatio-Temporal Effects of Land Use Changes in Savanna Wildlife Areas of Kenya',(Ph.D. dissertation, faculty of the Virginia Polytechnic Institute and State University, Blacksberg, Virginia) (1988).

agriculture, raw materials for industrial development, and general contribution to human welfare including ecological functions of nature and ecosystems.

1.4 Objectives of the Study

The main objectives of this study was to examine the potential for easements to be applied for purposes of limiting property rights over land for the benefit of wildlife habitat outside protected areas. This study therefore sought to:

1. Examine the law relating to easements and the potential for the use of environmental easements as a mechanism for conserving wildlife habitat outside protected areas in Kenya.

2. Review the Legal and Institutional frameworks affecting wildlife conservation in Kenya and their implications to conservation of wildlife habitat outside protected areas.

3. Examine the potential for the use of environmental easements in Kenya in the context of the existing legal and institutional framework for environmental easements, the property rights regime over land and the legal framework for wildlife conservation in Kenya.

4. Make appropriate recommendations for an enabling legal and institutional framework for the use of easements for conservation of wildlife habitat outside protected areas in Kenya.

For purposes of this thesis the term wildlife is used to refer to wild fauna and flora and depending on the context the term may refer to wild fauna separately from wild flora. Wildlife habitat is used to refer to places or areas where wild fauna and or wild flora occur naturally. The study is limited to wildlife habitat that is terrestrial as opposed to marine habitat.

1.5 Hypotheses

The hypotheses that this thesis sought to test were that:-

1. The property law system with regard to land in Kenya undermines the use of environmental easements as a mechanism for protecting wildlife habitat outside protected areas.

2. The provisions of the EMCA with regard to Environmental Easements provide an adequate legal framework for the use of easements as a solution to the conservation of wildlife habitat outside protected areas in Kenya.

3. There is an inadequate institutional framework for conservation of wildlife outside protected areas in Kenya and this undermines the use of environmental easements for wildlife conservation outside protected areas.

4. Environmental Easements have not been used to conserve wildlife habitat outside protected areas because there are insufficient legal provisions for incentives to encourage conservation of wildlife as a land use outside protected areas and for the use of environmental easements.

1.6 Research Questions

This thesis sought to address the following research questions:-

1. To what extent does the current regime of property rights over land provide an opportunity for the use of easements?

2. What is the legal framework for the use of easements to conserve wildlife habitat outside protected areas in Kenya?

3. What is the current institutional framework for wildlife conservation and to what extent does it support wildlife conservation and the use of easements outside protected areas in Kenya?

4. What is the potential for use of environmental easements as a mechanism for wildlife conservation in the context of the legal framework for easements, the regime of property rights over land and the legal and institutional frameworks for wildlife conservation?

1.7 Theoretical Framework

The theoretical premise for this thesis is property because conservation of wildlife habitat is related to land which is itself subject of property. Easements are proprietary rights in land and their use particularly for conservation of wildlife habitat involves limitation of property rights. Property in land refers not to the land *per se* but rather to an aggregation of legal rights. Property rights in land have been expressed in the metaphor of a bundle of

sticks as conceptualized by Wesley Hohfeld at the beginning of the twentieth century.[27]

Property is concerned with rights in *rem*- the rights relating to things external to the person and not connected to the persona.[28] Land is therefore one of the objects of property and a basis for *in rem* rights. As a legal concept, property in land comprises of rights, privileges and powers and comprises of legal relationships among people regarding land and the resources over the land.[29] Each right, power, privilege or duty comprises a stick in an aggregate bundle that constitutes a property relationship.[30]

What comprises land ownership has been elucidated as comprising eleven incidents of ownership-the right of possession, the right to manage, the right to the income of the thing, the right to the capital, the right to security, the rights or incidents of transmissibility and absence of term, the prohibition of harmful use, liability to execution, and the incident of residuarity on the reversion of lapsed ownership rights held by others.[31]

As per Jeremy Bentham, property is created and regulated by the law [32] in the sense that rights are a creature of the law and the absence of law is the absence of property. The existence of property is also justified on utilitarian grounds. As elucidated by Bentham - property exists for a purpose and that purpose is to tap individual energies in order to

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[27] Wesley Newcomb Hohfeld, "Fundamental Legal Conceptions as Applied in Judicial Reasoning" 22 Yale L.J. 710 (1917).
[28] *Ibid.*
[29] *Ibid.*
[30] Abraham Bell & Gideon Parchomovsky, 'A theory of Property, 90 Cornell L. Rev. 531 2004-2005 p 545
[31] A.M. Honor'e, "*Ownership*", in *Oxford Essays In Jurisprudence* 107 (A.G. guest ed., 1961)
[32] 2 Jeremy Bentham, "Anarchical Fallacies", in Bowring J (Ed.) *The Works of Jeremy Bentham* insert place of publication (1983) 489, 523, 510.

make society prosperous.[33] Land is a key foundation for the prosperity of society. It is the basis of all activities and the basis for accessing all that is separate from land such as the sea or the universe.

The metaphor of a bundle of rights in describing property relationship over land applies in both private and common property. Private property in land is defined in terms of a core bundle of rights that are chosen from the infinite relations that exist among people with regard to land as a scarce resource. An individual with private property over land can control all or most of the core bundle and their decision on inclusion or exclusion cannot be contested by society. Further, the owner of private property can break up the core bundle and alienate the rights with a clear hierarchy of decision making among owners. Thus private property is the highest form of property defined by William Blackstone as:-

> That sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe[34].

Contrary to the view that private property in land confers a despotic right of use and abuse of land, private property over land is not absolute. It is limited either by law or by the natural environment by the fact that land is a finite resource. The human race relies on land as a source of sustenance and this is particularly true of developing countries that rely heavily on the natural resources found on land as a basis for livelihoods and

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[33] Bentham, *Principles of the Civil Code,* in *Theory of Legislation,* at 109-122 (1987; reprint of C.K. Ogden ed. 1931).
[34] William Blackstone, *II Commentaries on the Laws of England*, (Wayne Morrison ed., 2001) 1765-1769) Ch. 1.

development. The theory of private property elucidated above has its origin in the western world and emphasizes the protection of private property as supreme. However, because of the dependence of the human race on land and its resources, the stewardship of natural resources on land is particularly important as it has implications on the survival of the human race.

Traditional African communities recognised and applied the concept of common property as opposed to private property over land. In traditional African society prior to the colonial period, the principle of the absolute private property over land did not exist. It was impossible for any one person to claim ownership of the land but rather the land was attributed to a group or clan and rights of access and use of the land are allocated to the members of such group or clan.[35]

English property law regime, introduced in the colonial period introduced the concept of private ownership of land. This concept combined the political authority over the colony with sovereign ownership over the *solum*. Thus it was asserted that the political state could own land and the subjects derived their rights over the land from the state as provided for by the laws of the sovereign.[36]

The concept of the commons has often been confused with open access, in which there is no right of exclusion, but rather multiple privileges of use granted to multiple owners and none has the right to exclude the other. In the event that there are too many owners with

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[35] J.B. Ojwang & Calestous Juma, 'Towards Ecological Jurisprudence' in Calestous Juma & J.B. Ojwang, (Eds.,) *In Land We Trust: Environment, Private Property and Constitutional Change* (Nairobi, Kenya: ACTS Press) (1996) 317.

[36] Okoth-Ogendo, H.W.O. 1991, *Tenants of the Crown Evolution of Agrarian Law and Institutions in Kenya* Nairobi, Kenya: Acts Press 16.

the privilege to use, the resource is open to overuse – a concept that has been described as a tragedy of the commons.[37]The classic examples given of this concept are with regard to natural resources that are held in common – fisheries, fields and the air and the tragedy arises in the form of overexploitation of fisheries, overgrazing of fields and air pollution respectively.

This designation of tragedy of the commons as conceptualized by Garret Hardin has however been revisited and observed that it applies rather to unmanaged property over which there are no regulations of access and use creating a state of open access.[38] This is unlike communally owned property in which each member of the community has equal rights of access and use and one clan or community has a right to exclude members of other communities or clan.[39] Wildlife resources upon which no person can claim property rights are vulnerable to the tragedy of the commons in an open access system. Traditional African communities used to have norms that governed hunting of wildlife resources to ensure that the resources were not over exploited.

Ecological stewardship is a matter of public interest[40] particularly because of the realization over the last three decades that ecological realities place a limitation on human activities. It is well put that:-

> The absolute finiteness of the environment, when coupled with human dependency on the environment, leads to the unquestionable result that human activities will at some point be constrained... In short, the

[37] Garret Hardin, 'The Tragedy of the commons", 162 *Science* 1243, 12244-45 (1968); Elinor Ostrom, *Governing The Commons: The Evolution Of Institutions For Collective Action* 182-84 (1990)
[38] Ciriacy-Wantrup, S. V & R. C. Bishop, "Common property as a Concept in Natural Resources Policy", Natural Resources Journal (1975)15: 73-727.
[39] *Ibid.*
[40] Calestous Juma & J.B. Ojwang (Eds.,) *In Land We Trust: Environment, Private Property and Constitutional Change* (1996) Initiative Publishers: Nairobi; Kenya p.2.

> environment imposes constraints on our freedom; these constraints are not the product of value choices but of scientific imperatives of the environment's limitations[41].

For this reason, it has been observed that protection of private property rights must have a corresponding duty of ecological stewardship on the part of the owners of private property.[42] Thus in Kenya the Environmental Management and Coordination Act entitles every person in Kenya to a clean and healthy environment but also imposes a duty to safeguard and enhance the environment.[43]

The pre colonial indigenous societies concept of the commons present a higher value to the issue of environmental management as these depended entirely on the natural resources and therefore the cultural orientations regarded environmental activity as central to the society and its well being.[44]This is not so with the Western concept of property which exalts private property. However, with the advent of colonialism, the traditional African concept of common property has largely been eroded and replaced with the Anglo-American law of property that carries with it the concept of private property that has its roots in capitalist economic theory.

The economic argument for private property assumed that natural resources over land were infinite and the issue to be determined was the question of who would have access to those resources. However, this is no longer the thinking today as natural resources are not infinite and the evolution of a new way of thinking- in the concept of sustainable

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[41] David B. Hunter, *An Ecological Perspective on Property: A Call for Judicial Protection of the Public Interest in Environmentally Critical Resources, (1988)*12 Harvard Envtl. L. Rev. 311.
[42] *Supra* note 40 at p. 2.
[43] Environmental Management and Coordination Act, 1999 (Kenya Gazette Supplement No. 3 (Acts No. 1) of 2000 Government Printer; Nairobi s. 3.
[44] J.B. Ojwang & Calestous Juma 'Towards Ecological Jurisprudence' in *supra* note40.

development - demands a balance between economic development, the environment and social well being.[45] Private property regime conferred upon a land owner rights over the land owned by him. It did not confer over a landowner rights over other parcels of land. However, it is necessary, for the enjoyment of private property that a land owner should acquire certain rights over another's land in order to enhance the enjoyment of one's property. This class of rights includes right of way over the land of another in order to access ones own land.

Easements belong to this class of rights and have their origins in English Common Law. English common law and the law of real property are very closely linked as the evolution of common law reflects the evolution of English law of real property.[46] Reference to common law refers to the law applied to England as a whole by the king's ordinary courts- the King's Bench, Common Pleas and Exchequer which were established in the middle of the twelfth century after the Norman Conquest. The decisions of the judges of these courts were recorded and developed into a systematic body of doctrine of 'Common Law.'[47]

In English Law of Property, real property is sub divided into corporeal and incorporeal hereditaments- with the term "hereditament" being used to refer to property that descended to the heir on intestacy before 1926.[48] Corporeal hereditaments refers to lands, buildings, minerals, trees and all other physical matter that is part of or fixed to land and

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[45] Alison field Juma, "Governance and Sustainable Development", in *supra* note 40 p. 25.
[46] Megarry & Wade, *The Law of Real Property*, (Charles Harpum *et al* (Eds.) 7th Edition Sweet and Maxwell (2008) 8.
[47] *Ibid* at para. 1-014.
[48] *Ibid* at p. 7. Before 1925 Law of Property Act that entered into force in 1926, if a person died intestate all his realty passed to his heir. Personalty was divided between some of his relatives. With the 1925 Law of Property, both realty and personalty both pass to certain relatives.

over which ownership is capable of being exercised. Incorporeal hereditaments on the other hand refer to rights rather than physical matter. English law of property classified certain rights as real property to ensure that these descended to the heirs and not to relatives as personalty. Easements are some of these very important class of rights over land and are classified as incorporeal hereditaments.[49] The use of easements at common law further justifies the view that property rights in land cannot be absolute and that a property owner must of necessity limit their property rights for the general good of the society and to promote the enjoyment of property rights over land. A more detailed discussion on easements is found later in chapter two of this thesis.

Despite the theory justifying the good of private property in land, some kinds of properties should be open to the public or at least subject to a public right. This theory has its roots in Roman law and has influenced European law as well as American Law particularly with regard to specific types of resources-roadways, lands under navigable waters, public access to waterfront property for navigational and fishing purposes.[50] Wildlife resources are not considered private property unless they are hunted as set forth in *Pierson v. Post*[51] an early nineteenth century wild animal hunting case.

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[49] *Ibid* at p. 8.

[50] Carol Rose, "The Comedy of the Commons: Custom, Commerce and Inherently Public Property" in *Essays on the History, Theory, and Rhetoric of* Ownership (Boulder Westview Press, 1994) 106 citing among others Daniel R. Couillete, "Mosses from an Old manse: Another Look at Some Historic Property Cases About the Environment," 64 Cornell L. Rev. 761, 802-803 (1979) (on Roman Law categories of public property); Harry N. Scheiber, "Public Rights and the rule of Law in American Legal History." 72 Cal. L. Rev. 217 (1984); Molly Selwin, "The Public Trust Doctrine in American Law and Policy" 1789-1920 Wisc. L. Rev. 1403.

[51] 3 Cai. R. 175 (N.Y. Sup. Ct. 1805) quoted in Carol Rose, "Possession as the Origin of Property" in *Property and Persuasions: Essays on the History, Theory and Rhetoric of Ownership* (Boulder: Westview Press, 1994) p.12.

Post was hunting a fox on an un-owned beach when an interloper appeared, killed the fox and ran off with the carcass, Fox sued on the theory that his pursuit established property right to the fox. The court held that occupancy or possession belonged to the one who killed the animal or who at least wounded it mortally or caught it in a net and that these acts brought the animal within certain control that gives rise to possession and hence a claim to ownership. This case lays down two principles of possession- a clear act and reward to useful labour. The former makes possession as a statement. With regard to wildlife in its natural habitat therefore, the absence of useful labour and absence of an act of possession makes them incapable of being made private property.

In Kenya, wildlife resources are conserved and managed as public property and the government has established the Kenya Wildlife Service as the public body vested with the resources and powers to protect conserve and manage the wildlife. Public ownership of wildlife resources offers an opportunity to invest in the conservation and efficient utilisation of the resource in a better manner than would be achieved if the management and use of the wildlife resource were left in private ownership. As the manager of the wildlife resources the government has a role as a manager of externalities by brokering numerous individual preferences and requiring individual users to consider the interests of other users. This is the exercise of police power which is political power:-

> The right of making laws with penalties of death, and consequently all less penalties, for regulating and preserving of property and of employing the force of the community in the execution of such laws, and in defence of the common wealth from foreign injury, and all this only for the public good[52].

[52] *Ibid.*

Political power is exercised by the State within the limits of preserving the relative entitlements among the members and as expressed by Epstein,

> The end of the state is to protect liberty and property, as these conceptions are understood, independent of and prior to the formation of the state[53].

With regard therefore to conservation of wildlife resources as a public property the state makes laws regarding the access and utilisation of those resources as well as regulating the land use which the wildlife relies upon for survival. To enable the exercise of political power to protect private rights, police power must vest in the sovereign.[54] Further, the formation and operation of the state demands that some private property must be converted to public use and because individuals will not voluntarily donate their property or engage in voluntary exchanges with the state, it is justified that a power must vest in the state to force the exchanges and this is through the power of eminent domain, or the power of the state to take private property for public use. This power has been exercised in the establishment of protected areas for the conservation of wildlife resources in which parcels of land that would otherwise be private property are designated for wildlife conservation. The power of eminent domain is limited to public good and in order to regulate the forced exchanges between the state and individuals, the principle of just compensation operates to ensure that the state provides fair equivalent compensation to each person for property taken away from them by the state for public use.

1.8 Literature Review

There is a wealth of material written on the issue of wildlife conservation beyond

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[53] *Ibid.*
[54] *Ibid.*

protected areas, their importance to wildlife conservation and to protected areas and strategies employed to ensure that they are conserved. Andrew F. Bennet in *Linkages in the Landscape: The role of Corridors and Connectivity in Wildlife Conservation*[55] discusses the importance of landscape connectivity for animal species. He argues that the protected areas cannot, in isolation ensure long-term conservation of wild fauna and flora. He provides a detailed discussion of the benefits to wild animals in fragmented landscapes to be able to move between habitats which, according to the equilibrium theory of island biogeography, could reduce the rate of species extinction.[56] He further argues that loss of habitat has negative implications for conservation of flora and fauna as it results in species loss, changes in the composition of faunal assemblages and ecological processes that involve animal species.[57] This work does not consider property rights as a basis for conserving wildlife habitat outside protected areas and does not examine easements as a mechanism that can be applied to reduce habitat loss outside protected areas.

The International Institute for Environment and Development in *Whose Eden? An Overview of Community Approaches to Wildlife Management*[58] provides an overview of literature on community approaches to wildlife management discussing the methods used in an attempt to conserve wildlife outside protected areas by involving local communities in Africa and advocating for increased participation of and benefits to local people in

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[55] Bennet, A.F (1998, 2003) *Linkages in the Landscape: The Role of Corridors and Connectivity in Wildlife Conservation.* IUCN, Gland, Switzerland and Cambridge, UK.
[56] *Ibid* at Ch. 3
[57] *Ibid* at Ch. 2
[58] International Institute for Environment and Development (IIED), (1994) *Whose Eden? An Overview of Community Approaches to Wildlife Management*, International Institute for Environment and Development, London.

conservation of wildlife areas on their land. This work does not examine the potential of easement as a means of involving local communities to participate in wildlife conservation on their land.

David Western and Michael Wright in *Natural Connections: Perspectives in Community-based Conservation* discuss community based conservation as a mechanism for conservation efforts within a community using case studies from Africa to emphasise the co-existence of people and nature as opposed to protectionism and segregation of people and wildlife.[59] Although the community based natural resource management initiatives discussed in this work use mechanisms that provide direct benefits to communities such as building schools and other public amenities to encourage communities to conserve wildlife habitat outside protected areas the communal lands are now being subdivided and replaced by individualisation of rights over land and natural resources and the work does not provide a solution as to how the subdivision of land can be exploited to enhance wildlife conservation on the private land.

Y.P. Ghai and J.P.W.B. McAuslan in *Public law and Political Change in Kenya: A study of the Legal Framework of Government from Colonial Times to the Present*[60] provides an authoritative study of the constitutional history of Kenya and its independence Constitution and gives a detailed account of the evolution of land law in Kenya from the

[59] David Western, "The Background to Community-Based Conservation" in David Western & Michael Wright (Eds.,) (1994) *Natural Connections: Perspectives in Community Based Conservation,* Washington D.C. Island Press.

[60] Y.P. Ghai & J.P.W.B. Mc Auslan, *Public Law and Political Change in Kenya: A study of the Legal Framework of Government from Colonial Times to the Present* (1970 Reprinted 2001 Oxford university Press, East Africa Limited: Kenya).

Colonial period to the present. This thesis has relied upon this account to inform the chapter on the institutional frameworks for conservation of wildlife outside protected area, particularly on the question of the evolution of land tenure regimes in Kenya. This work does not however focus on the question of easements as proprietary interests in land.

H.W.O Okoth-Ogendo in *Tenants of the Crown; Evolution of Agrarian Law and Institutions in Kenya*[61] traces the evolution of land law from the colonial times through to independence discussing also the implications of this to the evolution of land use law in Kenya, arguing that the foundation of the colonial tenure system was to provide opportunity for the agricultural exploitation of the country and that land use laws generally developed in a fragmented fashion. His work is relied upon on this thesis in understanding and explaining the evolution of Agrarian Law and Institutions in Kenya. This work was carried out before the enactment of the Environmental Management and Coordination Act and it does not address the issue of easements as a property right.

Calestous Juma and J.B. Ojwang in *In Land We Trust: Environment, Private Property and Constitutional Change*[62]has dealt with pertinent issues with regard to property rights and environmental in Kenya, examining issues relating to environment, land tenure systems and natural resource management from a legal and constitutional perspective. This work is relied upon as it provides a good rendition of theoretical issues on property,

[61] Okoth-Ogendo, H.W.O. 1991, *Tenants of the Crown Evolution of Agrarian Law and Institutions in Kenya* Nairobi, Kenya: Acts Press citing the East African (Lands) Order- in –Council of 1901 and 1902.
[62] Calestous Juma & J.B. Ojwang (Eds.,) *In Land We Trust: Environment, Private Property and Constitutional Change* (1996)Initiative Publishers: Nairobi; Kenya.

environment and governance and their applicability to the Kenyan context. While this work recognises the importance of limiting private property for the benefit of the environment, it does not discuss easements as a mechanism that can be used to limit property rights for purposes of the environment.

Patricia Kameri-Mbote in *Property Rights and Biodiversity Management in Kenya: the Case of Land Tenure and Wildlife*[63] addresses the issue of land and resource tenure and its effect on wildlife conservation outside protected areas arguing that laws and policies for wildlife management in Kenya have not taken into account property rights outside protected areas. She recommends that mechanisms such as servitudes, including easements, profits a'prendre and restrictive covenants would provide for wildlife conservation on individually owned land within the framework of the Registered Land Act. This work however does not examine critically the manner in which easements could be applied to conserve wildlife habitat and how well the provisions of the Environmental Management and Coordination act with regard to environmental easements lend themselves to implementation for wildlife conservation in Kenya.

Sir Robert Megarry and Sir William Wade in *The Law of Real Property*[64] provides an authoritative rendition of English law of real property and provides a basis for appreciating the evolution of the English land law and setting the context for easements as an interest in land, with its origins in English Law. This work focuses on English Law

[63] Patricia Kameri-Mbote *Property Rights and Biodiversity Management in Kenya: the Case of Land Tenure and wildlife (2002)* African Centre for Technology Studies (ACTS), ACTS Press, Nairobi, Kenya.
[64] Megarry & Wade, *The Law of Real Property*, (Charles Harpum *et al* (Eds.) 7th Edition Sweet and Maxwell (2008).

of Property and limits itself to the common law easement. The work discusses easements as a mechanism that is necessary for the enjoyment of private property. It does not address the question as to how the concept of easements can be used to limit private property for public interest particularly with regard to environmental concerns or wildlife conservation for that matter.

Gaunt and Morgan in *Gale on Easements*[65] discuss the theory and law of easements as an interest in land in English Law discussing its application together with other instruments such as profits a'prendre, and restrictive covenants and the common law jurisprudence on the subject. This work is relied upon to provide an understanding of the genesis and application of the common law easement in the English law of property, being the origin of the concept of easements and therefore provides a basis upon which the environmental easement mechanism can be better understood and critiqued. However, the work makes no reference to the use of easements for novel purposes such as nature conservation and is limited to the common law easement.

The Environmental Law Institute in *Legal Tools and Incentives for Private Lands in Latin America: Building Models for Success*[66] examines the use of various mechanisms including easements to conserve biodiversity. The study however, focuses on Latin America, addressing the adaptation of common law easements for purposes of nature conservation in the context of property rights over land in Latin America. There has been no study done yet, to examine how easements would be applied in Kenya for purposes of

[65] Gaunt, J. and Morgan, P. *Gale on Easements* (16th edition) London: Sweet & Maxwell: London (1997).
[66] Environmental Law Institute, *Legal Tools and Incentives for Private Lands in Latin America: Building Models for Success*(2003) USA.

conserving wildlife habitat outside protected areas and specifically under the provisions of Environmental Management and Coordination Act relating to environmental easements. It is this issue that is the subject of this thesis.

1.9 Research Methods

The Research method used for this thesis is library research. The primary sources for information include Acts of parliament and regulations, publications of statutory authorities, conventions, treaties and declarations. Secondary sources include journal literature and books.

1.10 Outline of Thesis

Chapter one provides the introduction to this thesis and explains what the research problem was, the background to the research problem, the hypotheses, the research questions and the objectives of the research.

Chapter two delves into the question of the legal framework for easements. It examines the common law foundations of the concept of easements, the characteristics of an easement at common law and how easements are created, transmitted and extinguished at common law. A section of this chapter then examines the legal framework for easements in Kenya. It discusses the characteristics, creation, transmission and extinguishment of statutory easements as provided for in various statutes including the Indian Transfer of Property Act, the Registered Land Act, the Water Act, and the Way leaves Act and distinguishes the statutory easements from common law easements. This discussion sets

the context for discussing the legal framework for environmental easements as statutory easements provided for under the Environmental Management and Coordination Act 1999 as a mechanism for environmental management.

Chapter three then examines the property rights regime over land as the context for wildlife conservation and management as well as for the use of environmental easements. It begins with an overview of the land tenure systems that govern land ownership outside protected areas and the rights conferred to the landowners. This is because property rights over land have implications on the manner in which land is used and thus affects wildlife conservation.

The chapter then examines the legal options for conservation of wildlife habitat outside protected areas with respect to compulsory acquisition of land and the use of land use regulations and their weaknesses. The laws and institutions examined include the Kenya Wildlife Service, the National Environment Management Authority, Kenya Forest Service, National Environment Tribunal, the Public Complaints Committee, the Agriculture Act, the Physical Planning Act and the Local Government Authorities Act. The last section of Chapter three then examines the viability of environmental easement as an alternative mechanism. It examines the constitutional right to property and how the provisions of environmental easements relate to the right to private property.

Chapter four examines the measures that are necessary for implementation of environmental easements to conserve wildlife habitat outside protected areas in Kenya. It

focuses on the need for an institutional framework to implement environmental easements and the need for incentives to encourage the use of environmental easements. The chapter examines an existing institution- the Kenya Land Conservation Trust as an alternative to the Kenya Wildlife Service with regard to conservation of wildlife habitat outside protected areas and to advance the use of environmental easements. It observes that the Kenya Wildlife Service is not an appropriate institution to apply the use of environmental easements to conserve wildlife habitat outside protected areas.

Chapter five is the final chapter of this thesis and it sets out the conclusion and the recommendations arising out of this research.

CHAPTER 2

LEGAL FRAMEWORK FOR EASEMENTS

2.1 Common Law Foundation for Easements

Common law recognized a limited number of rights that a landowner could have over the land of another in order to enhance the enjoyment of ones land. One of such rights is an easement and the other is profit a prendre.[1] Examples of easements at common law include rights of way, right of light and rights of watercourses. Examples of profits include a right to dig gravel or to fish.[2] Before the 18th century, easements were considered as rights annexed to corporeal hereditaments and were considered to be a mere privilege obtained for the benefit of corporeal land because they existed only if attached to some piece of land so as to benefit it. However, this distinction was abandoned and easements are classified as incorporeal hereditaments as rights over land and being an interest in land, are indeed real property.[3]

2.1.1 Essential Characteristics of an Easement : Re Ellen Borough Park Case

A very broad definition of an easement was given in *Metropolitan Railway v. Fowler* as "some right which a person has over land which is not his own,"[4] Also, a grant of an easement does not create an estate in land. A grant of exclusive use of land is an estate in land and not an easement as held in *Reily v. Broth*[5] that:-

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[1] Megarry & Wade, *The Law of Real Property*, (Charles Harpum *et al* (Eds.) 7th Edition Sweet and Maxwell (2008).
[2] *Ibid* at para 27-001.
[3] *Ibid* at para 1-012.
[4] *Metropolitan Railway v. Fowler* [1892] 1. Q.B. 165, 171 Per Lord Esher M.R.
[5] (1890) 44 Ch. D. 12, 26.

> The exclusive or unrestricted use of a piece of land I take it, beyond all question passes the property or ownership in that land, and there is no easement known to law which gives exclusive and unrestricted us of a piece of land.

It is the case of *Re Ellenborough Park*[6] that narrowed down the definition and settled the question as to what an easement is. This case provided the distinguishing characteristics of a right over land that can be said to be an easement.

The brief facts of the *Re Ellenborough Park* are that Ellenborough was an open space rectangular parcel of land surrounded by a road and one side of it faced the sea front. There were rows of identical houses that were constructed on plots situated along the three sides of the Ellenborough as a building estate. Each conveyance of the plots and the houses built on them granted to the owner of the house a right to full enjoyment of Ellenborough as leisure park at all times in common with other persons subject to a duty to maintain the Ellenborough Park. There was a covenant between the vendors and the purchasers and their successors in title that the Park would be kept as open space as an ornamental pleasure ground. The owners of other plots situated a row behind the actual houses fronting the park were also granted the right to use the Park.

Under the Compensation (Defence) Act 1939, compensation rental and dilapidations payment was payable to the owners of the Park. The owners of certain houses asserted that they also had a right to the payments as rights they had to use the Park amounted to an interest in the Park. The only interest that they could assert was an easement. The issue before the court was whether or not an easement existed over Ellenborough Park. It was

[6] *Re Ellenborough Park* [1956] Ch. 131.

affirmed by the Court of Appeal that the right to use the Park was an easement. The Court of Appeal also set out the four essential characteristics of an easement. These are that first, there must be a dominant and servient tenement. Second, that an easement must accommodate the dominant tenement. Third, that the dominant and servient tenement must be different persons. Fourth that a right over land cannot amount to an easement unless it is capable of forming the subject-matter of a grant.[7]

2.1.2 Easements Appurtenant and Easements in Gross

At common law, there are two classes of easements: easements appurtenant and easements in gross. An easement appurtenant confers a benefit on one piece of land, called the dominant tenement, by imposing a restriction or an obligation upon an adjoining parcel of land called the servient tenement. Both the benefit and burden run with the land. An easement in gross requires no dominant tenement. As a rule easements in gross were not recognized at common law.[8] Where easements in gross were recognized, they were still susceptible to easy destruction by a transfer of the burdened land or a purported transfer of the easement benefits.[9]

2.1.3 Negative and Positive Easements

Easements could be positive or negative. Positive easements require some things to be done on the servient tenement for the benefit of the dominant tenement e.g. establishment of a right of way. Negative easements prohibit the doing of some things on the servient tenement for the benefit of the dominant tenement e.g. prohibiting the construction of a

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[7] Gaunt, J. and Bowles M. 1959 *Gale on Easements* (13th edition) London: Sweet & Maxwell.
[8] *Ibid.*
[9] *Ibid.*

building on the servient tenement if such building would obstruct the view of the dominant tenement. As a general rule however, an easement could not impose an affirmative duty on the holder of a servient tenement to the benefit of the dominant tenement.[10]

2.1.4 Creating Easements

(a) By Statute

Although the origins of easements were in Common law, statutory reform on land law in England recognized easements as interests in land and capable of being conveyed or created at law. It is worth noting that the power of a public institution to acquire land compulsorily did not of itself provide the authority to acquire an easement over land that is not subject to the acquisition.[11]

(b) Creating Easements Inter Partes by Express Grant or Reservation by Deed

An individual land owner can subject his land to an easement for any estate or interest for which the land can be alienated. However, there must be consent for the easement if such is required.[12] The conditions however is that a grantor must be competent to grant the easement.[13] For example, a corporation that holds land can only grant an easement that is consistent for the purpose for which the corporation holds land.[14] Also, a person entitled to land cannot grant an easement over it that is more extensive than his own interest in

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[10] *Ibid.*
[11] *Sovmots Investments Limited* v. *Secretary of State for the Environment* [1979] A.C. 144.
[12] *Oakley v. Boston* (1976) Q.B. 270.
[13] *Supra* note 7, referencing *Re Gonty and Manchester, Sheffield and Lincolnshire Railway C.* [1896] 2 Q.B.
[14] *Ibid.*

the land.[15] A legal easement can only be granted *inter vivos* by deed and an easement that is granted otherwise than by deed is an easement in equity and it is not binding on a purchaser for value of the servient tenement without notice.[16] Where the testator disposes the dominant and servient tenements separately, an easement may be created by will over the servient tenement to benefit the dominant tenement.[17]

(c) Creation of Easements by Implication

Easements may also be inferred by implication under a grant including a lease and a testamentary gift of land where it can be shown that there was an intention to grant an easement even when the grant does not expressly grant or reserve an easement.

i. Implied Grant or Reservation by Necessity

An easement may be inferred out of necessity where it is shown that in the absence of a means of access or other right, the land granted or retained would be otherwise completely inaccessible or unusable.[18]

ii. Implied Grant or Reservation by Common Intention

An easement may be inferred where the grant contain words of description that imply that the parties intended to create an easement. And in such a case, estoppel can also apply to prevent the grantor from denying that an easement did not exist. [19] Easements can also be inferred by where circumstances of the case indicate that the land granted would be used in some particular manner.[20] An easement may be inferred under the doctrine of non-

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[15] *Beddington v. Atlee* [1887) Ch. D. 317, 327; *Paine & Co. v. St. Neots Gas & Coke Co.* [1938] 4 All E.R. 592.
[16] *Supra* note 7p. 105 Para 3-12.
[17] *Ibid.*
[18] *Ibid* at para 3-17 pp. 109.
[19] *Mellor v. Walmesley* [1905] 2 Ch. 164, 175.
[20] *Sovmots* at *supra* note 11.

derogation from grant on the basis that none can impede the purpose of his grant.[21]

iii. Implied Easements Wheeldon v. Burrows

The rule in *Wheeldon v. Burrows*[22] applies in circumstances where an owner of a piece of land disposes of a part of it and a question exists as to whether the grant of land also creates an easement over the land retained. The rule is that the only easements that can be inferred out of necessity are those that are necessary for the reasonable enjoyment of the parcel conveyed to another landowner.[23]

(d) Creation of Easements by Prescription

A prescription is defined as a "title acquired by use or enjoyment had during the time and in the manner fixed by law."[24] The period necessary is determined at Common Law and by Statute. The manner of enjoyment is also important in determining whether or not an easement can exist by prescription. The maxim *nec vi, nec clam, nec precario* established by civil law[25] encapsulates the manner of enjoyment necessary to create an easement by prescription and has been adopted in common law in *Mills v. Colchester Corporation*[26] with regard to easements thus "In the case of prescription, long enjoyment in order to establish a right must have been as of right and therefore, neither by violence, nor by stealth nor by leave asked from time to time."

i. Prescription at Common Law

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[21] *Brown v. Flower* [1911] Ch. 219, 226.
[22] [1879] 12 Ch. D. 31.
[23] *Supra* note 7 Para 3-39 pp. 123.
[24] *Supra* note 7 Para 4-01 pp. 169.
[25] In *supra* note 7 pp. 209 Para 4-64 (Cod. 3, 34, 1, de serv; Dig. 8,5,10 si serv, vid).
[26] (1867) L.R. 2. C.P. 476, 486.

Under Common law, the time fixed for a prescription is a period that is as long as the memory of man-"during the time whereof the memory of man runneth not to the contrary.'[27]

ii. Lost Modern Grant Doctrine

The doctrine of lost modern grant arises when "the court finds an open and uninterrupted enjoyment of property for a long period unexplained." The court then finds a lawful origin for the right in question by implying that a grant would have existed and was lost.[28]

iii. Prescription by Statute

The period necessary to create a right of easement may also be set in Statute. The Kenyan context for creation of easements by prescription is discussed below.

2.1.5 Extinguishing Easements

Easements may be extinguished by an express provision in a deed which is then registered.[29] Also, Easements may be extinguished by implied release thus, a way of necessity is limited by the necessity that created it and the end of that necessity extinguishes the right of way.[30] An easement is also extinguished by the unity of ownership of the dominant and servient tenement. This situation would arise when the dominant and servient tenements come under the ownership o one person.[31] An easement can also be extinguished by operation of law from express words of a statute. An example is with change of title over land from customary to registration in which registration

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[27] *Supra* note 7at pp. 170.
[28] *Attorney General v. Simpson* [1901] 2 Ch. 671, 689 per Farwell J.
[29] *Supra* note 7.
[30] *Holmes v. Goring* (1824) 2 Bing. 76.
[31] *Metropolitan Ry.* v. *Fowler (1892)* 1 Q.B. 165.

provides a new title. The court in *New Windsor Corporation* v. *Taylor*[32] held that where an Act of Parliament has according to its true construction, 'embraced and confirmed' a right which had previously existed by custom or prescription, that right becomes henceforward a statutory right, and the lower title by custom or prescription is merged and extinguished by the higher title derived from the Act of Parliament.

2.2 Easements Distinguished from other Interests in Land

2.2.1 Profits Aprendr'e

From the foregoing discussions, easements can be distinguished from other interests in land. One of these interests is Profits Aprendre. While an easement relates only to the user of land, a *profit a' prendre in solo alieno* confers a right to take from land some part of the soil or under the soil or some part of the natural produce of the land.[33] However, the rules and principles governing acquisition, extinguishment and disturbance of easements also apply to profits a prendre. While easements cannot exist in gross, profits exist in gross, and a person to whom a profit a prendre is granted does not have to own land that can be benefited by the profit.

2.2.2 Restrictive Covenants

A restrictive covenant is an agreement by one proprietor restricting the building on or the user or other enjoyment of his land for the benefit of the proprietor of other land.[34] Restrictive covenants are negative in nature, requiring the proprietor of a parcel of land to refrain from doing something. Easements on the other hand can be positive or negative.

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[32] [1899] 1 Q.B. 165 per Lord Davey.
[33] *Supra* note 7 citing *Alfred F. Beckett Ltd* v. *Lyons* [1967] Ch. 449, 482 per Winn L.J.
[34] Registered Land Act (No.25 of 1963) Government Printer; Nairobi s. 95.

The effect of a restrictive covenant may be restricted to the proprietors that created it or may pass on to their successors in title depending upon the agreement that creates the covenant.[35] Unlike easements, restrictive covenants are not registered on the property section of the land of the proprietor to be benefited as they do not run with the land. The Restrictive covenant is only binding if it is registered but registration does not grant the covenant any greater force or validity than it would otherwise have had if it had not been registrable and had not been so registered.[36]

2.2.3 Licences

A licence is a permission given voluntarily. It is distinguished from a profit a' prendre in the sense that a licence does not involve the right to take away material from land. A personal licence is essentially a right of user that, unlike an easement, is not attached to land and is not incident to a tenancy.[37] A licence granted on terms of payment is treated as part of the contract under which it is given and a contractual licence does not create a proprietary right in or over land.[38]

2.3 The Law Relating to Easements in Kenya

By virtue of the Judicature Act [39] English law of easements is applied in Kenya vide named Acts of the United Kingdom Parliament, the substance of common law, the doctrines of equity and the statutes of general application in force in England on 12 August 1987. Thus in *Kamau* v. *Kamau* for example, the court of appeal recognized

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[35] *Ibid.*
[36] *Ibid* at s. 95 (3).
[37] *Supra* note1 pp. 71 para 1-119.
[38] *Ashburn Ansalt* v. *Arnold* [1988] Ch. 1.
[39] Cap 8 Laws of Kenya (Act No. 16 of 1967) Government Printer; Nairobi.

equitable easements, creation of easements by necessity, and creation of an easement by operation of law (prescription).[40]

2.3.1 The Registered Land Act

The Registered Land Act came into force in September 1963 as a statute providing or registration of title to land and for regulating dealing in land registered under the Act.[41] The Act provides for easements and how they can be created on registered land as well as extinguished. The Act applies the Common Law easement as it defines an easement as:-

> A right attached to a parcel of land which allows the proprietor of the parcel either to use the land of another in a particular manner or to restrict its use to a particular extent, but does not include a profit[42].

This definition embodies the common law concept of dominant and servient tenement in that the right is one attached to land, that there are two different parcels by allowing the use of one land for the benefit of another land. And it also distinguishes the easement from a profit by applying the Common Law definition of a profit as "...the right to go on the land of another and take a particular substance from that land, whether the soil or products of the soil."[43] The rules regarding the creation of profits are similar to those of an easement under the Registered Land Act[44] with the exception that a profit can be enjoyed either as a profit appurtenant to other land or in gross[45] and a profit in gross can be dealt with as though it were land.[46]

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[40] *Kamau* v. *Kamau* Civil Appeal No. 45 of 1983 (2006) 1 KLR (E&L) 105-119.
[41] Registered Land Act Ch. 300 Laws of Kenya at Preamble.
[42] *Ibid* at s.3.
[43] *Ibid* at s. 3.
[44] *Ibid* at s. 96.
[45] *Ibid at* s. 96 (2) (a).
[46] *Ibid at* s. 96(5).

The Registered Act also distinguishes an easement from a licence, defining the licence as a permission given by the proprietor of land or a lease which allows the licensee to do some act in relation to the land or the land comprised in the lease which would otherwise be a trespass, but does not include an easement or a profit.[47] A licence is not capable of registration under the Registered Land Act and it is ineffective against bona fide purchaser for value. The only way that the interests of a licensee are protected is by way of a caution lodged against the property.[48]

An easement is also distinct from a restrictive covenant, which the Act defines as an agreement by one proprietor restricting the building on or the user or other enjoyment of his land for the benefit of the proprietor of other land.[49] Unlike an easement, the restrictive agreement is entered only in the encumbrance section of the register of the land burdened by the restrictive agreement. A restrictive agreement does not therefore create a property right. Further the registration of a restrictive agreement does not in any way grant validity or greater force to a restrictive agreement than it would have had even without registration. This is despite the fact that the benefit and burden of a restrictive covenant may be binding not only to the proprietors of the respective land so benefited or burdened but also to their respective successors in title.[50]

The Registered Land Act provides for two ways in which an easement may be created. One is the creation of an easement by a proprietor of one parcel by a prescribed form

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[47] *Ibid* at s. 3.
[48] *Ibid* at s. 100.
[49] *Ibid* at s. 95 (1).
[50] *Ibid* at s.95 (4).

granting an easement to the proprietor of another land for the benefit of that other land.[51] The other is through a transfer or lease in which the transferor of land or the lessor may grant an easement over land retained by him for the benefit of the parcel transferred or leased. The Act provides for the aspects that a deed creating an easement must specify and these are: the nature of the easement, the period for which it is granted, any limitations to the enjoyment of the easement so granted, the land burdened by the easement and the land that enjoys the benefit of the easement.[52]

An easement created over a lease is limited to the duration of the lease.[53]A deed creating the easement must be registered as an encumbrance in the register of the burdened land and in the property section of the land that it benefits.[54] The deed is then filed.[55] Any ancillary rights necessary for the enjoyment of an easement may be implied in the grant of an easement and these rights would not be unenforceable for the necessary and effective enjoyment of the easement.[56] An easement on registered land may be extinguished by express release contained in a prescribed form that is then used to cancel the easement.[57] The easement may also be extinguished by cancellation upon application by an affected person on proof of either of two grounds. One is that the period of time for which the easement was intended to subsist has expired and the other is that an event upon which the easement was intended to determine has occurred.[58]

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[51] *Ibid* at s. 94.
[52] *Ibid* at s. 95(3).
[53] *Ibid* at s. 94 (5).
[54] *Ibid* at s. 94 (4).
[55] *Ibid.*
[56] *Ibid* at s. 100.
[57] *Ibid* at s. 97.
[58] *Ibid* at s. 97(2) (a) & (b).

The court has powers to extinguish an easement on land registered under the Registered Land Act. This may be done on application of any person interested in the land affected by the easement and applies as well to easements that may have been created prior to the coming into force of the Registered Land Act.[59] The court may issue an order to wholly or partially extinguish or modify the easement and may order payment of compensation to any person suffering loss as a result of such order.

The applicant would have to show either that easement has become obsolete as a result of circumstances including changes in the character of the property or neighbourhood or that the continued existence of the easement impedes or is likely to impede the reasonable user of the land without securing practical benefits to the other person. The applicant may also show that the extinguishment or modification of the easement will not injure the person entitled to the benefit of the easement.[60]

2.3.2 The Water Act 2002

The Water Act, 2002 provides for among other things the management conservation, use and control of water resources and for the acquisition and regulation of rights to use water. It uses the term easement as the right to occupy so much of the lands of another a may be necessary for or incidental to the construction or maintenance of works authorized by the Water Act or the exercise of rights conferred by a permit issued pursuant to the Water Act.[61]The easement created under the Water Act is in essence an easement in gross that does not require the person to whom an easement is granted to

[59] *Ibid* at s. 98 (1).
[60] *Ibid* at s. 98 (1) (a)-(c).
[61] Water Act (No 8 of 2002) Government Printer; Nairobi s. 2.

own land that can be benefited by the easement. The use of this easement is also restricted to purposes of the water act and to persons with a permit or for works authorized under the Water Act. A person who holds a permit issued under the Water Act is authorized to construct works over another persons land and to acquire an easement over such land on the portion on which the works would be constructed.[62]

The Water Act makes elaborate provisions for the acquisition of easements and the rights arising out of such easement.[63] The easement includes right of access to any piece of land contiguous to the water of a permit holder. The right is only as far as may be necessary for purposes of constructing, inspecting, maintaining, operating or repairing the works of the permit holder. The permit holder is required to give notice to the occupier of the land of their intention to enter the land for purposes of the easement. The easement holder has the responsibility of maintaining the part of land that the easement applies to ensure that it does not cause flooding and to remove weeds, silt and other obstruction or nuisance.

Creation

An easement under the Water Act is created by a notice issued by a permit holder to the land owner over whose land an easement is desired. A copy of the notice is issued to the Water Resources Management Authority established under the Water Act. The easement is subsequently by deed upon agreement us to the particulars of the easement.[64] The information provided in a notice includes a description of the proposed works, the amount of water to be dealt with and a designation of the area of land that will be affected by the works. The permit holder is required also to indicate the amount of compensation

[62] *Ibid* at s. 28.
[63] *Ibid* at third schedule.
[64] *Ibid* at third schedule s. 7.

that he wishes to offer and the duration of the easement.[65] The deed creating the easement is executed by the grantor and the grantee is registered with the Registrar of titles and a copy is sent to the Water Resources Management Authority.

An easement for purposes of the Water Act may also be created by compulsory acquisition in the event that the landholder does not consent to the notice claiming an easement. The permit holder applies to the Authority for an easement over another person's land and the Authority may grant the easement with or without modifications and with the amount of compensation payable to the landholder.[66] The landholder is then presented with a deed embodying the particulars of the easement granted by the Water Resources Management Authority for execution. The Water Resources Management Authority can also execute the deed on behalf of the landholder without his consent and the deed is registered by the Registrar of Titles against the title of the land. The landowner has a right of appeal to the Water Appeal Board[67] against the compulsory acquisition of the easement.[68]

Extinguishment

An easement may be extinguished by the Registrar of Titles upon notification by the Water Resources Management Authority that the easement has lapsed[69]. An easement is said to have lapsed if the works authorized under the permit are not completed and the water is not utilized within one year from the date of acquiring the easement or any other

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[65] *Ibid at t*hird schedule s. 6 (1).
[66] *Ibid* at Third Schedule s. 9(1).
[67] *Ibid* s. 84 (1) - establishment of the Water Appeal Board.
[68] *Ibid* at third schedule s. 9.
[69] *Ibid* at s. 10(1).

period determined by the authority. An easement is said to have lapsed also in the event that the permit holder fails to utilize the permit for a continuous period of two years or a longer period that the Water Resources Management Authority may designate. An easement can also be extinguished upon cancellation of a water permit and in such a case; all the works created by the permit holder become the property of the landowner unless removed by the landholder within a period of two years.[70] Extinguishment is completed by cancellation of the easement from the Register of Titles.[71]

2.3.3 Limitations of Actions Act (Cap 22)

An easement may be created by prescription as set out in the Limitations of Actions Act.[72] The period provided in the Limitations of Actions Act for the acquisition of an easement is twenty years.[73] The creation of easements by prescription applies to any easement including an easement for access to light, air or access to a building as well as any way or watercourse provided that such easement has been enjoyed without interruption and as of right. Easements created by prescription are absolute and indefeasible.

2.3.4 Wayleaves Act

The Wayleaves Act[74] creates a statutory easement in gross by granting to the government the right to carry any sewer drain or pipeline through any land provided that there is no

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[70] *Ibid* at s. 17(2).
[71] *Ibid* at s. 18.
[72] Limitations of Actions Act Cap 22 Laws of Kenya.
[73] *Ibid* at s.32.
[74] Cap 292 of the Laws of Kenya.

interference with existing buildings on the land.[75] The government is not required to have a parcel of land that may be benefited by the right. Compensation is payable to a landowner whose trees or crops may be destroyed by the works carried out as a result of the easement.

2.4 Legal Framework for Environmental Easements

The Environmental Management and Coordination Act 1999(Herein after 'EMCA') was enacted as a legislation to establish an appropriate legal and institutional framework for the management of the environment. The rationale behind the enactment of EMCA was the need to for coordination of various sectoral initiatives and to improve the capacity of government to manage the environment. This is because the environment is the foundation of national economic and social, cultural and spiritual advancement.[76]

EMCA provides a broad definition of environment as including 'the physical factors of the surroundings of human beings including land, water, atmosphere, climate, sound, odour, taste, the biological factors of animals and plants and the social factor of aesthetics and includes both the natural and the built environment.'[77] The Act provides for Environmental Easements as one mechanism for the conservation and protection of the environment.[78]

2.4.1 Definition and Characteristics of Environmental Easements

The Act does not give a definition of an environmental easement but provides for the

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[75] *Ibid* at s. 3.
[76] Environmental Management and Coordination Act, 1999 (Kenya Gazette Supplement No. 3 (Acts No. 1) of 2000 Government Printer; Nairobi.
[77] *Ibid.*
[78] *Ibid* at part IX s. 112-116.

purpose and characteristics of it. However, the nature of an environmental easement is an easement capable of existing as an easement appurtenant or in gross. This is because the environmental easement consists of one or more obligations in respect of the use of land to facilitate conservation and enhancement of the environment. The land upon which the easement is imposed is referred to as the 'burdened environment'. And in place of another parcel to be benefited, the Act provides for a 'benefited environment'.[79] The benefited environment may as per definition of an environment[80] include land in which case it would be an easement appurtenant or an aspect of the environment, which would make it an easement in gross in the absence of a parcel of land to be benefited.

Probably for the avoidance of doubt, EMCA provides expressly that 'an environmental easement may exist in gross; that is to say, the validity and enforceability of the easement shall not be dependent on the existence of a plot of land in the vicinity of the burdened land which can be benefited or, of a person with an interest in that plot of land who can be benefited by the environmental easement.[81] This provision allows the burden imposed on a parcel of land to benefit an environment without having to show the beneficiary of that environment and without having to show the existence of a parcel of land that can be benefited.

2.4.2 Conservation Objectives of Environmental Easements

While the general purpose of an easement at Common Law and the Statutory easement under the Registered land is to enhance the use or enjoyment of another parcel, the

[79] *Ibid* at s. 112 (2).
[80] *Ibid.*
[81] *Ibid* at s. 112 (6).

general purpose of the environmental easement is to 'further the principles of environmental management.[82] It is noteworthy that the principles of environmental management are not set out expressly in the Act, but may be inferred from the provisions relating to environmental conservation orders that may be imposed on land burdened with an environmental easement. These include[83] preservation of flora and fauna; preservation of quality and flow of water in a dam, lake, river or acquifer, preservation of outstanding geological, archeological or historical features, preservation of scenic view, open space, public access, preservation of natural contours, restricting mining, restrict agricultural activity, creation or maintenance of migration corridors for wildlife.

In addition to restricting the use of land, which gives the environmental easement the character of a negative easement, the grant of conservation orders over the burdened land for the purposes outlined above gives the environmental easement the character of a positive easement. That is to the extent that an environmental conservation order would also require the owner of the burdened land to carry out activities to enhance the environment that is to be benefited by the easement. Of particular importance to this dissertation is the use of environmental easements for purposes of conserving wildlife habitat outside protected areas and the potential for this is explored in greater detail in chapter three of this thesis.

2.4.3 Creating, Enforcing and Extinguishing Environmental Easements

An environmental easement is created by the court upon application for a grant of one or

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[82] *Ibid* at s. 112 (2).
[83] *Ibid* at s. 112 (4) (a)-(k).

more environmental easements.[84] The court has broad powers in creating an environmental easement as it may impose conditions on the grant of an environmental easement as it considers to best advance the object of the environmental easement. EMCA does not create an opportunity for the creation of an easement *inter partes* voluntarily by deed. The creation of an environmental easement is one of compulsory acquisition through court.[85]

The Act provides for the payment of compensation to the landowner or any person that has a legal interest in the land upon whose land an environmental easement is imposed.[86] Compensation is to be awarded upon application by the person with the legal interest in the land upon which an environmental easement is granted. The applicant needs to show the nature of the legal interest and the compensation that is sought to be paid. The court may order that compensation awarded be paid by the grantee of the environmental easement or if the court considers the easement that is sought to be of 'national importance' it may order that the government pays for the easement.

The amount of compensation calculated in accordance with the provisions of the Constitution and the laws relating to compulsory acquisition of land.[87] The provisions of the Land Acquisition Act[88] would be the current governing law on compensation of environmental easements. This provision may present certain complexities and this is discussed further in chapter three in the context of the application to the provision one

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[84] *Ibid* at s. 113.
[85] *Ibid*.
[86] *Ibid* at s. 116.
[87] *Ibid* at s. 116 (1) - (5).
[88] Cap 295 Laws of Kenya (Act No. 47 of 1968) Government Printer; Nairobi.

environmental easement for conserving wildlife habitat.

The right of enforcement of environmental easements is limited to the person in whose name the environmental easement is issued by the court. Such a person may institute proceedings to enforce the easement and may request the court to issue an environmental restoration order.[89] Such an order may require the landowner against whom it is issued to restore the environment to as near the state to which it was before the action against which the easement is to be enforced was taken. The court may also grant any remedy available under the law relating to easement in respect of land. The court also has broad powers at its discretion to adapt and adjust the law and procedures relating to the enforcement of the requirements of an environmental easement.[90]

Once imposed by court, an Environmental Easement must be registered against the title of land upon which it is imposed.[91] The system of registration applicable is the system of land registration provided by the statute applicable to that particular system of registration of easement. This means that under the Registered Land Act[92] the environmental easement would be registered in the encumbrance section of the land burdened but may not in the absence of a parcel of land to be benefited be entered in the property section of any parcel.

In the event that an Environmental Easement is imposed on unregistered land, such

[89] Environmental Management and Coordination Act *supra* note 76 at s.114 (2) (a).
[90] *Ibid* at s. 108 (2) (b) & s. 102 (3).
[91] *Ibid* at s. 115.
[92] Chapter 300 of the Laws of Kenya (No. 25 of 1963) Government Printer; Nairobi.

easement would be entered in a register[93] maintained by the District Environment Committee. The committee is established under EMCA[94] as a committee of the National Environment Management Authority also created by EMCA.[95] With regard to all registrations of easement whether on registered or unregistered land, the name of the applicant for the environmental easement would be entered as the person in whose name the environmental easement is registered.[96]

EMCA does not make an express provision for the manner in which an easement may be extinguished. Because environmental easements have not as at the time of writing this thesis been implemented, it can only be implied that a court would have powers to extinguish an easement upon application of either the easement holder or the person on whose land an easement is imposed and it may also be inferred that a compelling argument may be made for extinguishing an environmental easement on the ground that the circumstances of the environmental easement have changed and the easement can no longer achieve the purpose for which it was imposed and its continued existence presents an undue limitation of the enjoyment of the land by its owner.

2.4.4 Land Control Act and its Implications for use of Environmental Easements

The Land Control Act[97] entered into force in 1967 as a statute to control transactions in agricultural land. This Act is relevant to the legal framework for easements as it seeks to control transactions in land which by implication include easement. The transactions

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[93] Environmental Management and Coordination Act *supra* note 76 s.115 (2).
[94] *Ibid* at s.29.
[95] *Ibid* at s. 7.
[96] *Ibid* at s. 115 (3).
[97] Cap. 302 of the Laws of Kenya (No. 34 of 1967) Government Printer Nairobi.

affecting agricultural land and to which the Act applies are sale, transfer, lease, mortgage, exchange, partition or other disposal or dealing with any agricultural land.[98] Easements, whether those under the Registered Land Act or Environmental Easements under EMCA could be inferred as being 'dealings' in land and would be within the control of the Land Control Act in so far as they would apply to agricultural land.

Agricultural land is defined very broadly to include land that is not within a municipality or a township, or a market. The Land Control Act establishes a Land Control Board (LCB) that considers and grants consent to controlled transactions over agricultural land.[99] The transactions exempted from the Land Control Act include the transmission of land by will or intestacy of a deceased person. This is limited to transmission that does not involve the subdivision of the land into two or more parcels to be held under separate titles. A transaction involving the government, the Settlement Fund Trustees or a County Council is also exempt.[100]

The effect of the land control act is that it renders void any controlled transaction to which the land control board has not granted consent.[101]An instrument creating a controlled transaction is also incapable of being registered by the registrar of titles unless the required consent is granted.[102] This would mean that an easement that requires to be registered for it to take effect would be of no effect if the land control board withholds its consent.

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[98] *Ibid* at s. 6(1).
[99] *Ibid* at part II s. 3- 5.
[100] *Ibid* at s. 6 (3) (a)-(b).
[101] *Ibid* at s.6.
[102] *Ibid* at s. 20.

An application for consent of the land control board is made in a prescribed form and within six months after the agreement for the controlled transaction is concluded and may be made by any party to the agreement. A right of appeal to the decision of the land control board lies with the Central Land Controls Board established under the Land Control Act.[103] The Land Control Board has a wide discretion in deciding whether or not to grant consent to a controlled transaction including considering the effect of their decision to the economic development of the land concerned as well as the ability of the grantee to maintain standards of good husbandry. The Board may also consider whether or not the terms and conditions of the transactions are unfair or disadvantageous to one of the parties to the transaction.[104]

The Land Control Board is however required to limit its consent to the sale, transfer, lease exchange or partition of land to citizens of Kenya, a private company limited or cooperative society all of whose members are citizens of Kenya and group representatives under the Land (Group Representatives) Act[105] and a state corporation established pursuant to the State Corporation Act.[106] Nevertheless, the President may at his discretion and upon application by a party exempt any person in respect of controlled transactions or a controlled transaction from the provisions of the Land Control Act. Such exemption is effected by notice in the Gazette.

The provisions of the Land Control Act would apply to most of the land that contains

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[103] *Ibid* at s. 13.
[104] *Ibid* at s.9.
[105] Cap 287 Laws of Kenya (Act No. 36 of 1968) Government Printer; Nairobi.
[106] Cap 446 Laws of Kenya.

wildlife outside protected area and on which an environmental easement may be used to conserve migratory corridors. The provisions of the land control act presumes that the controlled transactions would be voluntary between willing parties as such is usually the case for the transactions envisaged under the land control act. However, the Environmental Management and Coordination Act provides that any person or a group of persons may apply to the high court for a grant of environmental easement.[107] This provision would include persons or entities that would otherwise not have been eligible to hold interests in land either by virtue of being non citizens or as by virtue of being established as legal entities in any other way other than as companies or cooperatives or as government corporations. The provisions of the Land Control Act would therefore not be applicable to an environmental easement imposed by court.

There seems therefore to be *prima facie* a conflict between the provisions of the Environmental Management and Coordination Act and the Land Control Act with regard to persons that can hold environmental easements as interests in land. The Environmental Management and Coordination Act was enacted much later than the Land Control Act and it provides that any prior written law relating to the management of the environment shall have effect subject to modifications necessary to give effect to the provisions of the Environmental Management and Coordination Act and any provisions conflicting with it would be void. Land is an aspect of the environment and therefore the Land Control Act is a legislation relating to the management of the environment particularly because good husbandry and ability to manage land are some of the issues that the Land Control Board

[107] Environmental Management and Coordination Act, 1999 (Kenya Gazette Supplement No. 3 (Acts No. 1) of 2000 Government Printer; Nairobi s. 113.

is expected to have regard in considering whether or not to consent to a controlled transaction.

CHAPTER 3

PROPERTY RIGHTS IN LAND AND THEIR IMPLICATIONS FOR THE USE OF ENVIRONMENTAL EASEMENTS FOR WILDLIFE CONSERVATION

3.1 An Overview of the Land Tenure Systems Outside Protected Areas

Wildlife habitat outside protected areas falls under three different land tenure systems. These are Government Land, Private Land and Communal Land. Within the Communal land tenure system, there are Trust Lands and Group Ranches. These land tenure systems present certain challenges to wildlife conservation outside protected areas in the context of the constitutional right to property and the powers of government to regulate land use to ensure that wildlife habitat is conserved.

3.1.1 Private Land

With regard to private land, the quantum of rights of private land ownership is set out in the 1882 Transfer of Property Act of India or the Registered Land Act. A process of adjudication and registration establish the specific land interests. There are currently two systems of registration of land in the form of registration of documents and registration of title.[1] The legal provisions for registration of documents are found in the Registration of Documents Act[2] and the Land Titles Act[3] and the Government Lands Act.[4] While the provisions for registration of titles is comprised in the Registration of Titles Act[5] and the Registered Land Act.[6] The registration of document system involves the registration of the document or deed and not the title. The document itself rather than the register proves

[1] Tudor Jackson *the Law of Kenya* Kenya Literature Bureau; Nairobi (1970) p. 263.
[2] Cap 285 Laws of Kenya.
[3] Cap 282 Laws of Kenya.
[4] Cap 280 Laws of Kenya.
[5] Cap 281 Laws of Kenya.
[6] Cap 300 Laws of Kenya.

title. It is a record of isolated transactions in land. [7]

Transfer of Property Act of India

The Transfer of Property Act of India (ITPA) was extended to the Protectorate in 1897 under the East African Order in Council, 1897 article 11(b). The ITPA is supplemented with the common law of England and doctrines of equity and statutes of general application in force in England on 12th August 1897. The ITPA provides for two types of Estates in land- Freeholds and Leaseholds. The duration of an estate in freehold is uncertain though limited and is further divided into three classes, namely fee simple estate, fee tail and life estate and an *estate par autre vie.*

Leaseholds are an estate for a fixed term of years and are distinct from freeholds in the sense that the maximum duration of leaseholds is fixed in term. The estate in leaseholds may be further categorized into three; leaseholds may be fixed in term for certain duration. This may be for ninety nine (99) years or they may be fixed in term with a duration that is capable of being ascertained for example from year to year. Leaseholds may be in the form of tenancies at will and tenancies at sufferance. A tenant at will cannot alienate land and this tenancy does not create a definite estate. A tenancy at sufferance is one that initially starts as a tenancy but the tenant continues in possession of the estate even after the tenancy has expired.

Registration of Documents Act

The Registration of Documents Act was originally enacted for the registration of long

[7] *Supra* note 1 at p. 264.

leases that were granted to the crown and converted to freehold interests. It is applied to unadjudicated claims at the Coast. Registration is mandatory for all documents affecting any right or interest in land and including mortgages, conveyances, assignments or leases for more than a year. The Land Titles Act was previously the Land Titles Ordinance 1908. It was enacted to facilitate alienation of Crown Land at the Coast for the purpose of distinguishing between private land and crown land situated within the ten mile coastal strip.[8] The Act does not define land but considers it as consisting immovable property which includes land, benefits to arise out of land and things attached to the earth or permanently fastened to anything attached to the earth. The definition does not include standing timber (other than coconut trees), or growing crops or grass as part of land.[9]

Land Titles Act

The Land Titles Act provides for three certificates of titles- Certificates of Ownership that grant freehold (fee simple) title granted to persons claiming an estate in fee in land; a Certificate of Mortgage granted to mortgagees of immovable property; and Certificate of Interest granted to persons with rights and interests as owners of immovable property (other than land) or with rights by way of lease, encumbrance, charge, lien contract or other interest in any immovable property. The interests excepted in the certificate of interests exclude rights included in a certificate of ownership or mortgage as well as rights in remainder, reversions or expectancy over immovable property.[10]

A certificate of title is conclusive proof against all persons and the government of the

[8] *Supra* note 1.
[9] Land Titles Act Cap 282 Laws of Kenya s. 3.
[10] *Ibid* at s. 20.

matters contained in the certificate including being conclusive proof as to the ownership of coconut trees, houses and buildings on land over which the certificate is granted as at the date of the certificate.[11] All subsisting particulars of the land including mortgages, and other encumbrances or of any lease to which the property is subject and of the right or interest in the property as at the date of the certificate are noted on the certificate.

Registration of Titles Act

The Registration of Titles Act was first enacted in 1920. It applies to all land granted by the government as fee simple or term of years before 1920 or land that is subject to certificates of Ownership, Mortgage or interest issued by the Recorder of Titles under the Land Titles Act. It applies also to leaseholds converted from the terms of 99 or 999 years to freeholds and to any titles converted on a voluntary basis from Government Lands Act or Land Titles Act to Registration of Titles Act.[12] The Act defines land as including land and benefits that arise out of land or things embedded or rooted in the earth, or attached to what is so rooted or attached. Land also includes any estate or interest in land together with all paths, passages, ways waters watercourses, liberties, privileges, easements, plantations and gardens thereon. [13]

The Registration of Titles Act introduced the Australian Torrens system of title registration in that the register should accurately and completely and beyond all arguments reflect the current facts that are material to title. The register is the source of all information concerning title and in the event of error on the register, the person that

[11] *Ibid* at s.21.
[12] Registration of Titles Act cap 281 s. 6.
[13] Registration of Titles s. 2.

suffers loss must be put in the same position as far as money can do as if the register were correct.[14]

The title under the Registration of Titles Act consists of a grant or certificate of title issued to the proprietor. A duplicate of the title is kept in the Registry. (Coast Titles are prefixed C.R. No... while up-country titles I.R. No... titles issued under the Trust Land Act (Cap 288) and registered under the Registration of titles are prefixed I.R.N. No...) Registration is mandatory for all conveyances such as transfers, charges and certain leases. Registration is not required for documents specified in the Act[15] which are essentially agreements that do not create, declare, assign, limit or extinguish any right to title. The certificate of title issued under the Registration of titles Act is conclusive evidence that the person named in the title as the proprietor of the land is the absolute and indefeasible owner subject to encumbrances, easements, restrictions and conditions contained in the title. Such title can only be challenged on ground of fraud or misrepresentation to which the person named as proprietor is proved to be a party.[16]

Registered Land Act

The Registered Land Act was enacted in 1963 for the purpose of providing for registration of land owned by indigenous Africans to be registered pursuant to the *Swynnerton Plan*[17] and the recommendations of the East African Royal Commission.[18]

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[14] Tudor Jackson *supra* note 1 at p. 264.
[15] *Supra* at note 13 at s. 40
[16] *Ibid* at s. 23.
[17] Swynnerton, R.J.M. 1995 *A Plan to Intensify the Development of African Agriculture in Kenya*, Nairobi, Kenya: Government Printer.
[18] East African Royal Commission Report (1955) Cmnd 9475, paragraph 77 p. 32.

The Registered Land Act defines land as including land covered with water, all things growing on land and buildings and other things permanently affixed to land.[19] Registration under the Registered Land Act confers two classes of interests in land- absolute proprietorship of land and proprietorship of lease. Registration of a person as the proprietor of land confers upon such person absolute proprietorship over the land together with all rights and privileges belonging or appurtenant to the land.[20] Registration as the proprietor of a lease vests in the person so registered the leasehold interest described in the lease together with all implied and expressed rights and privileges and subject to all implied and expressed agreements, liabilities and incidents of the lease.[21]

The absolute proprietorship interest in land created by the Registered Land Act is akin to the fee simple estate under the ITPA. However the Registered Land Act provides both the substantive and conveyance law with relation to land registered under it. The Transfer of Property Act 1882 of India ceases to apply upon the first registration of any land under the Registered Land Act except with respect to dealings in land before the first registration.[22]

The only restrictions against absolute proprietorship over land are those that are registered against the title to the land[23] and overriding interests listed in section 30 of the Registered Land Act. Overriding interests are restrictions that need not be registered including rights of way, rights of water and profits, natural rights of light, air, water and

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[19] *Supra* note 9.
[20] *Ibid* at s. 27 (a).
[21] *Ibid* at s. 27(b).
[22] *Ibid* at s. 164.
[23] *Ibid* at s. 28 (a).

support, rights of compulsory acquisition, entry search and user conferred by written law, leases for a term less than two years, periodic tenancies, electric supply lines, telephones and telegraph lines or poles, dams, canals laid pursuant to any written law. Like the fee simple estate the absolute proprietorship over land is an estate that is unlimited in time and can be transmitted over generations forever. An absolute proprietor can grant leases. The Registered Land Act is supplemented by the common law of England as modified by the doctrines of equity and applies in relation to land, leases and charges and interests in land.[24]

3.1.2 Communal Lands

(a) Group Ranches

The establishment of group ranches was conceived in order to grant free hold interests in land to groups in the rangelands of the country following the *Swynnerton Plan* of individualisation of tenure. Most of these rangelands are occupied by Maa speaking communities that are largely nomadic pastoralists. These areas were for a long time reserved for the Maa community through the Special Districts Ordinance of 1902 that declared them closed districts protected from external pressure.[25]

In some of these areas, individuals were granted freehold interests on an experimental basis in an attempt to cultivate an African middle class to sustain free market policies in agriculture at independence and this was the genesis of the concept of ranches in Kenya. The first six individual ranches were constituted in 1962 and later, with the support of the World Bank, the concept was applied to groups enabling a group of individuals to

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[24] *Ibid* at s. 163.
[25] Sankan, S. 1971. *The Maasai,* Kenya Literature Bureau: Nairobi.

collectively obtain title to a large private ranch, hence "group ranches" between 1964 and 1965.[26] Later, through the Land Adjudication Act in 1968 and the Land (Group Representatives) Act[27] formalised the conversion of rangelands into group lands. Title to the land vests in the group and no individual member of the group can dispose of the land. The group members continue to access and use the land communally based on customary laws. The group representatives are elected and upon registration, they become a body corporate. Members of the group have a right to vote and to participate in decision making through meetings of the group.

The Registered Land Act provides for registration of absolute proprietorship in land to groups established under the Group representatives Act. It provides that the names of group representatives are deemed to be the absolute proprietors of the land subject to their duties under section 8 of the Land (Group Representatives) Act. [28] The registrar of lands adds or deletes the names of group representatives in accordance with the directions of the Registrar of Group Representatives. Increasingly group ranches are being subdivided among the members of respective group ranches and converted to individual titles under the Registered Land Act. Registration of Land under the Registered Land Act operates to extinguish customary laws over land.[29]

(b)Trust Lands

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[26] Kituyi, M. 1990 Becoming Kenyans: Socio-economic Transformation of the Pastoral Maasai Acts Press, Nairobi p.69.
[27] The Land (Group Representatives) Act Cap 287 of the Laws of Kenya (Act 36 of 1968) Government Printer; Nairobi.
[28] *Ibid* at s. 106 A.
[29] *See Gathiba v. Gathiba* Civil Case No. 1674 of 1984 (2006) 1 KLR (E&L) 356

Trust Lands were native reserves in the colonial period that were, at independence vested in the local government authorities as Trustee for the communities ordinarily resident in them.[30] The communities residing in Trust Lands apply African customary law for purposes of land occupation, use, control, disposal and succession.[31] However, the quantum of customary rights over the land is undefined and the rights are not registered in any form.

The constitution of Kenya and the Trust Lands Act provide for the manner in which Trust Lands may be alienated for various purposes with the effect that customary rights on alienated land are extinguished upon registration of such land under the Registered Land Act.[32] As observed by the *Njonjo Commission of Inquiry* the local government authorities have abused the power to alienate Trust Land by disposing of Trust Land to individuals without due regard to the customary rights and interests of resident communities.[33] The communities have limited power to keep outsiders from exploiting resources on the Trust Lands as they have no legal right to alienate Trust Land. The Land Adjudication Act provides for the process of ascertaining and recording of rights and interests in Trust land for purposes of eventual registration as private land under the Registered Land Act.

3.1.3 Government Land

Government Land comprise what was formerly Crown Lands under the Crown Land

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[30] Constitution of Kenya, Section 118.
[31] The Trust Land Act, Chapter 288 of the Laws of Kenya (Revised Edition 1970) (1962).
[32] *See Gathiba v. Gathiba supra* note 29.
[33] Republic of Kenya 2002 *Report of the Constitution of Kenya Review Commission* (September 2002) Short Version p.35.

Ordinance of 1915 and consists of alienated land and unalienated land. It was applied to land that was vested in the Government of Kenya by sections 204 and 205 of the Kenya Independence Order in Council of 1963 and section 21, 22, 25 and 26 of the Constitution of Kenya (Amendment) Act 1964. The Government Lands Act applies to all freeholds and leasehold interests in land granted by the government prior to 1920 except leaseholds converted to 999 years or to freeholds under the Registration of Titles Act.

The purpose of the legislation is to make further and better provisions for regulating the leasing and other dispositions of Government Land and related issues. The Government Lands Act[34] empowers the president to dispose of government land by way of grants, leases and sale.[35] The president may dispose of government land himself or delegate to the commissioner of lands.[36]

3.2 The Implication of the Land Tenure Systems to Wildlife Conservation

3.2.1 The Challenge of Uncontrolled Land Use Change

Land outside protected area is under immense pressure for land use change. Private land is particularly susceptible to land use change as the property owners are able to procure loans against title to obtain funds to develop their parcels. Also, private land can be sold to developers and unless there are restrictions on the use of the land, such land can be converted to other uses resulting in loss of wildlife habitat. Most of the protected areas are found on communal land either on Trust Lands or surrounded by Group ranches.

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[34] Chapter 280 of The Laws of Kenya Revised Edition 1984(1970) (Hereinafter the Government Lands Act); Government Printer; Nairobi.
[35] *Ibid* parts III and IV of the Act, s. 4, 7, 9 and 19.
[36] *Supra note* 34 at s 3.

Communal land is also under increasing pressure for subdivision and conversion to private land as illustrated in the *Ecotech Ventures* and the recommendations of the Public Complaints Committee of NEMA regarding development in the Masai Mara Game Reserve and surrounding communal land.[37] In the matter, the Kenya Association of Tour Operators, the Kenya Tourism Federation and Narok County Council and another filed a complaint to NEMA against Ecotech Ventures with regard to a proposed development by Ecotech Ventures in the Masai Mara Game Reserve. NEMA referred the matter in 2003 to the Public Complaints Committee.

The brief facts of the matter were that Echotech Ventures proposed to construct a tourist facility on an area inside the Masai Mara Game Reserve and the complainants complained that the proposed development was likely to have adverse impacts on the environment as it was of a permanent nature and proposed to be developed in a delicate ecosystem being part of the Makari ecosystem of the Masai Mara Game Reserve. In its recommendations the Public Complaints observed that a large part of the Trust Land that is adjacent to the Masai Mara Game Reserve had been adjudicated and allocated to either group ranches or individual holdings. The Committee further observed that the result of the subdivision and use of the land had a negative impact on the habitat and movement of wildlife within and outside the Masai Mara Game Reserve. The committee recommended that the existing management plan for the Masai Mara together with land use plans be updated and used to guide decision making for preservation of wildlife resources and to mitigate conflicts in the area.

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[37] Public Complaints Committee Recommendation No. 62/2005 (Unpublished, on file with author).

3.2.2 Limitations of Compulsory Acquisition as a Mechanism for Habitat Conservation

Any measures to conserve wildlife habitat on land outside protected areas must take into account the existing land tenure systems and the rights of the land owners. The constitution of Kenya[38] guarantees the right to hold property as a fundamental right and freedom of the individual. Chapter five of the constitution provides for the right to be free from deprivation of property without compensation.[39] However, the right to property is not absolute; it is to be exercised subject to the rights and freedoms of others and for the public interest.[40] Private property may be compulsorily possessed or acquired only for purposes of defense, public safety, public order, public morality, public health, town and country planning or the development or utilisation of any property in order to promote the public benefit.[41] Compulsory acquisition of property need not be total but would also include partial acquisition or possession of some of the rights over the property.[42]

The environmental management and conservation *per se* is not expressly provided for in the constitution or in the Land Acquisition Act as a basis upon which property rights in land may be acquired. Public interest broadly interpreted provides an opportunity to take away private property rights in land for purposes of environmental concern and this includes wildlife resources.[43] More specifically, the provisions of the Wildlife

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[38] Constitution of Kenya.
[39] *Ibid.* at s. 70 (c).
[40] *Ibid* at s. 70.
[41] Constitution of Kenya s. 75(1) (a).
[42] Bhalla R.S "Property Rights, Public Interest and Environment" in Calestous Juma & J.B. Ojwang, (Eds.,) *In Land We Trust: Environment, Private Property and Constitutional Change* (Nairobi, Kenya: ACTS Press) (1996).
[43] *See Sea Star Malindi Ltd* v. *Kenya Wildlife Services* Miscellaneous Civil Suit No. 982 of 1997 (2006) 1 KLR (E&L) 512.

(Conservation and Management) Act give opportunity for the creation of protected areas through compulsory acquisition of land. The Act provides that the Minister in charge of wildlife may declare any area of land to be a National Park following a resolution by the National Assembly. If the land to be acquired is Trust Land, the land must first be set apart as provided for in the constitution of Kenya.[44] In the case of private land, the Land Acquisition Act would be applied.[45]

Land acquisition is an elaborate process that does not lend itself easily for purposes of wildlife conservation outside protected areas. This is because full compensation must be paid for the land acquired and the process of doing so including holding public inquiries, surveying and mapping is also involving and would cost a lot of financial resources. Its feasibility is also limited by the fact that all land upon which wildlife habitat is found may not be capable of being acquired because it is expansive. Compulsory acquisition for purposes of environmental conservation is only likely to be used in exceptional situations and it does not provide an opportunity for the government to undertake large-scale conservation initiatives.[46]

3.2.3 Limitations of Land Use Regulation as a Habitat Conservation Mechanism

Compulsory acquisition further removes the land from the landowners and precludes participation in management and decision making over the acquired property. This means that regulating land use for wildlife conservation is the second alternative. The Wildlife

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[44] Constitution of Kenya s. 118

[45] The Wildlife (Conservation and Management) Act, Cap 376 Laws of Kenya (No. 1 of 1976) Government Printer; Nairobi s. 6(1).

[46] See Bhalla, R.S. 1996 Property Rights, Public Interest and Environment' in Juma, C. and Ojwang, J.B. (Eds.) 1996 pp. 61-81.

(Conservation and Management) Act[47] and the Wildlife (Conservation and Management) (Amendment) Act[48] are the principal statutes regulating wildlife conservation and management in Kenya. The former statute is enacted for the purpose of consolidating and amending the law relating to the protection, conservation and management of wildlife in Kenya and for related purposes. The latter establishes the Kenya Wildlife Service as a body corporate with the necessary powers to implement all matters relating to wildlife conservation under the former Act including the power to sue and be sued and to acquire and hold movable and immovable property.[49]

The Role of Kenya Wildlife Service in Regulating Land Use

The functions of the Kenya Wildlife Service include formulating policies on wildlife conservation, advising government on establishment of protected areas (National Parks, National Reserves and Protected Wildlife Sanctuaries), managing protected areas, providing wildlife conservation education and extension services to the public, carrying out research on wildlife conservation and management, advising government, local authorities and landowners on wildlife conservation and administering and coordination international agreements regarding wildlife and to provide services to the farming and ranching communities to protect agriculture and livestock from destruction by wildlife.[50]

Apart from advising on policy formulation, providing education, conducting research and

[47] The Wildlife (Conservation and management) Act, Cap 376 Laws of Kenya (No. 1 of 1976) Government Printer; Nairobi.
[48] Wildlife (Conservation and Management) (Amendment) Act (No. 16 of 1989) Kenya Gazette Supplement No. 95 Government Printer; Nairobi.
[49] *Ibid* at s.3.
[50] *Ibid* at s. 3A.

advising land owners, government and local authorities on wildlife conservation, the role of the Kenya Wildlife Service in conserving wildlife outside protected areas is rather broad. It includes the power to compulsorily acquire private property and converting it to protected areas, entering into agreements with landowners for habitat conservation and working with other public bodies including the local government authorities and National Environment Management Authority for the management of wildlife habitat protected areas.

The role of KWS in applying police power to regulate use of private land is however limited. This role has been interpreted in the case of *Sea Star Malindi Limited* v. *Kenya Wildlife Service.*[51] The applicant a private company was the registered proprietor of a parcel of land part of which was 100 feet between the land and the high watermark. KWS had ordered the applicant to stop construction on the 100feet of land as the area among other reasons contained fragile ecosystem. The High Court, held that the property was private land and KWS had no jurisdiction over the property and by issuing the orders to the applicant, KWS had acted *ultra vires* the Wildlife Conservation and Management Act and against the Constitutional right to property and should rather have exercise the power of compulsory acquisition to acquire the property and compensate the applicant.

The Role of Other Statutory Institutions

The other option for KWS to control land use outside protected areas with the exception of compulsory acquisition is to rely on the provisions of other legislation and the

[51] *Sea Star Malindi Limited* v. *Kenya Wildlife Service* Miscellaneous Civil Suit No. 982 of 1997 1 Kenya Law Reports (E &L) pp. 512-534.

statutory powers of other public bodies established under the statutes that might have some powers which could benefit wildlife conservation outside protected areas. These statutes include the Agriculture Act,[52] the Physical Planning Act[53], the Forest Act[54], the Water Act[55] and the Environmental Management and Coordination Act[56] and the Local Government Authorities Act.[57]

None of these statutory institutions have as their primary responsibility conservation and management of wildlife resources - their mandates and responsibilities are set out in respective statutes and address very sectoral objectives that may only incidentally benefit wildlife conservation outside protected areas. For example the Agriculture Act[58] was enacted to conserve soil erosion and has several measures and penalties for conservation of soil fertility. The Water Act on the other hand focuses on conservation of water resources in Kenya and establishes the Water Resources Management Authority as its institutional framework.[59] Likewise, the Kenya Forest Service is established under the Forest Act[60] and its mandate is conservation of forests and its ability to benefit wildlife habitat is limited to the wildlife areas that contain forest resources.

Land Use Planning

The two pieces of legislation that can also benefit wildlife conservation outside protected

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[52] Cap 318 of the Laws of Kenya.
[53] Physical Planning Act (No. 6 of 1996) Laws of Kenya
[54] Forests Act, 2005 Kenya gazette Supplement No 88 (Acts No. 7) Government Printer; Nairobi;
[55] The Water Act (No 8 of 2002) Laws of Kenya
[56] Environmental Management and Coordination Act, 1999 (Kenya Gazette Supplement No. 3 (Acts No. 1 of 2000) Government Printer; Nairobi.
[57] Local Government Authorities Act Cap 265 Laws of Kenya.
[58] *Supra* note 55.
[59] *Ibid* at s. 7
[60] *Supra* note 54.

areas are the Physical Planning Act[61] and the Local Government Authorities Act.[62] They provide wide powers to the Director of Physical Planning and the Local Government Authorities to prepare land use plans and to implement these to ensure that land use changes are done within the provisions of the law and to prevent unregulated land use change which is a key threat to wildlife habitat outside protected areas. The Physical Planning Act applies to all parts of the country subject to any specific exemption that may be made by the Minister in charge of Physical planning which currently is within the Ministry of Lands and Settlement.[63] It applies to all lands- government land, private land and Trust land. The Act establishes the office of a Director of Physical planning as the chief government adviser on all matters relating to physical planning.[64] The Physical Planning Act is an excellent instrument that could be used to provide for planning for key wildlife habitat areas outside protected areas in the country. It provides for various types of Physical Development Plans - Regional Physical Development Plans are plans for the area or part of a county council and are prepared in regard to any government land, trust land or private land within the area of authority of a county council.

The purpose of the plan is to improve the land, to provide for proper physical development of the land, provide transport, public utilities recreation and to provide for suitable use of land. These plans could be utilized to control unplanned development and could be used to designate areas that are important wildlife areas and determine the most appropriate use of land for such areas. The Director of physical planning may declare any

[61] Physical Planning Act (No. 6 of 1996) Laws of Kenya.
[62] Local Government Authorities Act Cap 265 Laws of Kenya.
[63] *Supra* note 61 at s.2.
[64] *Ibid* at *s*.4.

area considered to have "unique development potential" to be a special planning area.[65] The purpose for this is to enable preparation of physical development plan irrespective of whether the area lies within or outside the area of a local authority. Development plans are prepared through the office of the Director of Physical Planning. However, despite such elaborate provisions for land planning, the Physical Planning Act and the provisions of the Local government Authorities act with regard to planning and enforcement are poorly implemented at best and provide little value for wildlife conservation outside protected areas. The lack of development and implementation of land use plans and its effects on wildlife conservation is demonstrated in the case of the Jamii Bora housing project.[66] (See Box 1 below at page 75)

The issues raised by the Jamii Bora housing project are of key importance to the question of the legal and institutional framework for wildlife conservation and management outside protected areas. The Jamii Bora Housing project issue brought into focus the role of key institutions outside protected areas- the Kenya Wildlife Service, the Local Government Authorities, and the National Environment Management Authority (NEMA). The issues addressed present the challenges to some of the mechanisms provided for under EMCA, particularly the Environmental Impact Assessment Licence to conserve wildlife habitat outside protected areas. Local government authorities can hamper the ability of either KWS or NEMA to protect wildlife habitat if they fail to carry out and implement land use plans. One of the grounds for The National Environment Management Authority denying the Appellants an EIA licence was that the project site

[65] *Ibid* at s. 23.
[66] Republic of Kenya Tribunal Appeal No. NET/02/03/2005 (unpublished, copy on file with the author).

lies within the wildlife migratory corridor and dispersal area and that the project would adversely affect the continued use of the area as a wildlife habitat.[67]

Box 1: Case Study of the Jamii Bora Housing Project

The Jamii Bora Housing Project
The Appellants (Jamii Bora Charitable Trust/Jamii Bora charitable Trust Registered Trustees) purchased a parcel of land in the Kisaju area of Kajiado District for the purpose of developing a housing project on the property. The project is set on approximately 290 acres of land in Kisaju, Kajiado District, about 65 km from Nairobi, off Namanga Road on parcel L.R. Number Kajiado/Kisaju/58 and parcel number L.R. No Kajiado/Kisaju/2995 purchased by the Appellants. The design of the project is to construct a new town consisting of 2000 housing units of about 50square metres each and to construct social amenities and commercial opportunities for about 2000 families.

Environmental Impact Assessment Licence
The Appellants lodged an application for an EIA licence. NEMA declined to grant the license. on the grounds that among others, the project site lies within the wildlife migratory corridor and dispersal area, being located on the athi-kapiti plains; that there was strong opposition from the local people; that the future cumulative impacts of the project were uncertain in light of the enormity of the project; that the proposed mitigation measures proposed by the Appellants did not adequately address the anticipated potential environmental impacts of the project.

The Appellants lodged an appeal to the National Environment Tribunal arguing that the grounds cited by the Respondent for refusing to grant the EIA licence had no basis in law or in fact. The notable institutions that objected to the construction project in Kisaju and which participated as interveners/interested parties in the proceedings of the National Environment Tribunal included the Friends of Nairobi National Park- a membership society; Kenya Wildlife Service; Kitengela Ilparakuo Landowners Association (KILA) - a membership association of landowners in Kitengela; the Wildlife Foundation and International Livestock Research Institute (ILRI).

The Ruling of the National Environment Tribunal (NET)
On April 12, 2006, The National Environment Tribunal overruled NEMA's decision and granted an EIA licence to Jamii Bora Trust to carry out the construction. The Tribunal issued strict conditions on the EIA licence among them that the project would incorporate a wildlife surveillance outpost designed in collaboration with KWS to provide a system of data gathering on wildlife behaviour and to monitor impact of the project on wildlife and to minimize adverse effects. The specific activities include tagging wildlife; Measures to avoid discharging treated waste waters into the rivers under the Water Act 2002; Reasonable and cost effective administrative support to Ol Kejuado County Council for controlling urban sprawl expected to arise from the project; establishment of systems of managing community relations and distributing benefits of the housing project equitably to members of the local community; compliance with all other laws, licences for the project; and availing information on mitigation measures to all relevant stakeholders.

In support of its argument for denying the EIA licence, NEMA relied heavily on the provisions of a KWS draft management plan- "The Nairobi National Park Ecosystem Management Plan, 2005-2010" to prove the existence of a wildlife migratory and/or dispersal area.[68]NEMA argued that the project site lies within an ecological zone known as the Athi Kapiti Plains and that much of the area acts as a habitat for wildlife providing among others a calving zone for wildebeests and zebra at an area located on the project area.[69] In overruling NEMA's decision to withhold the EIA licence, the Tribunal observed the following with regard to the role of the local government authority in regulating development:-

> The Tribunal is mindful of the real risk that, if decisive action is not taken in the near future, the Athi Kapiti Plains will not continue to function for long as a wildlife habitat and dispersal area for the Nairobi National Park. However.....the threat to the viability of the wildlife habitat arises, not from any *one* development, spontaneous or planned, but from the absence of an enforceable land use plan for the area, which has then allowed uncoordinated and unplanned sub-divisions and conversions of land use-from pastoralism to commercial, industrial and residential uses-to take place on individual plots without being accompanied by the development of the necessary common infrastructural and utility services.[70]

The Tribunal further observed that under the Physical Planning Act providing for development control, the Director of planning had the power to declare an area with unique development potential or problems as a special planning area for the purpose of the preparation of a physical development plan. The Director could suspend development for a period of up to two years until the physical development plan of such an area had been approved by the Minister responsible for Planning. Notably, the local government

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[68] *Supra* note 71 s. 2.
[69] *Supra* note 66 at para 42.
[70] *Ibid* at para 70.

authority had not taken advantage of this provision.

From the above discussions, there are many sectoral laws and public bodies with mandates incidental to conservation of wildlife habitat. However, these require coordination. The Kenya Wildlife Service lacks the mandate to coordinate all the other statutory bodies to support wildlife conservation outside protected areas. This mandate rests with the National Environment Management Authority established under EMCA and in which KWS is designated as one of the lead agencies in matters of the environment. Further, as demonstrated by the Jamii Bora Case, the ability of such mechanisms as Environmental Impact Assessments, Land use plans to conserve wildlife habitat outside protected areas is limited.

3.3 Viability for Use of Environmental Easements Outside Protected Areas

Environmental Easements provide an alternative to the use of compulsory acquisition and a viable mechanism in the absence of land use planning and enforcement outside protected areas. Being a property rights mechanism Environmental Easements operate to limit the rights of use of land of landowners and therefore take away a part of the property rights that one would otherwise hold in the land.

3.3.1 Compulsory Acquisition of Environmental Easements

The constitutional provision for compensation for taking away property is the basis for the provision in EMCA that requires the court to grant compensation to any person that loses an interest in land as a result of the imposition of an environmental easement on

land in which the affected interest is held.[71] The EMCA provides that the court is to take into account the provision of the constitution and the law on compulsory acquisition in determining the value of an environmental easement.

One key difference between compulsory acquisition of land and acquisition of environmental easements is that unless the environmental easement to be acquired is shown to be in the public interest, the compensation due is payable by the applicant for the easement.[72] The court may however direct that the government pays the compensation with respect to an easement shown to be of public interest.[73]

In *Commissioner of Lands & Another* v *Coastal Aquaculture Ltd*[74] the Commissioner for Lands had issued a notice of compulsory acquisition of private land for the purpose of 'Tana River Delta Wetlands.' In dismissing the appeal, the court of Appeal held that the conditions for acquisition of private property are that the land must be required for the purposes of a public institution, that the acquisition will serve one of the interests set out in section 75(1) (a) and that the necessity for the acquisition must outweigh the hardship to the owner.

The provisions of the EMCA with regard to the creation of environmental easements presume a compulsory acquisition process that is court mandated. This is interesting

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[71] Environmental Management and Coordination Act, 1999 (Kenya Gazette Supplement No. 3 (Acts No. 1) of 2000 Government Printer; Nairobi s. 116(1).
[72] *Ibid* at s. 116(4)
[73] *Ibid.*
[74] *Commissioner of Lands & Another* v. *Coastal Aquaculture Ltd* Civil Appeal No. 252 of 1996 (2006) 1 KLR (E&L) pp. 261-294.

because the constitution limits compulsory acquisition of property to a public institution and for public purposes. The provisions of EMCA for creation of easements by compulsory acquisition avails the use of compulsory acquisition to any person including individuals as well as public and private bodies. This is a curious provision considering that in *Park View Shopping Arcade* v. *Kangethe & 2 others*[75] the court held that although people have a duty to protect the environment, certain actions are best exercised by law and by designated public institutions. EMCA makes no provision for the creation of environmental easements by deed between willing landowners, which presents a limitation on the potential of using the mechanism on a large scale. This is because the provision for creation of environmental easements by an application to court presumes an adversarial process of taking away certain rights of landowners and compensating them for the rights of use taken away.

3.3.2. The Need for Voluntary Environmental Easements Created by Deed

Easements under common law as well as contained in the Registered Land Act are interests in land capable of being created by deed. This makes them readily available to various landowners for purposes of increasing the enjoyment of land. However, any person that would like to see wildlife areas outside protected land conserved by an environmental easement would have to make an application to the High Court for a grant of environmental easement over the parcel that contains the wildlife habitat that needs to be conserved. This essentially means that they would have to retain the services of a lawyer to represent their interests in the application as the procedures for the conduct of

[75] *Park View Shopping Arcade* v. *Kangethe & 2 others* civil suit No. 438 of 2004 (2006) 1 KLR (E&L) 591.

proceedings in the high court are complex to the layman.

Courts in Kenya have huge backlogs and decisions of the court over the imposition of an environmental easement could take a very long time to conclude while it would only otherwise take a deed to create an easement appurtenant under common law and as stipulated in statute such as the Registered Land Act. The history of the creation of parks and reserves is one of outright dispossession of a people of their wildlife resources. The creation of protected areas in Kenya took away huge resources in water and grazing space that the indigenous communities depended on for their way of life and reserved it for exclusive wildlife use.[76] Thus the creation of environmental easements by compulsory acquisition may be reasonably expected to cause mistrust among land owners living in wildlife areas particularly because there are other mechanisms such as leases that can provide for conservation of wildlife habitat without recourse to court process.

Leasing land for conservation purposes may thus be preferred over environmental easements. However, the benefit that would be lost in applying leases over environmental easements is that leases being a possessory interest would be less appropriate than an environmental easement that would be a non possessory interest. A landowner that grants a lease over his land for conservation of wildlife habitat would give up more of the bundle of rights over his land by granting a possessory interest than by granting an environmental easement. The latter would enable the landowner to retain all other rights over the land with the exception of rights that would undermine the grant of an environmental easement.

[76] Myer, N. 1972 'National Parks in Savannah Africa', in *Science*. 78, 1255.

The government is in the process of revising the law and policy relating to wildlife in Kenya and has in draft form, a policy[77] and bill. It is noteworthy that both the policy and bill provide for the use of easements as agreements between willing parties for purposes of conserving wildlife habitat outside protected areas. The bill essentially reproduces the provisions of the environmental management and coordination act 1999 with the variation of providing for creation of easements by deed between willing parties.[78] This provision if enacted in would create a statutory easement very identical to the environmental easement under the Environmental Management Act save that easements as provided for under the bill would not be created solely through court but by deed.

3.3.3 Land Tenure Systems and the Use of Environmental Easements

While private tenure is favourable to the use of environmental easements because of an elaborate registration system and clarity of rights of the private owner, communal tenure over land presents certain challenges over the use of environmental easements for wildlife conservation. It should be noted that most of the arid and semi arid areas in which the majority of parks and reserves are found are still either under Trust Lands or Group Ranches in which customary tenure governs the allocation and use of resources. Customary tenure unlike private tenure under any of the registration systems discussed in preceding sections of this does not create an estate in land for the communities living on the land.[79]

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[77] Republic of Kenya, Ministry of Tourism and Wildlife *Draft Wildlife Policy,* 2007 (Unpublished, on file with author).
[78] Republic of Kenya, Ministry of Tourism and Wildlife (Conservation and Management) Bill, 2007 (Unpublished, on file with author) s. 49.
[79] *Ibid.*

The constitutional provision for setting apart Trust Land provide for an opportunity to extinguish customary interests in land and allocating freehold interests under the Registered Land Act following a process of land adjudication and registration.[80] Thus an environmental easement granted for the duration of an interest in customary law is limited to the extent that the interest upon which it would be based is subject to erosion by the setting apart of Trust Land and the creation of individual absolute proprietorship under the Registered Land Act.[81]

Group Ranches present a different challenge to the potential for use of environmental easements. Firstly, title to the group ranch land is vested in the group ranch representatives and the members of the group apply customary law in the access and use of resources in the group ranch.[82] Thus for purposes of an environmental easement for conservation of wildlife habitat, on a group ranch, the environmental easement could be registered against the title to the group ranch or imposed over an interest in customary law of a member over the group ranch.[83]

With regard to the option of imposing an environmental easement against title to the group ranch, the group representatives would then be responsible for enforcing the terms of the environmental easement and ensuring that the members of the group ranch do not use their land in a manner that would be contrary to the purposes of the environmental

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[80] Constitution of Kenya s. 118.
[81] *Gathiba v. Gathiba* Civil Case No.1674 of 1984 (2006) 1 KLR (E&L) 356.
[82] Land (Group Representatives) Act, Cap 287 Laws of Kenya (Act No. 36 of 1968) Government Printer; Nairobi. S. 8.
[83] Environmental Management and Coordination Act, 1999 (Kenya Gazette Supplement No. 3 (Acts No. 1 of 2000) Government Printer; Nairobi. s.112 (3).

easements. This may create a difficulty in enforcement of the environmental easement because the group ranches consist of several members. Imposing and registering an easement over an interest in customary tenure in group ranches would be open to similar limitations as those facing customary interests in Trust lands- that the subdivision of the group ranch and registration of individual freehold interests under the Registered Land Act would extinguish customary interests in land and this would include environmental easements granted over an interest in customary interest.[84]

The case study of the Sheep and Goat Land (see box 2 below on page 84) illustrates the challenges facing the creation of an environmental easement on government land. Firstly, the land administration system does not provide an opportunity for parties to identify with accuracy the parcels of land that is government land. In the case of the Sheep & Goat Land the parties attempting to negotiate the environmental easement over government land could not obtain information from the government with regard to whether the parcel was still intact or whether it had been subdivided and allocated to individuals. It should be noted that the allocation of public land to private individuals irregularly was a matter of great concern and the government set up a commission of inquiry into the matter and the findings were largely that a lot of public land has been subject of irregular and illegal allocations.[85] The case study of the Sheep and Goat Land was indeed subject of disputes with allegations that it had been irregularly allocated to private individuals.

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[84] *Gathiba v. Gathiba supra* note 81.
[85] Republic of Kenya *Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land* (2004) Government Printer, Nairobi.

The process of placing an environmental easement over the sheep and goat land did not follow the court process. Ideally, the Kitengela Landowners Association would have had to make an application to the high court for a grant of an environmental easement over the property and may have been better served by such a process than by negotiation with an unwilling grantor.

Box 2: Case Study of the Sheep and Goat Land- Use of Environmental Easement

The Sheep & Goat Land

The Sheep and Goat Land consisted of 2,912 acres of ranch land adjacent to Nairobi National Park. The land was initially set aside for sheep and goat breeding in a government agricultural project but reverted to government ownership after the project collapsed. It serves as a dispersal area and provides unimpeded wildlife migration routes necessary to maintain wildlife populations in Nairobi National Park. The local communities living adjacent to the land use it to pasture livestock and to access water for domestic use.

The land has been the centre of controversy regarding its use. At one time some 250 acres of the land was allocated to individuals who wanted to construct residential houses on it but local communities living adjacent to the land protested and KWS together with its partners obtained a court injunction against the alleged allocation.

The Environmental Easement

An environmental easement under the Environmental Management and Coordination Act, 1999 provided an opportunity to keep the land open for wildlife use while at the same time guaranteeing access to water and pasture for the local community in the area. In 2003, the easement was negotiated between KWS, local communities as represented by the Kitengela Land Owners Association and the Wildlife Foundation (a non-governmental organization that leases land for wildlife conservation outside Nairobi National Park) with the support of the African Wildlife Foundation (AWF).

The easement would be granted in perpetuity for wildlife conservation to ensure that the land is retained in open space as one parcel to provide for the conservation of wildlife habitat, and allow wildlife dispersal and migration to and from Nairobi National Park. The easement would also ensure sustainable open land grazing for wildlife and for livestock by the local community. It prohibits any use of the property that would significantly impair or interfere with the conservation values of the property including fencing the property, construction of buildings, cultivation, industrial or residential use, and subdivision. The easement was presented to the Ministry of Lands and Housing through the KWS for the government to consent but the Ministry did not consent to it.

It is a matter of speculation whether or not any compensation would be payable to the government had the Kitengela Landowners Association made a successful attempt at imposing an environmental easement on the land through court process. In the case study, the Landowners Association requested for a grant and it was expected that the grantees would not pay for the easement.[86] The provision for compensation for environmental easements under EMCA[87] presumes that environmental easements would apply only to private or communal tenure and not to government land. The implication for this is that government land may not until it is disposed to private ownership be subject to environmental easements. This is a disadvantage as a grant of environmental easement on government land would provide an opportunity to subject all other rights that may be granted to the provisions of the environmental easement.

[86] Deed of Environmental Easement between Government of Kenya, Kitengela Land Owners Association, Kenya Wildlife Service and The Wildlife Foundation (2003) (unpublished, copy on file with the author).
[87] *Supra* note 71 at s. 116.

CHAPTER 4

MEASURES TO SUPPORT THE USE OF ENVIRONMENTAL EASEMENTS TO CONSERVE WILDLIFE HABITAT OUTSIDE PROTECTED AREAS

4.1 Institutional Frameworks for the Application of Environmental Easements

4.1.1 Kenya Wildlife Service

Chapter three reviewed the various institutional frameworks for conservation of wildlife resources outside protected areas. All the key institutions established by law as discussed in chapter three do not have a specific legal mandate to conserve wildlife habitat outside protected areas by the use of environmental easements except for the Kenya Wildlife Service.

Environmental easements provide a viable mechanism for Kenya Wildlife Services to use in conserving wildlife areas outside protected areas. Firstly, the Kenya Wildlife Service is a public institution and could obtain easements through a process of compulsory acquisition as provided for in EMCA.[1] Further the Wildlife (Conservation and Management) Act provides legal basis for KWS to apply agreements akin to easements. Section 20 (1) of the Wildlife (Conservation and Management) Act provides that the Director of the Kenya Wildlife Service can enter into *any agreement* with a competent authority which the Director may consider necessary for the purpose of ensuring that animal migration patterns essential to the continued viability of a national Park or

[1] Environmental Management and Coordination Act, 1999 (Kenya Gazette Supplement No. 3 (Acts No. 1 of 2000) Government Printer; Nairobi. s. 116(4).

National Reserve are maintained.[2]

Competent authority is defined to include landowners, local government authorities with respect to Trust Land and the government with respect to public land. Despite this enabling provision, KWS has not entered into any conservation agreement with regard to conserving wildlife habitat outside of the protected areas. KWS has however focussed on management of protected areas and may be said to be too preoccupied with conservation of protected areas to address the question of land use change outside protected areas. [3] It has therefore not proactively pursued the use of agreements or of environmental easements. It is therefore necessary to examine the option of using a different institutional framework for conservation of wildlife habitat outside protected areas and one that that would use environmental easements.

4.1.2 Kenya Land Conservation Trust

The effective use of environmental easements for conservation of wildlife habitat in Kenya would require an enabling institutional framework. None of the current institutional frameworks for wildlife conservation or environmental management provide a framework to support the conservation of wildlife areas outside protected areas in Kenya by applying environmental easements. The Kenya Land Conservation Trust is a private institutional framework that demonstrates potential as an institutional framework for the use of environmental easements with respect for conservation of wildlife habitat

[2] The Wildlife (Conservation and management) Act, Cap 376 Laws of Kenya (No. 1 of 1976) Government Printer; Nairobi s. 20(1) (emphasis added).
[3] Patricia Kameri-Mbote *Property Rights and Biodiversity Management in Kenya: the Case of Land Tenure and wildlife (2002)* African Centre for Technology Studies (ACTS), ACTS Press, Nairobi, Kenya p.p. 104-108.

outside protected areas in Kenya. The Kenya Land Conservation Trust is an initiative to create an appropriate institutional framework to support the use of easements and other property rights for conserving wildlife habitat in Kenya. It was founded by the African Wildlife Foundation (an international non governmental organization) the Kenya Wildlife Service and the Ministry of Lands and Settlement. [4] It was incorporated in 2005 as a Trust pursuant to the Trustees (Perpetual Succession) Act.[5]

The objectives for which the Trust was established are to promote and facilitate the conservation of land, biological diversity and natural resources in Kenya for public benefit through the use of different approaches and mechanisms. It is designed to do this by acquiring and holding property rights in land including purchase, easements leases and management agreements that enable the Trust to conserve land and natural resources. The Trust also provides for the establishment of a Trust Fund to provide financial resources for the purposes of the Trust.[6]

The Founding Trustees of the Trust are representatives of the Ministry of Lands, represented by the Commissioner of Lands, the Director of Kenya Wildlife Service and a representative of the African Wildlife Foundation. Land owners are represented on the board of Trustees through appointments made by a National Land Owners Forum that is comprised of various landowners association and landowners forum in wildlife areas in Kenya. Further, the Trust establishes Local Community Steering Committees of the Trust

[4] Kenya Land Conservation Trust, *Trust Deed* (2005) (copy on file with the author).
[5] Kenya Land Conservation Trust, *Certificate of Incorporation* (2005) (copy on file with the author)
[6] *Supra* note 5.

to provide an opportunity for Landowners and community members participate in the decision making processes in areas where the Trust will be working.

The Kenya Land Conservation Trust was established as a private charitable Trust under the Trustees Perpetual Succession Act.[7] This establishment presents certain limitations to the capacity of the Trust to sufficiently address the need for a national institutional framework in Kenya. The Kenya Land Conservation Trust would have legal limitations in collaborating with the National Environment Management Authority as a private institution. This is because EMCA imposes a requirement upon NEMA to consult with institutions (lead agencies) that are mandated by statute in the specific area of environment that they work.[8]

The Kenya Land Conservation Trust as a private charitable trust is no different from any other private institution pursuing its declared objectives and would not have any special right to be consulted by NEMA with regard to planning, resource mobilization and conservation of wildlife habitat outside protected areas. The Trust provides for the establishment of a fund within the Trust into which funds raised by the Trust are paid. These funds are to be used to support conservation of wildlife habitat by paying landowners for sale of land as well as for the use of environmental easements outside protected areas. The Trustees of the KLCT have the power to raise funds including

[7] Trustees Perpetual Succession Act, Cap 164 Laws of Kenya.
[8] Environmental Management and Coordination Act, 1999 (Kenya Gazette Supplement No. 3 (Acts No. 1 of 2000) Government Printer; Nairobi. s. 9(2) (a).

seeking donations.[9]

4.2 The Role of Incentives in Encouraging the Use of Environmental Easements

From a theoretical perspective, property rights over land exist for purposes of providing utility to the persons that have the property rights particularly the right to use the land and to obtain maximum benefit out if it. Such use would only be subject to the provisions of any law regulating the use of the land, Common Law rules against nuisance as well as contractual obligations affecting the exercise of rights over the land. In line with this argument, landowners would essentially choose to put their land in a use that results in maximum returns.

With regard to wildlife resources, even the greatest estate in land, the absolute proprietorship under the Registered Land Act or the fee simple estate under the Transfer of Property Act of India does not confer property rights over wildlife to the owner of the land. None of the definitions of land under the various statutes providing for estates in land include wildlife resources. At common law, wildlife resources being fugitive resources are not subject of property unless they have been hunted or in the process of being hunted.[10] In Kenya except for tourism, there is at present no economic value accruing to a landowner for wildlife found on land since hunting is prohibited. The key challenge for wildlife conservation outside protected areas is therefore to determine a way of making wildlife keeping a profitable land use. At the moment, the cost of having wildlife on ones land outside Protected Areas includes competition between livestock and

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[9] Kenya Land Conservation Trust, *Trust Deed* (2005) (copy on file with the author).
[10] *Pierson v. Post* 3 Cai. R. 175 (N.Y. Sup. Ct. 1805) quoted in Carol Rose, "Possession as the Origin of Property" in *Property and Persuasions: Essays on the History, Theory and Rhetoric of Ownership* (Boulder: Westview Press (1994) p.12.

wildlife for water, pasture, salt licks and other habitat.[11] Sometimes wildlife causes destruction of property and even causes loss of life. The cost of keeping wildlife outside the protected areas is absorbed by the landowners who do not get anything in return from the revenues collected by the KWS or the Local Government Authority for the cost of maintaining wildlife habitat.

The use of environmental easements would only be successful if there are economic incentives that make wildlife keeping a viable land use.[12] In the event that wildlife keeping does not provide economic returns, the landowners have no incentive to conserve the wildlife and could well convert the land into other uses. This situation is especially delicate for endangered species found in areas that may not support tourism enterprises that provide an income and these areas require incentive mechanisms to encourage conservation on activities. In the event that wildlife keeping does not provide economic returns within the broader tourism framework the landowners and communities have no incentive to conserve the wildlife and could well convert the land into other uses.

[11] Patricia Kameri-Mbote *Property Rights and Biodiversity Management in Kenya: the Case of Land Tenure and wildlife (2002)* African Centre for Technology Studies (ACTS), ACTS Press, Nairobi, Kenya.
[12] *Ibid.*

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

This thesis has examined the potential for environmental easements to conserve wildlife habitat outside protected areas in Kenya. The Environmental Management and Coordination Act 1999[1] provides for environmental easements as a mechanism to be used to facilitate the conservation of the environment by imposing one or more obligations on the use of land. This thesis observed that environmental easements have not been used for conservation of wildlife habitat outside protected areas as intended by the Act.

The findings of this research and the recommendations are presented in the following sections.

5.1 Property Rights over Land and their Implications for the Conservation of Wildlife Habitat Outside Protected Areas

The western view of private property over land is that private property grants absolute rights over land to an individual owner to the exclusion of all other interests. There are however, necessary limitations to private property and therefore private property rights over land cannot be absolute but must be limited to accommodate other interests and for the greater enjoyment of property. Wildlife being a fugitive resource is not subject of private property and yet it is a key component of the environment. It also adds social cultural, spiritual economic and aesthetic values to the society. Without being managed

[1] Environmental Management and Coordination Act, 1999 (Kenya Gazette Supplement No. 3 (Act No. 1) of 2000 Government Printer; Nairobi s. 112.

properly, wildlife resources can be depleted from overexploitation as well as land use change. Although wildlife is not property, it relies upon land to provide its sustenance as wildlife habitat. The government has the responsibility of conserving wildlife resources as a public resource and for this purposes the powers of eminent domain and police power are vested in the government through the constitution to be exercised for public good. The power of eminent domain is used to acquire private property for public use and has been exercised in the establishment of protected areas in the form of National Parks and Game Reserves under the Wildlife (Conservation and Management) Act of 1976. The protected areas protect wildlife habitat from land use change as a change in the status of protected areas requires among other things the approval of the National Assembly.[2]

Areas outside protected areas are also critical for wildlife conservation and for the viability of protected areas. However, these areas comprise land that is in private, communal and public ownership. The implications for this is that property rights over land outside protected areas need to be limited for the benefit of conserving wildlife habitat found in them. Land use change is the main threat to the existence of wildlife outside protected areas. There are various legal mechanisms that can be applied to limit property rights over land for the benefit of wildlife resources. The power of eminent domain provides an opportunity through the Land Acquisition Act [3] to expand the protected areas provided that such measures are taken by a public body, are shown to be in the public interests and the benefit for acquisition outweighs the hardship caused to the property owner and that prompt and fair compensation is made to the property owner.

[2] The Wildlife (Conservation and Management) Act, Cap 376 Laws of Kenya (No. 1 of 1976) Government Printer; Nairobi s.7 (2) (b).
[3] Land Acquisition Act Cap 295 Laws of Kenya.

This mechanism however has its limitations as not all land outside protected areas can be acquired for wildlife conservation. Land is a scarce resource and cannot all be converted into protected areas.

Police power provides another opportunity to regulate the use of private property for wildlife conservation. This is done through legislation particularly the Wildlife (Conservation and Management Act) that is the principal law that provides for the protection, conservation and management of wildlife in Kenya. The Kenya Wildlife Service is established under the Wildlife (Conservation and Management) (Amendment) Act [4]as the institution to implement the provisions of the Wildlife Act. The mandate of KWS includes formulation of policies on the conservation, management and utilization of all types of wild fauna and flora and to sustain wildlife to meet conservation and management goals.

The mandate of the Kenya Wildlife Service to regulate land use outside protected areas is limited as shown in the case of *Sea Star Malindi Limited* v. *Kenya Wildlife Service.*[5] Although there is a provision in the Wildlife Act[6] enabling the Director of KWS to enter into an agreement with private landowners for conservation of wildlife outside the protected area, this provision has not been used to conserve wildlife habitat outside protected areas. KWS has focused specifically on the management of wildlife inside protected areas and not on the conservation of habitat outside protected areas. This

[4] Wildlife (Conservation and Management) (Amendment) Act (No. 16 of 1989) Kenya Gazette Supplement No. 95 Government Printer; Nairobi s.3.
[5] *Sea Star Malindi Limited* v. *Kenya Wildlife Service* Miscellaneous Civil Suit No. 982 of 1997 1 Kenya Law Reports (E &L) pp. 512-534.
[6] *Supra* note 2 at s. 20.

means that KWS has to rely on the ability of other statutory bodies to enforce land use regulations that could benefit conservation of wildlife habitat outside protected areas.

A review of statutes establishing other government bodies and their potential role in conserving wildlife outside protected areas shows that the Local Government Authorities Act[7] and the Physical Planning Act[8] are key statutes that affect conservation of wildlife habitat outside protected areas by controlling development through land use plans. These however have not been effective at all due to lack of implementation and enforcement as demonstrated by the Jamii Bora Case.[9] The National Environment Tribunal noted that the local government authority had not put in place a land use plan and on this basis the Tribunal could not take away the rights of a private land owner to develop land unless there were gazetted land use plans to regulate development.

A review of the Environmental Management and Coordination Act (EMCA)[10] as an alternative statute that could regulate land use outside protected areas reveals a broad mandate for the National Environment Management Authority (NEMA) established under the act to use mechanisms such as Environmental Impact Assessment licenses, Environmental Restoration Orders, Creation of special protected areas, among others. EMCA also establishes the National Environment Tribunal to consider appeals made to it against decisions made by NEMA particularly with regard to decisions regarding issuance of licenses including environmental impact licenses. The Tribunal does indeed

[7] Local Government Authorities Act, Cap 265 Laws of Kenya.
[8] Physical Planning Act (No. 6 of 1996) Laws of Kenya.
[9] Republic of Kenya Tribunal Appeal No. NET/02/03/2005 unpublished – copy on file with the author.
[10] *Supra* note 1.

consider these matters, some of which relate to wildlife conservation outside protected areas as illustrated by the case of the Jamii Bora Project to the extent of determining and issuing orders relating to environmental impact Assessment licenses.

The public complaint committee is another institution established under EMCA with a mandate as the ombudsman in environmental matters, addressing complaints from the public with regard to environmental matters. The Committee makes its recommendation to NEMA for implementation. With this mandate, the Public Complaints Committee has a limited mandate to the extent that it can deal with matters relating to wildlife conservation and land use and make recommendations as to what actions should be taken to resolve a particular problem.

As the Echotech Ventures Matter [11]demonstrates, the recommendations of the Public Complaints Committee can if implemented operate to regulate change of land use on wildlife areas. However, the implementation of these findings relies upon the ability of local government authorities and the Director of Physical Planning which has not been effective.

Other institutional frameworks reviewed include the Kenya Forest Service as provided for by the Forest Act[12], The Water Act 2002[13] and the Agriculture Act[14]. However these institutions are limited by their legal mandate that is only incidental to wildlife

[11] Public Complaints Committee Recommendation No. 62/2005(Unpublished, on file with author).
[12] Forests Act, 2005 (Acts No. 7) Laws of Kenya
[13] Water Act (No. 8 of 2002) Laws of Kenya
[14] Agriculture Act Cap 318 Laws of Kenya.

conservation. It is not primarily to conserve wildlife resources. Further, these institutions are largely uncoordinated in their efforts and KWS does not have the power to coordinate them as they are lead agencies under the Environmental Management and Coordination Act to be coordinated by NEMA. Further, none of them has a mandate to take up property rights in the form of environmental easements to conserve wildlife habitat outside protected areas.

5.2 Legal Framework for Environmental Easements

Eminent domain and police power are the key options for securing wildlife habitat outside protected areas. These mechanisms are limited in their ability to conserve wildlife outside protected areas in that compulsory acquisition is not feasible in all areas where wildlife resources are found. Further, land use regulations and land use plans fail for lack of implementation. Easements provide an alternative mechanism and the first chapter of this thesis examined the framework for easements.

There are several statutes that provide for the use of easements and these are the Registered Land Act,[15] the Transfer of Property Act of India,[16] the Water Act,[17] the Wayleaves Act[18] as well as the Limitations of Actions Act.[19] It was further noted that in addition to statute, English Common Law applies in Kenya[20] and supplements the statutory provisions on easements. This is demonstrated by the case of *Kamau* v *Kamau*[21]

[15] Registered Land Act (No. 25 of 1963)Cap 300 Laws of Kenya.
[16] Transfer of Property Act of India (1882)
[17] *Supra* note 13
[18] Walyleaves Act Cap 292 Laws of Kenya.
[19] Limitations of actions Act Cap 22 Laws of Kenya.
[20] Judicature Act Cap 8 Laws of Kenya.
[21] *Kamau* v. *Kamau* Civil Appeal No. 45 of 1983 (2006) 1 KLR (E&L) 105-119.

in which the court of appeal considered and applied common law doctrines on easements, equity as well as statutory provisions on easements.

A review of the legal framework for easements revealed that that there are two different kinds of easements-the common law easement and statutory easements. English common law has developed very stringent characteristics for the common law easement vide the *Re Ellenborough Park* case[22] that set out the four characteristics of an easement. Namely, that there must be a servient and a dominant tenement, that the servient tenement must benefit the dominant tenement and that the two tenements must be owned by different persons. The easement must also be specific enough to form part of a grant. These four characteristics define an easement at common law and there is generally no end to the kinds of easements that can exist provided always that these four characteristics are fulfilled. We also found out that common law easements can be created by deed or by implication or by prescription.

A review of the Registered Land Act[23] and its provisions for easements revealed that the statute applies the common law easements in that it requires the existence of two parcels of land in the form of a dominant tenement and a servient tenement. The Water Act[24] on the other hand provides for a different kind of statutory easements- statutory easements that do not fulfill the requirements of the common law easement and which are for very restricted purposes- those issued to a person holding a permit issued under the Water Act.

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[22] *Re Ellenborough Park* [1956] Ch. 131.
[23] *Supra* note 15.
[24] *Supra* note 13.

The purpose of these easements is to enable the person holding a permit to lay pipes and other works on the land of another with obligations on the permit holder to maintain the area over which the easement applies. This easement differs from the Registered Land Act easement as well as the common law easement in that it does not require the existence of a dominant and servient tenement but rather creates an easement in gross. This is because the permit holder can obtain an easement without having to own adjacent land that is to be benefited by the easement.

A review of the Environmental Management and Coordination Act[25] with regard to the legal framework for easements revealed that the Act provides for the creation of environmental easements which are actually easements in gross and which are to be applied for purposes of environmental conservation by placing obligations on a persons land for the benefit of the environment including wildlife habitat. The environmental easement is therefore a statutory easement with different characteristics from the common law easement. Indeed, EMCA expressly provides that the validity of an environmental easement is not undermined by the fact that it may not have the characteristics of an easement at common law.

A unique characteristic of the environmental easement different from other statutory easements is that environmental easements are created through a court application by any person or group of persons and compensation is due to a successful applicant. Environmental easements are registrable against title to the property in accordance with the registration statute that the parcel of land applies and are binding against successors in

[25] *Supra* note 1.

title for the duration of the easement which could be for a term of years, an interest in customary law or in perpetuity.

There is potential for the use of environmental easements as a mechanism to conserve wildlife habitat as demonstrated first by the existence of wildlife areas outside protected areas that provide important ecological functions and support to protected areas in Kenya. Further, the provision in EMCA creating a statutory easement specifically for environmental conservation provides a key ingredient in the potential for use of easements. It removes the stringent requirements of the common law easement that would otherwise make it difficult if not impossible to fulfill for purposes of environmental management. This is particularly useful with regard to conservation of wildlife habitat outside protected areas. EMCA provides for the creation and registration of easements in all types of land tenure regimes including communally owned land.

However, the provisions of EMCA that limit the creation of environmental easements by court limit the use of easements for wildlife conservation and it is recommended that these provision be amended to include a provision that environmental easements for conservation of wildlife habitat may be created by deed among willing parties.

5.3 Land Tenure System and the Use of Environmental Easements

A review of the Land tenure system in Kenya revealed that Kenya's law of property in land is a product of the influences of the English Land Law as well as the customary laws of indigenous communities. Holding of private land as freehold and leasehold estates is

provide for in the Transfer of Property Act of India (which provides for leaseholds and fee simple estates) and the Registered Land Act (which provides for absolute proprietorship). Customary tenure is provided for under the Constitution of Kenya, the Trust Land Act[26] and the Land (Group Representatives) Act[27] which establishes Group Ranches. Public land is provided for under the Government Land Act.[28]

The private land regime is provided for in five separate pieces of registration- Government Land Act[29] Registered Land Act,[30] Land Titles Act,[31] Registration of Titles Act[32] and the Registration of Documents Act.[33] All these Acts are in force in Kenya, with the Registration of Documents Act and the Land Titles Act applying to properties at the coast and the rest to up country properties. Easements are registrable interests in land and the private land registration system provides an opportunity for the use of environmental easements to conserve wildlife habitat outside protected areas.

The Government Lands Act designates government land as alienated or unalienated land. The latter refers to land that has been set aside for certain use under statute for example wildlife conservation by the creation of parks under the Wildlife (Conservation and Management) Act, forests under the Forests Act as well as land set apart for the use of government agencies or land alienated to individuals as leasehold interest. Unalienated government land is land that has not been set aside for any government use or alienated to

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[26] Trust Land Act Cap 288 Laws of Kenya.
[27] Land (Group Representatives) Act Cap 287 Laws of Kenya.
[28] Government Lands Act Cap 280 Laws of Kenya.
[29] *Ibid.*
[30] *Supra* note 15.
[31] Land titles Act Cap 284 Laws of Kenya.
[32] Registration of Titles Act Cap 281 Laws of Kenya.
[33] Registration ofDocuments Act Cap 285 Laws of Kenya.

an individual as leasehold. Government land provides a challenge on the use of environmental easements as demonstrated by the attempt to place an environmental easement on the Sheep and Goat land in Kitengela. EMCA however provides that an environmental easement can be granted over any land provided the conservation purpose of the easement is shown.

Customary tenure presents special challenges to the use of environmental easements. This is because in the Trust Land as well as in the Group Ranches, customary rights over land are unregistered. With regard to Trust Land, the government and the local government authorities can alienate Trust Land and extinguish customary interests. This makes customary tenure over land very insecure and therefore a challenge to the use of environmental easements for conserving wildlife habitat on Trust Lands.

While EMCA provides that environmental easements may be applied for an interest in customary tenure[34] it would not be possible in the current land registration system to register interests in land under customary law. EMCA however provides that the District Environment Committee can create a register of environmental easements for land held in customary law.[35] However, this provision is not provided for under any system of land registration and does not secure the environmental easement as the land itself could be converted to private ownership and customary rights would be extinguished. It is therefore recommended that appropriate legislation be promulgated for the identification and recording of customary interests and to place these interests in equal legal strength

[34] *Supra* note 1at s 112 (s).
[35] *Ibid* at s. 115 (2).

with registered interests and to provide for the survival of customary interests when land tenure is converted from customary to private tenure. This will enhance the potential for use of environmental easements on land held in customary tenure.

The government has been undertaking a process of reviewing the land policy and the draft land policy is currently in draft form.[36] This policy recognizes that many communities still rely on customary tenure for resource use and management and notes that customary rights to land have been undermined consistently by the land registration system. The policy provides for the establishment of a system of documenting and mapping existing customary tenure and to provide a framework for recognition of customary rights to land and land based resources. It is recommended that this policy be passed and implemented to provide the necessary clarity on the quantum of customary rights to land and their transmission. In addition, it is recommended that the constitution and the Trust Land Act be revised to provide greater security of customary tenure over land particularly on Trust Lands to curtail the powers of government to set apart trust land without full participation of the communities that are ordinarily resident in the Trust lands.

5.4 Measures to Implement the Use of Environmental Easements

While the legal framework for environmental easements provides that any person or a group of persons can apply for a grant of environmental easements one of the reasons that the environmental easements have not been applied is that individual persons and groups may not have the interest or capacity to apply easements for wildlife conservation outside

[36] Republic of Kenya, Ministry of Lands *Draft National Land Policy, 2007 (*unpublished, copy on file with author).

of protected areas. This is because wildlife resources are public property and their conservation is in the public interest. In the same way therefore that wildlife habitat inside parks is managed by a public body in the form of KWS, it is necessary to have a public body to manage wildlife habitat outside protected areas.

KWS has not entered into any agreements with landowners for the conservation of wildlife habitat on land outside protected areas. The other institutional frameworks that apply land use regulations do not have the legal mandate to take up property rights such as easements for wildlife conservation. There is therefore a gap left for an institutional framework that can be responsible for the management of wildlife habitat outside protected areas. The design of this institution would include the participation of the KWS because the ecological viability of protected areas is affected by the status of wildlife habitat outside them.

There are private voluntary initiatives undertaken by private landowners, communal landowners to conserve wildlife habitat outside protected areas. Communities are setting apart their land and forming wildlife "conservancies" in which land is set aside for wildlife conservation.[37] The conservancies are unregulated by government and the wildlife areas so set a part have no form of legal protection and provide no guarantee for long-term conservation of wildlife habitat or endangered species they seek to protect.

Kenya Land Conservation Trust as an Alternative Institutional Framework for Easements

[37] For example Samburu Wildlife Forum establishes Waso-Wamba Conservancies in Samburu District-Samburu Wildlife Limited, Articles and Memorandum of Incorporation (unpublished, on file with the author).

A different voluntary initiative is the Kenya Land Conservation Trust, established as a body corporate under the Trustees Perpetual Succession Act in 2005.

The Trust is an initiative of the African Wildlife Foundation-an international nongovernmental organization, Kenya Wildlife Service and the Ministry of Lands and Settlement which are the founding institutions. Other members of the Trust include individuals and landowner associations. This institution has potential to implement the use of environmental easements as its mandate is to conserve wildlife habitat outside protected areas using property rights based mechanisms such as easements, land purchase and leases.

The Kenya Land Conservation Trust provides a good institutional framework for the use of environmental easements through voluntary transactions. In order to increase its mandate as a national institution with a legal mandate, it is recommended that the Trust be established as a statutory body. The establishment of the Trust as a statutory body would give the Trust a legal basis for engaging with all the other sectoral agencies in identifying and planning for the conservation of these areas and to conserve these areas using appropriate incentives.

The establishment of the Kenya Land Conservation Trust as a statutory body would mainstream the use of environmental easements as a mechanism to conserve wildlife habitat outside protected areas. Under the Environmental Management and Coordination Act, anyone may make an application to court for the grant of an environmental

easement, making the use of this mechanism open for all, without any coordination or regulation. It is recommended that the Environmental Management and Coordination Act should be amended to require that the use of environmental easements should be carried out by the Kenya Land Conservation Trust as the institution designated by law to acquire property interest over land to conserve wildlife habitat outside protected areas. In British Columbia, for example a non-governmental organisation wishing to hold conservation covenants over land must first be designated by law to accept such covenants. [38]

The government has undertaken a process of revising the wildlife policy[39] and the Wildlife Act[40] and it is recommended that the Wildlife Act be amended to establish the Kenya Land Conservation Trust as an institutional framework along side the Kenya Wildlife Service. The Trust should be established with the specific mandate of conserving wildlife habitat outside protected areas using property rights based mechanisms such as environmental easements and providing for collaboration with KWS, landowners, and other government agencies.

It is further recommended that a further amendment be made to provide that the Trust would also be funded from part of the revenue collected by the KWS and the Local Government Authorities from the respective National Parks and Reserves that they

[38] British Columbia 1994 *Land Title Act* (on file with the author).
[39] Republic of Kenya, Ministry of Tourism and Wildlife Draft Wildlife Policy, 2007 (unpublished, copy on file with author).
[40] Republic of Kenya, Ministry of Tourism and Wildlife *(Conservation and Management)* Bill, 2007 (unpublished, copy on file with author).

manage. The funds would be used by the Trust to negotiate environmental easements and other mechanisms with landowners for the conservation of wildlife habitat outside parks and reserves. A limitation of the use of environmental easements for habitat conservation lies in the requirement by EMCA that environmental easements are to be imposed on land through an application to court. This is limiting in that an institution such as the Kenya Land Conservation Trust could use other means such as negotiating environmental easements over privately owned registered land and have the same registered against title without resort to a court application that has an adversarial approach. Court applications may be available for critical habitats for which private landowner may refuse to voluntarily grant an environmental easement and the environmental easement would have to be shown to serve a public interest.

The Need for Incentives to Encourage Use of Environmental Easements

The availability of incentives for wildlife conservation and for the use of environmental easements is a critical factor in the successful implementation of environmental easements. From a utilitarian perspective, landowners would conserve wildlife habitat if they could benefit from wildlife keeping as a land use. While the land law in Kenya provides for the leasehold and freehold estates in land, the definition of land in the Registered Land Act as well as in the Indian Transfer of Property Act as (immovable property) excludes the ownership of wildlife resources. This concept is in keeping also with common law provisions that provide that wildlife resources being fugitive cannot be subject of property except only after they are hunted and killed and become the property

of the hunter.[41] A review of the Wildlife (Conservation and Management) Act[42] revealed that there are limited incentives to encourage a landowner to conserve wildlife on their land. The Act prohibits hunting thus leaving the non consumptive utilization of wildlife resources through activities such as wildlife based tourism. In addition to the provisions prohibiting hunting the cost of conserving wildlife habitat outside protected areas is borne by the landowner. Wildlife often competes with livestock for pasture and water and also destroys crops and property. There is no compensation payable by the government to land owner for the loss of property.

The creation of environmental easements through court provides a further opportunity to take away the rights of the landowner and their voluntary involvement in the conservation of wildlife habitat outside protected areas albeit with some compensation for the land use rights foregone. It recommended that provision be made within the legal framework to provide specifically for incentives to encourage landowners to conserve wildlife habitat. This can be done by providing funds to pay for environmental easements, creating a fund to support the establishment of wildlife based tourism facilities for landowners who conserve wildlife habitat. Funds can be provided in the form of grants and subsidised loans to landowners to develop wildlife based enterprises and to market these enterprises. It is recommended further that the government should also develop the requisite infrastructure such as roads and communication for greater access to wildlife areas for tourism purposes. Such an initiative would boost the

[41] *Pearson* v. *Post* 3 Cai. R. 175 (N.Y. Sup. Ct. 1805) quoted in Carol Rose, "Possession as the Origin of Property" in *Property and Persuasions: Essays on the History, Theory and Rhetoric of Ownership* (Boulder: Westview Press, 1994 at p. 12.
[42] *Supra* note 2.

opportunities for economic returns for wildlife keeping outside protected areas and it would also expand the potential for use of environmental easements as an additional mechanism for habitat conservation.

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