" THE ENGLISH DOCTRINES OF EQUITY AND TRUST AND THE AFRICAN CUSTOMARY NOTION OF TRUST: A COMPARATIVE ANALYSIS OF THE FIDUCIARY PRINCIPLES WITH PARTICULAR REFERENCE TO THE AKAMBA COMMUNITY OF KENYA"

by

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TABLE OF CONTENTS

PREFACE

The dissertation contains an exposition and discussion of the English law of equity and trust, and the customary notion of trust. The trust concept, especially in property holding, is an important social and economic institution.

The account given herein is by no means exhaustive. This is attributable to several factors. In undertaking a task like the present one of writing a research paper, one is bound to encounter a number of problems. The problems are magnified where one is making his first attempt and where research has to be conducted alongside the normal lecture attendance. A detailed research needs alot of time, but time and occasion do not allow. Besides, resources to make an exhaustive research are lacking. In the process of writing, therefore, one finds himself heavily indebted to several people. I shall not list the names of all those who helped me in this field, but to all of them I say thanks.

Special thanks, however, go to my Supervisor, Mr. Isabirye (Lecturer in Law, University of Nairobi). He has been of a great assistance to me. He read each of the chapters and made useful corrections which helped in shaping the paper into what it is now.

I cannot also forget to thank my parents. They have always encouraged me greatly in my academic pursuits..

Lastly I must thank Miss Mary Ngaruiya for agreeing to type the dissertation, thus transforming it from an almost illegible manuscript to a legible paper.

Any mistakes are, however, my responsibility.

HENRY MUKILYA MULLI
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ABBREVIATIONS:

A.C.	Appeal Cases
Ch.	Chancery
Ch.D.	Chancery Division
De G & J.	De Ge & Jones, Temp, Cranworth Chelmsford & Campell
E.A.	East African Law Reports
E.A.L.J.	East African Law Journal
H.C.C.A.	High Court Civil Appeal
J.A.L.	Journal of African Law
K.H.C.D.	Kenya High Court Digest
L.J. Ch.	Law Journal Reports, Chancery Division
L.Q.R.	Law Quarterly Review
L.R. Eq.	Law Reports, Exchequer Cases
N.L.R.	Nigeria Law Reports
W.L.R.	Weekly Law Reports

TABLE OF CASES

INTRODUCTION

Two main attitudes have characterised comparisons between African legal institutions and English law. May non-African anthropologists[1] would have us believe that African law is no more than a quaint body of exotic rituals which raises no analogy with the "civilised" and sophisticated legal orders of Europe. The African chauvinist,[2] on the other hand, is out to streneously demonstrate that the African legal genius is comparable to anything which England can offer. Between these two extremes the comparatist must tread warily, objectively and with no bias. In Kenya, the co-existence of the two regimes of law[3] naturally invites comparison - a comparison, however, which stems from a down-to-earth enquiry as to the effectiveness of this or the other system for more perfectly realising the goals of society. In this search for a better legal order considerations of chauvinism or denigration are utterly irrelevant.

Property concepts in many customary laws, as will be shown, were traditionally impressed with the "trusteeship" idea. This derived from the fundamental premise that basic property belonged to the ancestors, while the living were but temporary beneficiaries. In effect, as will be proved, property was an ancestral "trust" committed to the living for the benefit of themselves and generations unborn. The notion of an ancestral "trust" had two doctrinal consequences. First, by emphasizing the community interest in property generally it made ownership subject to a clear social obligation which precluded an individualistic conception of property. Ownership was a social "trust". Secondly, political and social functionaries charged with the administration of community property were strictly enjoined to discharge their functions in the primary interest of the group in question. In short, these functionaries were fiduciaries. English-trained jurists[4] administering the customary law were quick to invoke the trust parallel and designate the head of the family, the chief and the caretaker as "trustees" holding property in trust for the family or the community. Many distinguished authorities on customary law[5] have also made similar comparisons. An English jurist who comes across these analogies in the customary law may well think at first blush that he is on familiar ground, but he will probably pause when, on delving deeper, he unearths such strange doctrines as "the head of a family is not in some

../2

cases liable to account to the family in respect of family property" or "the members of the family cannot sue the head for the specific enforcement of his fiduciary duties".

The object of this paper is therefore to examine the validity of the trust analogy, with the Akamba community of Kenya being used for illustrative purposes, and with particular reference to the institution of family property; to show the institution's value and relevance to the community, thus high lighting its shortcomings or otherwise, and finally suggest ways whereby customary law might profit from the lessons of equity. Such a study inevitably poses several questions, revolving around the controversy as to whether customary notions of law still hold firm and whether they are of any practical relevance to modern Kenyan Society where English law has had considerable influence. The paper will attempt to answer these questions.

Chapter one is a historical survey of the development of the English law of trust before its reception into Kenya. There will also be a discussion of its reception, applicability, and relevance to the Kenyan Society. Our justification for having such a historical account is that it is an essential prerequisite to a proper understanding of this branch of English law, a factor which will simplify, to some extent, the comparative analysis. Chapter two is mainly concerned with an examination of the nature of customary law. This will entail a critique as to whether Customary Law is actually law in strict sense, and whether it is of any validity and relevance to the people it is supposed to serve. The justification for this chapter is that it is our belief that it will admirably serve as a stepping-stone on which the trust analogy in customary law will rest and be based. In chapter three we shall embark mainly on the comparative analysis of the fiduciary principles in English and kamba customary laws. This is the main chapter of the paper, and it is our opinion that the comparative study will show clearly the weaknesses of the one system vis-a-vis the other. Chapter four will be a critique of the "trust" analogy as discussed in chapter three. There will be an analytical and functional appraisals of the "trust" institution under customary law, so as to elicit the more the shortcomings of customary law in this field, and further clarify any fields which were left ~~under~~ unclear by chapter three. The chapter will also contain some suggestions for the reform of the customary law rules which have been in examination. This will then

.../3

pave the way to the conclusion part of the paper, which will be a summary of the contents of the four chapters. It will also show that the questions which form the basis of the paper have been answered and will include a review of how the questions were answered. Hence whatever we have proved will be presented.

Mentionworthy is, however, the fact that this is a relatively virgin area in the sence that very little research has been done on it neither by the foreigners nor by the African elites. We nevertheless hope that we shall overcome the problem by making use of the little material there is, and by supplementing these with the writer's own knowledge[6] of the "law" under discussion, it is hoped that our proposition will be proved.

CHAPTER ONE

HISTORY OF EQUITY

Preliminary note

A detailed account of the history of equity and its relationship with common law is outside the scope of this chapter. Only a very brief outline will be given here, and for a full exposition, the reader should consult standard works on the subject[1]. In this chapter, however, we shall mainly concern ourselves with the birth and growth of equity which led to the development of the trust institution, the reception of the English law of equity and trust to Kenya, and its application by the Kenya Courts.

THE GROWTH OF EQUITY IN ENGLAND

The period after the Norman Conquest saw the birth and growth of the common law. It was one of the great achievements of the Norman Kings that, under their rule a system of law "common"[2] to the whole of England was consolidated. These laws were administered by the Kings justices on circuit and by the three common law Courts[3].

A key figure in the administration of justice was the Lord Chancellor[4], one of whose functions was the issuing of royal writs which began every action at common law. The rule was that a plaintiff had no cause of action unless his claim came within the scope of an existing writ. By issuing new writs and varying existing ones, the chancellor was able to influence the development of common law. Nevertheless, this influence was a limited one, since, even if a plaintiff acquired a writ to fit his claim, the writ could be declared invalid by a common law judge. By about 1250 the common law judges were becoming more conservative in their attitude to new developments, and the practice of declaring new writs to be invalid increased, culminating in the Provisions of Oxford 1258 which provided that no new writ was to be issued without the consent of the council, the king's governing body. These fetters on the growth of the law were loosened somewhat by the Statute of Westminster II 1285 - the Statute in Consimili Casu[5] - but the position was still highly unsatisfactory in that a plaintiff, even if he did obtain a suitable writ might yet be defeated by the power or influence of his opponent, since in those harsh times "might" all too often meant "right". A plaintiff who failed to obtain redress through lack of a remedy or failure to administer it could petition the king in Council, praying that the king

might exercise his wide discretionary power to do justice among his subjects. It was the chancellor, as the king's chief minister, who delt with these petitions. Gradually the chancellor came to determine matters raised in the petitions independently of the King in Council, so that by the end of the 15th century petitions were addressed directly to him, the issues were tried in his own Court, and decrees were made in his name. This was the beginning of the equitable jurisdiction of the Court of chancery.

In the early days of chancery jurisdiction there were no set rules or procedure. The chancellor decided each case on its merits according to "conscience" and his judgments were founded not on precedent but on his own individual sence of right and wrong; hence the famours remark of John Selden "Equity is a roguish thing. For law we have a measure. Equity is according to the conscience of him that is chancellor, and as that is longer or narrower, so is equity. 'Tis all one as if they should make the standard for the measure of a chancellor's foot".

That equitable decrees were originally based on "consciense" is not surprising in view of the fact that almost all the early chancellors were bishops, concerned more with relieving hardships in individual cases than formulating a body of defined rules and principles. It was not until chancellors began to be drawn from the ranks of lawyers that precedents began to appear and rules were laid down. The process began with Lord Ellesmere (1596-1617) and was continued by Lord Nottingham (1673-1682) known as the "Father of Equity", under whose chancellorship many of the principles of Equity were systematised. There then followed Lord Hardwicke (1737-1756) and finally Lord Elson (1801-1827). All these chancellors were eminent lawyers, and it was natural that under their guidance equity should have developed from its original formlessness into a system of rules almost as rigid as the common law itself.

The early Court of chancery was faced with two procedural problems. The first was how to compel a defendant to appear before the Court in answer to the plaintiff's petition without the issue of a royal writ. This was easily solved; the chancellor would issue a sub poena ordering the person to appear before the Court on pain of forfeiting a sum of money. The second problem was how to enforce certain equitable

...../6

decrees against a defendant without coming into conflict with common law Courts. For instance, if A had the legal title to land, but equity held that A should hold the land to the use of B and B should have possession, the common law would not recognise any rights in B, and, if A sued at law his legal title and right to possession would be upheld. Since the chancellor could not deny A's tile nor challenge the ruling of a common law Court, the only way to uphold B's claim would be to act in personam against A and prevent him from bringing an action at law. This, the chancellor did by issuing a "common injunction" restraining the defendant from suing at law to enforce his legal rights, or, if he had already obtained a judgment at law, from exercising those right. Failure to obey an injunction was punishable by imprisonment for contempt.

It was over the use of the common injunction that the inevitable open confrontation between common law and equity finally occurred. Relations between the two systems had always been strained, but perhaps because of the respect in which the chancellor, as the king's chief Minister, was held, an open clash had been carefully avoided. Matters finally came to a head in 1615 during the chancellorship of Ellesmere. Chief Justice Coke was not prepared to see the common law flouted, and in a number of judgments he declared the concellor's imprisonment of those who disobeyed injunctions to be unlawful; furthermore, he asserted that the jurisdiction of thechancellor was contrary to the statute of Praemonire 1353 and another one of 1402. Lord Ellesmre, fore his part, vigorously defended the position of chancery, asserting that his Court was not interfering with the due process of law, but was merely acting in personam against the defendant, directing that on equitable grounds, he should not pursue his remedy at law. James J. finally stepped in and appointed his Attorney General, Sir Francis Bacon, to adjudicate on the matter. Bacon decided in favour of chancery and although a few more hostile challenges were mounted by the common law, by the end of the 17th century the victory of chancery was complete and its jurisdiction unassailable.

THE DEVELOPMENT OF THE TRUST

The concept of the trust is perhaps the most important single contribution of Equity to the substantive law of

..../7

England. It is the centre-piece of equitable rights. The original form of Trust was the "use". There were various reasons why it might be advantageous to give land not to B directly, but to A "to the use" of B. Example might be where B was a knight frequently out of the country on crusades and needing A to hold the land inorder to perform and to receive feudal services, or where B was a community of monks, forbidden by their order from holding property, or B was afraid of forfeiting the land on account of a conviction for a felony, or of losing it to his creditors. Insuch cases clearly it would be advantageous to vest the legal estate in A (the feofee to uses), who could hold the land for the benefit of B (the cestui que use). But whatever the purpose for which the use was created, the position was that the common law did not recognise the rights of B at all but regarded A, the holder of the legal estate, as alone beneficial entitled. Thus it could be said that A was the owner at law, and B the owner in equity.

One of the advantages of the use was that by vesting land in a group of adults, it was possible for the beneficial owner to avoid the burdensome feudal incidents to which the holder of a legal estate was subject. So widespread was the evasion of feudal incidents in this way that the royal revenues were being lost on a large scale. This prompted the passing of the statute of uses[6] in 1535 which abolished the use by providing that whereland was given to A "to the use of B" A was to drop out and B would be deemed to be the holder of the legal estate.

It was not long, however, before a means of avoiding the consequences of the statute was found. This was done

simply by the use upon a use. If land were given to A "to the use of B to the use of C" why should not B, the legal owner under the statute, be compelled in Equity to hold it to the use of C?. By about 1700 such a disposition was recognised as effective to give the beneficial interest to C, the second use being called a "trust". Eventually it became unnecessary to mention A at all, and the standard form of words could be "unto and to the use of B in trust for C". The legislature did not seek to prevent this evasion of the Statute of Uses since by the end of the 17th Century, great constitutional and social changes had taken place in England and the importance to the crown of fendal revenues had greatly diminished. The former reasons for preventing property from being held on trust no longer existed.

By the end of Lord Elson's chancellorship in 1827 equitable jurisdiction had expanded to its present day proportions, and almost all the principles of equity were firmly established[7]. For our purposes we may treat the ancient use as the exact counterpart of the modern trust[8]. Thus to borrow the Late Sir Arthur underhill's definition[9]. A trust is "an equitable obligation, binding a person[10] to deal with property over which he has control, for the benefit of persons of whom he himself may be one, and any of whom may enforce the obligation"[11].

It is impossible to enumerate all purposes for which trusts are used. Broadly speaking they enable people to enjoy the benefit of property, who are for one reason or another unable to hold the legal ownership in it themselves. Thus, the rights of beneficiaries under a settlement of land are always held for them in trust. The reason for this is that it has been found impractical for the legal ownership of land to be split between a number of people. Moreover groups of people, such as unincorporated associations can enjoy the benefit of property held in trust even though the law does not accord legal "personality" to their group. The "trust and confidence" imposed in the trustee by the creator of the trust is the core and essence of the matter. Equity will not permit the trustee to depart from his undertaking. The right of the beneficiary arose only, as it were, as a side wind of this principle.

RECEPTION OF EQUITY IN KENYA

Equity as administered in England was introduced in

.../9

Kenya in the instrument which provided for the application of English law.[12] The Courts were hence directed to apply "The substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August, 1897.... provided that the said common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary".[13] Also they were directed to exclude customary law if its application was "repugnant to justice and morality or inconsistant with a written law..."[14]

The effect of the above provision[15] is that subject to local circumstances and to any local statute, the entire common law and equity forms part of Kenyan law. There is a controversy, however, as to whether the limitation to pre 1897 laws refers only to statutes of general application or whether it applies to the rules of common law and Equity. Inotherwords, although clearly it is acknowledged that only pre 1897 English statutes are the ones which should be in force in Kenya, it is uncertain from the wording of the Act whether the Kenyan Courts are to apply the rules of common law and Equity as they exist now, or as they existed in 1897. Some writers, notably Professor Allot[16] favour the latter interpretation, and support is lent to this view by the following dictum of Petrides J. in a Nigerian case,[17] that "the statutes of limitation... were statutes of general application in force in England on January 1st 1900[18], and they, in common with other statutes of general application which were in force on that date, are together with the common law and the doctrines of Equity which were in force in England on the same date in force within the jurisdiction of this Court". On the other hand other writers, notably A.E.W. Park[19] hold the contrary view, i.e. that common law and equity is to be applied as it exists at the present time.

It is submitted with respect that this[13A] the correct (practical) view. It cannot be denied that in practice Kenyan Courts seldom, if ever, draw any distinction between pre and post 1897 English cases dealing with common law or equitable principles, and that a decision is likely

.../10

to be based on the second category as on the first. It is submitted, therefore that the only limit to the applicability of post 1897 English cases occurs where the particular decision is based on a post 1897 English statute which brought about a change in the English law, and has no equivalent in Kenya, or where it is inconsistent with a Kenyan statute or its 'circumstances' or binding precedent.

Since section 3(1) of the Judicature Act[20] provides for the application of the English doctrines of equity in Kenya, it becomes clear that the reception includes all the doctrines of equity evolved in England[21] as discussed above. One can therefore be justified in saying that Equity is a distinct source of law in Kenya though the distinction between common law and equity was modified by the English Judicature Act, 1873. But as Allen[22] puts it "inspite of the fusion there is still a frontier between common law and chancery", although in Kenya they are applied by the same Courts.

APPLICATION OF EQUITY BY THE KENYA COURTS

If we regard equity as a distinct sourse of law, then its application in Kenya should be subject to the same conditions as the other sources of law in Kenya[23]. It follows from this that those doctrines of equity which have been described as "anachronisms should be regarded as unsuitable to the conditions of Kenya (e.g. the doctrine of conversion, secret and half-secret trust etc)[24]. Apart from this reservation it may be said that the resonable doctrines of equity have played an important role in the development of the law in Kenya.

Again, although the Kenya Courts will apply any rule of equity which is not repugnant to a local statute or to local circumstances, it is clear that the only equitable matters which do infact come before the Courts are those which are referable to the social conditions now prevailing in the country. Presently, land is the most valuable type of property and the commonest source of wealth[25]. Thus it is these equitable rules and remedies which are most applicable to land that are mostly discussed by the Courts.[26] Conversely, since the society is not yet fully commercialised stocks and shares are not an important species of property. Hence many of the technicalities of modern law of trusts in England are not encountered in Kenya. Other factors which have prevented a more extensive application of equitable

principles are the comparative varity of wills, and the demands of the extended family system which have hindered the establishment of charities. The local case law is hence on some topics. However, in view of the rapid development taking place in the country, ~~increasing~~ causing the great increase in commercial activity[27], it is expected that before long there will be a comprehensive body of Kenya law embracing all equitable topic.

CHAPTER TWO

MEANING AND NATURE OF CUSTOMARY LAW IN THE KENYAN CONTEXT AND BASIS FOR ITS EXISTENCE

It is universally admitted that wherever there is an assemblage of persons united together for common purposes or ends, there must be some notion of law, for mankind has, as Cicero[1] observed, a genius for law. That there must be a supreme power in every state or community, says Paterson[2] is an axiom which cannot be explained but which must nevertheless be assumed. Even in the rudest forms of state there is a similar power, whether lodged in the patriarch or the elders of the tribe, and it is usually found to assume by turns a legislative, a judicial, and an executive form. This supreme power is only a synonym for that human voice which cannot be resisted by any one inidividual or by any minor combination of them short of the majority, for whenever one resists it, all the other indivuduals readily combine consciously or unconsciously to uphold it. There exists in such community much of those positive rights and obligations constituting that Austinian positive marality which may be called the customary law and which each person can enforce against his neighbour.

There is no single definition of customary law agreed by lawyers, jurists, social anthropoligists and others who may be concerned with it.[3] This, in itself, is not suprising for both "custom" and "law" may be used in a number of differing senses depending upon the requirements of a writer's approach. However, ~~there has been attempts in~~ some several African countries have attempted to define customary law, for the place of customary law in the developing legal systems of new African states is a matter of some considerable contemporary importance which calls for some precise definition in this immediate aspect.[4]

Both Uganda and Tanganyika[5] define customary law in terms of its nature, viz rules of law established by custom and usage.[6] The Uganda Magistrates' Courts Act, 1964 defines "Civil Customary law" to mean "the rules of conduct which govern legal relationships as established by custom and usage and not forming part of the common law nor formally enacted by parliament". Also, the Tanganyika Interpretation and General Clauses Ordinance, section 2(1), (as

..13

amended by Magistrates' Courts Act, 1963, 6th Schedule) provides that" 'customary law' means any rule or body of rules whereby rights and duties are acquired or imposed, established by usage in any Tanganyika African Community in general as having the force of law, including any declaration or modification of customary law made under the Local Government Ordinance, but does not include any rule or practice which is abolished, prohibited punishable, declared unlawful or expressly or impliedly disapplied or superseded by written law; and references to native law and custom shall be similarly construed". Similarly the Ghana-Interpretation Act, 1960, Section 18(1), (2) provides that "customary law, as comprised in the laws of Ghana, consists of rules of law which by custom are applicable to particular communities in Ghana, not being rules included in the common law under any enactment providing for the assimilation of such rules of customary law as are suitable for general application...

The Kenya Magistrates' Courts Act[7], on the other hand, ventures a new approach by defining customary law, not in terms of its nature, but in the contents of its subject matter. Thus, section 2 provides:

"In this Act, except where the context ~~other~~ otherwise requires:

'Claim under customary law' means a claim concerning any of the following matters under African customary law.

(a) Land held under customary tenure;

(b) Marriage, divorce, maintenance or dowry;

(c) Seduction or pregnancy of an unmarried woman or girl;

(d) Enticement of or adultery with a married woman;

(e) Matters affecting status, and in particular the status of women, widows and children, including guardianship, custody, adoption and legitimacy.

(f) Succession, both testate and intestate, and administration of estates, except as regards property disposed of by a will made under a written law..."

The major difficulty in this approach is to discover whether the above list is meant to be exhaustive. Can a District Magistrate's Court, which has exclusive

jurisdiction in proceedings concerning a "claim under customary law" deal with any matter not covered in the above definition?. Although it can ligitimately be argued that the list is exhaustive in view of the use of "means" rather than "excludes"[8] it is submitted that it could not possibly have been the intention of the draftsman to exclude from the jurisdiction of district Magistrates matters not covered in the definition for this would lead to absurd results. The most significant omission from the subjects listed is customary contract and tort. Although there is not in Kenya a well developed customary law relating to contracts[9], there is no doubt that each customary law recognise and enforces rights and obligations arising from contracts e.g. pledges, sales etc. especially among cattle people.[10] Again, in the field of tort, the definition only covers the sexual wrongs of seduction, pregnancy, enticement and adultery. In effect all customary law recognise many other torts, whether they may be wrongs against the persons, e.g. homicide and other bodily injuries, or against property, e.g. cattle trespass. All these contractual and tortious rights and obligations were consistently enforced by the African Courts prior to integration[11] and it is submitted that the position has not altered by virtue of the new definition. It is hardly likely that the intention of the legislation was to abolish the application of the customary laws relating to contracts and torts.

The above is also Cotran's[12] view, who bases his argument on a proper construction of section 3(2) of the Judicature Act 1967[13]. The section in short provides that the High Court and all subordinate Courts (which includes Courts of District Magistrates) shall be guided by African customary law in Civil Cases. There is no definition of customary law in the Judicature Act and the definition contained in section 2 of the M.C.A. specifically applies to that Act only, Cotran argues. In the circumstances "customary law" as used in section 3(2) of the Judicature Act is not confined to the subjects specified in section 2 of the M.C.A. and must necessarily include all the subjects of customarylaw recognised by the law of Kenya. By necessary implication, therefore, Cotran concludes that Courts of District Magistrates must by virtue of section 3(2) of the Judicature Act be guided by the customary law of contract and tort even though it is excluded from the list of subjects

in section 2 of the M.C.A.

The statutory definitions of customary law given above ~~law gives~~ Produce a picture as to the meaning of customary law. At this juncture it can therefore be said that by customary law we inclusively refer to the rules of law which each African community has evolved under each ones customs over a period of years, which rules have come to possess binding powers over every member of the community. It then sets apart from the laws which were introduced by the colonial powers. It is based on the values of law as evolved and prac by diverse indigeneous groups living here before the colonial era and which have continued to a lesser or greater extent to govern and regulate the way of life of the indigenous communities which had in the first place evolved them. The phrase then understood thus, becomes a term employed for convenience referring not to a single African customary law (for it has never existed and probably will never), but collectively to all the rules of law evolved by the various African communities, each within its own time, place and peculiar circumstances.

As far as the nature of customary law is concerned, it would not be suitable for this paper to attempt a sociologica analysis of this. However, it is believed that a brief outli of the characteristics of customary law is useful in the attempt to answer the question as to the basis of the existence of customary law in Kenya.

A particular customary law must be in existence at the relevant time, and must be adhered to and recognised by the community. In an illuminating passage on the nature of African customary law, Lord Atkin had this to say: "Their Lordships entertain no doubt that the more barbarous customs of earlier days may under the influence of civilisation become milder without losing their essential character as custom. It would, however, appear to be necessary to show that in their milder form they are still recognised in the native community as custom, so as in that form to regulate the relations of native community inter se... It is the assent of the native community that gives a custom its validity, and therefore barbarious or mild, it must be shown to be recognised by the native community whose conduct it is supposed to regulate.[14]

Again, customary law is not a frozen and rigid system but one which from time to time develops and modifies itself inorder to accord with changes of social conditions. Hence one of its most striking features is its flexibility; it appears to have been always subject to motives of expediency and it shows unquestionable adaptability to altered circumstances without entirely losing its character.

There are many changes that have taken place. An obvious one is the use of writing. In the past, customary law had been not only unwritten, but there was a time when the presence of any form of writing in a transaction raised a presumption that the transaction was one governed by English law. This absolute position has been abandoned. There may also be mentioned the alienability of land. The traditional rule of customary law prevented the free transfer of land between two completely unconnected persons. However, in the commercial society this is most inconvenient and there are now many cases which recognise that land held under customary titles may, subject to certain conditions, be readily alienated.[15]

At present, the vast majority of the inhabitants of Kenya conduct most of their activities in accordance with and subject to customary law.[16] There are reasons - legal, sociological, psychological or even jurisprudential for the existence of customary law in Kenya, which in turn explain the basis for the application of this law in Kenya.

It is submitted that customary law emanates from custom and as such a thorough understanding of custom, in the Kenyan context will partly answer the question as to the basis for the existence of customary law in Kenya.

Custom is to society what law is to the state.[17] Each is the expression and realisation to the measure of men's insight and ability of the principles of right and justice. The law embodies these principles as they command themselves to the incorporate community in the exercise of its sovereign power. Custom embodies them as acknowledged and approved, not bythe power of the state, but by the public opinion. Nothing, therefore, is more natural than that, when the state begins to evolve out of the society, the law of the state should in respect of its material contents be in great part modelled upon, and coincident with, the custom of the society.[18] When the state takes up its function of administering justice, it accepts as valid the rules of right already accepted by the society of which it is itself a product, and it finds these principles already realised in the customs of the realm. In this connection, it must be remembered that at first the state is so weak that its judicial authority depends partly at least, on voluntary submission, whilst custom is so closely linked with religion and taboo that any departure from it is almost unthinkable.

Another ground for the law-creative efficacy of custom is to be found in the fact that the existence of an established usage is the basis of a rational expectation of its continuance in the future. Justice demands that, unless there is good reason to the contrary, men's rational expectations shall, so far as possible, be fulfilled rather than frustrated. Even if customs are not ideally just and reasonable; even if it can be shown that the national conscience has gone astray in establishing them; even if better rules might be formulated and enforced by the wisdom of the judicature, it may yet be wise to accept them as they are, rather than to disappoint the expectations which are based upon a stabilised practice.[19]

Considerations such as the above are sufficient, even in modern times and in fully developed legal systems, to induce the legislature on due occasion to give express statutory authority to bodies of national or local custom.

Thus, in Califonia, the customs developed on the gold fields for the regulation of mining industry were given the authority of law by the legislature. Similarly, in New Zealand, when English Government and English law were introduced on the founding of the colony, the legislature thought fit that the original Maoris should to a large extent continue to live by their own tribal customs, and to this extent these customs were given by statute and still retain the authority of law. In Kenya as well customary law originates from the customs of the people and depend upon general acceptance by the community. People obey because they accept it.

Law defined becomes an integral part of a community, ~~Germane~~ germane to its development and welfare, and not an imposition from without. It reflects the community's hopes, fears, wishes as well as the social, cultural, economic, political or even religious institutions which it embodies. This way, law is seen in its proper perspective. It is revealed as being no more than a superstructure of the community, itself based on the economic set up obtaining in it. This economic base comprised of the mode of production, the means of distributing what is so produced, and on the ownership in the community of the means of production. The law of a community mirrors that community's superstructural values, which taken together reflect and embody in turn the philosophy or idea of good life[21] espoused by the community. This exposition clearly takes customary law and indeed any other law which can legitimately claim the respect and obedience by its subject.

In view of the above argument, customary law claims obedience and respect from Africans. Based on customs which have their source in a community, which is made up of persons who are community-oriented, it does, of necessity reflect, embody and give effect to African values and aspirations. The major means of production are held communally by the family[22], ~~being~~ which was the smallest unit ~~which~~ that could own rights of user over land delegated in turn by the clan, which enjoyed limited rights of control delegated by the community. The community in turn may be said to have any such rights of control and ownership as were necessary inorder to carry out on behalf of every member~~ship~~ of the

community the powers similar to those of a trustee, which rule the community fulfilled in respect of land for the benefit of the members generally.

Lastly, the above justifications for the existence of customary law in Kenya are even more strengthened by the effect of the provisions of the Magistrates' Courts Act (section 2) and the Judicature Act 1967, section 3(2).[23] As discussed above, these two provisions form a legal basis for the application of customary law in Kenya. When taken together with the sociological and jurisprudential factors analysed above, then the basis for the existence (and perhaps application) of customary law in Kenya is seen in a clear perspective. The next chapter, which will primarily be based on the fiduciary principles in the kamba customary law, in so far as concerns property-holding, will be analysed against this background, and should therefore be seen in the same context.

CHAPTER THREE

A COMPARISON OF THE FIDUCIARY PRINCIPLES IN ENGLISH LAW AND THE AKAMBA CUSTOMARY LAW

In chapter one we delt with the evolution of the English law of trusts and its reception in Kenya. In chapter two we examined the nature and validity of African customary law. In this chapter, we shall try to analyse both systems of law through a critique into the fiduciary principles involved, with the Akamba Community of Kenya being used for illustrative purposes. The analysis is restricted to the fiduciary principles governing family property holding for it is our opinion that this is one good area where the customary trust analogy can be seen in its right perspective.

Maitland[1], writing about the English law of equity and trust said:

> "of all exploits of equity, the largest and the most important is the invention and development of the trust".

In this course of lecture the learned professor ascribed the invention of the law of trusts to the work of English lawyers, and therefore concluded that the trust is the peculiar product of English legal genius. However, it should be pointed out that the institution of trusts is not only peculiar to English law. Thus, writing of the Katab of Northern Nigeria, for example, one learned author[2] records:

> "If the sons are too young to inherit the various kinds of property enumerated above, the property is held in trust for them by their father's brother or paternal cousin, who restores it when they reach the age of discretion or gives them the equivalent either in kind or by meeting their marriage expenses".

In this case, it is evident that the word "trust" is being used in this context in the customary law sense.

As concerns the Akamba also, the notion of trust is the basement of property holding in family circles. The family[3] is the basic unit in the social and political pattern not only of the Akamba community but also of traditional Kenya. Virtually all traditional institutions revolve around the concept of the family. Land, for instance, has got religious or superstructural significance as here family ancestors are buried or the land itself is a deity which requires placating. The kamba land tenure can, therefore, be termed as family holding and this is in consonance with a Nigerian

..../21

chief who is reported to have said:

> "I conceive that land belongs to a vast family of which many are dead, few are living and countless numbers are yet to be born".[4]

Again, as will become increasingly evident later the customary fiduciary principles are in most cases trammelled with the incidents of status and traditional privilege. A head of a family is hence not merely a colourless custodian of property but an exalted bearer of traditional office, as well as reverend father of the household. He enjoys a unique social standing within the family[5].

From the above exposition it becomes clear that there exists two types of trusts in Kenya, one operating under customary law and the other under statute or English law. There are differences between the two types. For example, whereas writing is an essential in a declaration of trust, in customary law writing is not necessarily essential. According to the Mende of Sierra Leone forexample, "the individual inheriting land automatically becomes the head of the family concerned and trustee of its property and in acknowledging his position the other members look to him to fulfill the double responsibility"[6]. The mere fact that writing was absent in the creation of a trust according to customary law does not necessarily make the position of a trustee less responsible. In England, under common law, a trust could be created without deed, without writing, without formality of any kind, by mere word of mouth. According to the Preable of the Statute of Uses[7] it could be created by signs[8]. Noteworthy, however, is the fact that in recent times, there is a tendency either through legislative action[9] or by judicial decisions[10] to merge the two types of trust

The kamba customary law has no such thing as the dichotomy of law and equity, the fiduciary situations which one encounters in the customary law are not therefore traceable to a distinct system analogous to equity. However, an enquiry into the customary institutions discloses many situations in which persons hold or manage property, or are entrusted with tasks to be performed, for the benefit of other persons. A head of a family, a successor, and a caretaker are all functionaries entrusted with the administration of property in the primary interest of other persons,[11] They have limited, or no beneficial interest in such property and are strictly forbidden by welt entrenched doctrines of customary law from exploiting

their position of trust in their own selfish interests. These functionaries would therefore seem to come within the definition of a fiduciary in the American Restatement of Trusts: "A person in a fiduciary relation is under a duty to act for the benefit of another as to matters within the scope of the relation".

NATURE AND EXTENT OF THE POWERS OF THE 'TRUSTEES' IN THE TWO SYSTEMS

The English trust is the offspring of the dichotomy of legal and equitable interests in property.[12] The Chancellor's enforcement of the use proceeded on the premise that legal title was detachable and distinguishable from the beneficial interest in property, and that it was unconscionable for the feofee to use to exploit his standing at law to the detriment of the cestuique use. The Chancellor's jurisdiction thus gave rise to the concept of dual ownership which allows the trustee to hold title while the beneficiary retains the right to beneficial enjoyment.

The kamba customary law knows no such cleavage between title and beneficial enjoyment.[13] The family head, like the trustee, has control of family property, but title and the right to beneficial enjoyment are both vested in the family. The managerial powers of the head are strictly distinguishable from the title to the family property and it probably is inaccurate to describe the head as holding family property. In this regard his postion is not unlike that of the life-tenant under the English Settled land Act of 1882 who was deemed to be a trustee[14] in respect of his wide powers of dealing with the settled land although the legal estate was not vested in him. Before 1926, the legal estate was either vested in the trustees of the settlement or split up between the beneficiaries, but the Act of 1882 struck at the doctrinal fetters upon the alienation of the property by conferring wide powers of disposition upon the tenant for life. The settled land Act of 1925 completed this process of liberation by vesting the legal estate in the tenant for life, thus making his fiduciary position more like the usual common law trustee as regards the location of title.

The difference between the trust and family property reflects the fundamental attitudes of the two legal systems. English law with its strong individualistic bias is replete with devices for concentrating the trappings of title and

../23

effective powers of control and disposition in the hands of an individual. Economic and conveyancing notions favour the individual holder of property, armed with the legal competence to dispose of the property and to pass title unaided by any other persons, even though there may be a host of persons beneficially interested in the property.[15] Thus title to the estate of the ~~estate of the~~ decedent, or to settled land under the English settled land Acts, or to the ~~subject~~ Subject matter of the trust for sale is vested in one or two individuals. Not so in kamba customary law, where the pervading collectivism tends to emphasize "corporate" title and to circumscribe the powers of control which a single individual may wield over "corporate" property. However, new economic and social phanomena have caused a significant increase in the head's powers of disposition.

The usual conception of a trust is a dispositive scheme whereby title to property is vested in one person upon trust to hold it for another. The trustee is thus, usually depicted as enjoying no beneficial interest in the trust res. There is, however, no doctrinal impediment to a trustee being a cestuique trust. There can, of course, be no trust where a person is at once sole trustee and sole beneficiary; equity does not counternance the spectacle of a person discharging the full panoply of a trustee's obligations to himself. But the validity of a trust will not be vitiated by the mere circumstance that a sole trustee is one of the beneficiaries, although this may justify the appointment of an additional trustee. Where a trustee is also one of the beneficiaries[16] his position is closely analogous to the head of the family who is a trustee and also one of the cestuique trust. A head of the family, by definition, is a member of the family he ministers unto, and is as much entitled to participate in the enjoyment of family property as any other member. His "trusteeship" is therefore a "highly interested trusteeship".

As far as creation is concerned, in English trust, it depends on the settlor's intention. But intention is utterly irrelevant to the establishment of fiduciary relations between the head and members of the family.[17] The head voluntarily assumes his office, but is placed in a fiduciary position by virtue of the office and without respect to his intentions. Thus, there is no analogy here with either an express or implied trust.[18] The analogy with a constructive trust is

valid to a point; both fiduciary situations arise by operation of law. But the modern tendency in England[19] is to regard the constructive trust as a purely remedial device which comes into operation when an act savouring the unjust enrichment is committed. The customary fiduciary relationship is based on an affirmative duty, not on any remedial theory. This is not unlike the fiduciary position of the tenant for life under the English settled land Acts. Like the head of the family, a tenant for life is deemed by law to stand in a fiduciary relationship with the other beneficiaries and ~~enjoyed~~ enjoined "to have regard to the interests of all parties entitled under the settlement"[20] in exercising the extensive powers conferred upon him in respect of the settled land.

The family head's powers of control and management are in many ways similar to those of a trustee. Like a trustee, he can take such steps and incur such expenses as are reasonabl to preserve the family property (i.e. the res). Indeed, he is under a moral obligation to ensure the growth of family resources.[21] English law recognises this and grants the trustee the primary right to sue. But unlike a trustee, a head of family is personally liable to the costs of litigation in respect of family property.[22] The basis is that members of a family are jointly and severally liable for the whole of the debts of the family and therefore each member of the family is personary liable for the whole of the costs incurred in litigation.[23]

As far as the duty of loyalty is concerned, it is a fundamental fiduciary principle. It ordains that the trustee must not place himself in a situation where there is a conflict between self-interest and his duty to the beneficiaries. The kamba customary law also proclaims the paramountcy of the family's interests over the self-interest of the head of the family; the head's obligation to administer family property in the interest is a fundamental legal doctrine and a basic tenet of traditional religious ideas. Deviation from this norm constitutes an outrage upon the ancestral spirits and attract drastic sanction of disposition.[24] Unlike equity, however, the customary law has no armoury of elaborate rules to deter the remotest conflict between self-interest and duty to others. Equity for instance, forbids the trustees to

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purchase the trust res from himself even where the price is otherwise fair and the transaction is not tainted with bad faith.[25] Equally impeachable is a sale by the trustee of his own property to himself as a trustee. A trustee must not deal with the trust property in such a way as to make for himself a profit out of it or out of his dealings with it.[26] Similarly, he is prohibited from entering into competion with the trust. He is not entitled to renumeration in respect of the administration of the trust.[27]

No clear-cut parallels to these rules can be found in kamba customary law. A head of a family, by accepting office commits himself to the preservation of family property; indeed it is the obligation of every member to preserve the family heritage.[28] With the head, the duty to preserve becomes something in the nature of a duty to augment, and the idea of buying off the rest of the family from the family estate violently offends the very basis of customary tenure.[29] Such a transaction is utterly inconceivable. Equally repugnant to traditional idea is a sale of his own property by the head to himself as family head; the family ties which bind the head and members do not admit of such unabashed commercialism.[30]

The most striking contrast between the law of trusts and the law of family property is to be found in the principles relating to the rendering of accounts by the fiduciary. Customa law to some extent differs from equity. A trustee in English law is under a duty to keep accurate and clear accounts in respect of the administration of the trust property, showing receipts and expenditures, accretions and losses.[31] The duty to account is so fundamental that in some jurisdictions an express exemption therefrom is adjudged contrary to public policy. This duty is supplemented by a duty to furnish information to the beneficiaries; they both expose the trustee's stewardship to periodical inspection, and afford to the beneficiaries a direct means of holding the trustee to his fiduciary duties.

Fiduciary principles in kamba customary law was traditional bound up with the cult of ancestral worship. A basic tenet of this cult was that the living were strictly accountable to the ancestral spirits for their actions. This idea of strict accountability to the ancestral spirits was a potent

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factor of social control generally, but it was particularly significant in the administration of family property, since such property was an ancestral trust.[33] Thus, although the head of the family was immune from liability to account to the members of the family, this in no way detracted from his accountability to the ancestral spirits. In effect, then, the defects in mundane legal procedures were cured by the efficacy of religious sancitons. However, it must be appreciated that the efficacy of the customary fiduciary institution was strictly anchored on strict adherence to religious tenets. With the erosion of the cult of ancestral worship, it is imperative to devise on effective down-to-earth machinery for transplanting this fundamental idea of accountability into social reality.

REMEDIES:

A cardinal characteristic of the law of trusts is the existence of an armoury of remedies which beneficiaries may prosecute against the erring trustee. Sanctions are well articulated in equity; indeed the law of trusts may properly be described as the law of remedies. The position is remarkably different in kamba customary law. Here, the frontiers of the head's liability tend to be blurred by the prerogatives attaching to his traditional office.

One of the areas where a comparison of the two systems discloses a wide divergence is the extent to which the beneficiary may execute his trust. In equity a fiduciary need not wait for breach of trust before invoking the aid of the Court; he can specifically enforce the duties of a trustee either by obtaining an injunction to restrain a threatened or imminent violation[34], or by procurring a Court's order directing the trustee to execute the trust. The kamba customary law is a bit different. An aggrieved member of a family may, however, make representations to elders who may intercede on his behalf inorder to procure, for instance, a more equitable distribution of family land etc.[35]

As concerns redress for breach of trust too, equity has a much more definite concept of redress. Judicial remedies in customary law are not clear. Extra-judicial methods may be resorted to to ensure compliance with fiduciary duties, such as appeals to other heads of families or invocation of the ancestral spirits. But the exemption from liability to

account serves as a preliminary bar to any process or redress. Again both customary law and equity regard the removal of a fiduciary as a grave sanction. It is the most drastic remedy that family members can pursue against their head. In both systems removal is not an automatic consequence of every breach of fiduciary obligation. A Court of equity will only grant this relief where the trustee has proved himself manifestly unfit to administer the trust estate, and only serious violations attract the sanction of removal both in equity and kamba customary law.[36]

Proceedings in rem afford the most potent remedy for the beneficiary under trust and members of the family alike. The object here is to secure the restitution of the property improperly appropriated by the fiduciary and the defaulting fiduciary is not a necessary party to the action. In both equity and customary law the principle underlying the right to trace is that the beneficiary interest in the property remains vested in the beneficiary notwithstanding the improper disposition of the fiduciary. Except in certain limited circumstances, and since the property persists in its character as the beneficiary's property, the beneficiary is entitled to recover it wherever he finds it. Equity, like the customary law assures the beneficiary a right to follow into the hands of the trustee the trust res which the trustee has improperly appropriated to himself, or the product of such property.[37] Customary law goes further than equity in affording the family an additional remedy in respect of immovable property.[38]

The right of process against the property can be an invaluable weapon in the hands of a beneficiary where the fiduciary has parted with the res. There are comparable provisions in equity and customary law for such a remedy. Thus, provided there is some concrete trace of the trust property, the beneficiary can follow the trust property in the hands of all third parties with the important exception of "the darling of equity", the bona fide purchaser for value of the legal estate without notice of the beneficiary's interest.[39] Against such purchaser, the maxim "equity follows the law" prevails. There is however, only a limited right to trace against a volunteer who takes without notice; here the equities are equal and the beneficiary and the volunteer take pari passu.[40] An important condition ofthe above equitable remedy is that there must be some tangile product of the trust res,

the property ceases to be traceable if it is expended on a dinner, for example. Customary law has its own brand of limitations on this remedy. The right to trace is only available in respect of immovables, and is depended on prompt action by the family.[41]

The customary law raises no analogy with the doctrine of bona fide purchaser. The state of customary law can be summed up in the maxim "once family property always family property." The purchaser's good faith does not rank equally with the family's ancestral heritage. Analystically, the doctrine of bona fide purchaser is somewhat incongruous in Kenya circumstances. In the first place the doctrine is founded on the dichotomy of law and equity which is utterly inapplicable to customary law.[42] The head of family does not have exclusive title to family property, and the kamba customary law resembles English law in upholding the maxim "nemo dat quod non habet" as a general principle. Secondly, the corporate element in landholding is so fundamental in customary law that a purchaser is necessarily put on enquiry as a matter of ordinary prudence; caveat emptor is more appropriate to Akamba customary law, and therefore to Kenyan circumstances as concerns this area. A propective purchaser must make copious enquiries as to whether the property is owned by an individual or by the family.

CHAPTER FOUR

CRITIQUE OF THE FIDUCIARY PRINCIPLES IN CUSTOMARY LAW AND SUGGESTIONS FOR REFORM

In chapter three we delt with a comparative study of the fiduciary principles in English law and the Kamba customary law. Similarities and differences between the two were analysed, and the shortcomings of customary law vis-a-vis English law exposed bare. In this final chapter, we shall confine ourselves to an analysis of these shortcomings and then suggest ways in which these deficiencies can be cured. It is our opinion that in this way, we shall contribute something in the search for a better legal order.

CRITIQUE OF THE FIDUCIARY PRINCIPLES

The term "trust" in English jurisprudence and literature is generally used in two senses. In its wider signification, it embraces all matters of confidence and serves as a general synonym for a fiduciary relation. In this broad sense, agents, company directors, guardians and other fiduciaries are all trustees.[1] Thus, if in describing a head of a family as a trustee it is meant that a head holds an office of trust in the general sense, then the analogy is unobjectionable We have amply demonstrated that the head is entrusted with the administration of family property for the benefit of the family to whom he owes some fiduciary duties.[2] The exact nature of these fiduciary obligations need not detain us here if we are merely concerned with establishing between, say, a guardian and his ward, or an agent and his principal.

However, the term "trust" is more usually used by the English jurists in the narrower sense being reserved for the particular kind of a fiduciary relationship which owes its origin to the separation in England of Courts of law and Courts of equity and which was evolved by the English Courts of chancery from the ancient use.[3]

To what extent, then, can a head of a family be described as a trustee in the narrow sense? As we have seen,[4] the customary law raises no analogy to the English dichotomy of law and equity which led to the development of the trust. Consequently, the holding of family property is not, to a large extent, characterised by the separation between title and beneficial interest which is basic to the trust idea. But this analytical difference need not have any

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vital significance.

The powers of the two functionaries are reasonably analogous in substance and extent, both are subject to some form of delimiting factors; the trust instrument in the case of the trustee and the council of elders[5] in the case of the head of a family.

We have also noted that customary law has a concept comparable to the equitable duty of loyalty[6] though the customary idea is rudimentary and lacking in the refinements of niceties characteristic of the equitable conception of fidelity. The difference here is only one of degree. But there is a crucial difference between trust and the customary fiduciary institutions. The analogy between the trust and the insitution of family property breaks down on the question of enforceability, which is a basic ingredient of the trust concept. Hart[7] has defined a trust as "an obligation imposed either expressly or by implication of law whereby the obligor is bound to deal with property over which he has control for the benefit of certain persons of whom he may himself be one and any one and any one of whom may enforce the obligation[8]."

Customary law has not evolved any comparable concept of enforceability in regard to the head of family's obligation.[9] The only strict legal procedure which may be invoked against the head in this regard is, as it were, a summons before the family council - to show cause why he should not be deposed for alleged misdeeds. The object of this procedure among the Akamba is not to seek redress for breach of fiduciary obligations or the specific performance thereof but to demand an effective answer to an indictment on pain of deposition. The possibility of deposing the family head does not cure this defect, which defect is fatal to the analogy with the English trust.

Another crucial question is whether the customary fiduciary principles, in their present state, adequately safeguard the beneficial interests of the members of the family. In former days the religious prescriptions of the cult of ancestral worship were a formidable deterrent to violations by the head, and no recourse to the Courts or other legal process was necessary for the purpose of ensuring performance on the part of the head. In any case society was not "sophisticated", the economy was on a subsistence

../31

level, and the motivations of defalcations were minimal. Things have radically changed in modern times. A new economic order, replete with opportunities for self-aggrandizement now obtains, while contact with Western ideas has seriously undermined the fabric of traditional social and ethical values.[10] One indicent of this social change is the practice of installing "educated" persons as heads of families. Far from bringing enlightened administration in its wake, this practice often saddles families with heads who are contemptuous of tratitional restraints and who can hence exploit their fiduciary position in their own interest.

In the light of the foregoing a system which is predicated on the assumption that the head will be constrained by the canons of customary propriety to perform his fiduciary obligations is patently inadequate and ineffectual. The aggrieved members of the family have no means of securing satisfaction in material or tangible terms; and the goals of customary law which proclaim the paramountcy of members' interest are clearly not being realised. The sanction of deposition, even if an effective deterrent, cannot be readily resorted to, since many family loyalties and susceptibilities are offended by this drastic measure. In any case deposition by itself neither restores the misappropriated property nor affords recompense therefore.

Nor should considerations of status be allowed to thwart the enforcement of the head's fiduciary obligation. In former days, the immunities enjoyed by the head were matched by a high sense of responsibility in respect of his obligations to the family. Privilege was not a license for exploitation but an opportunity for serving the family to the full. With the diminution of this classic sense of duty, the case for retaining the symbols of status is no longer tenable. In any case, considerations of status are not in consonance with modern trends in Kenyan society. Traditional authority is emphatically rejected both within the family and the oman. A new political philosophy, bustling with robust egalitatianism now holds sway, and the progression from status to contract[11] is now in an advanced stage. The head of the family no longer commands the traditional authority he formerly wielded, but has however not been denuded of the legal privileges founded on his former standing within the family. Their retention is as incongrous as it is unjust.

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Our comparative study has disclosed the effectiveness of the methods whereby equity holds the trustee to his fiduciary duties. A beneficiary can invoke the aid of a Court of equity in either compelling the trustee to specifically perform his obligations or restraining a threatened breach or in procuring redress for breach. Customary law could profit from the lessons of equity.

SUGGESTIONS FOR REFORM

Customary law is a flexible system; it is not static. Institutions based on the usages and customs of a people are bound to change when their foundations cruble. Yet in a system which has adopted the English doctrine of stare decisis the natural evolution of the law is sometimes stultified by rigid adhrence to precedent; and then it becomes fifficult to foster growth by a deliberate push. Where the deficiency consists of a defective procedure of for giving effect to a well-settled customary principle, reform does not involve a violent break with traditioanl doctrine and should not provoke an outcry from the purists. Where a radical change in custom necessitates a substantive departure, the lament of the purists is equally unjustified, since what they seek to preserve is no longer customary.

In considering the reform of the law relating to the head's obligations in respect of family property, several factors ought to be borne in mind. The law in this area does not admit of a simple classification into one branch of the law; it encompasses property law, family law, and procedural law. With regard to the proprietary aspect of the institution our main concern is to ensure that the beneficial interest in family property actually accrues to all members entitled thereto. But customary notions of domestic propriety do not approve of canvassing small internal claims in public. The privacy of family affairs should therefore be preserved until exposure in utterly unavoidable. We have also noted that this institution is trammelled with the incidents of traditional office. Since the head's authority is no longer an important phenomenon in Kenyan public law the law of family property should be purged of all incidents of status.

The first proposal submitted here is that the head of a family should be made unequivocably accountable to the members of the family in respect of family property.

.../33

Accountability is basic to the concept of a fiduciary obligation. The head should, therefore, be held to some duty of accounting in respect of his dealings with family property. It is not suggested that the equitable conception of a duty to account should be adopted in all its rigours. Family business could hardly be transacted in the proper atmosphere if any members of the family could insist on an accounting by the head at any time. Nor is it feasible to compel the head to keep meticulous accounts which a cestui que trust expects of the trustee. But, as the Nigerian Court laid down in ARCHIBONG V. ARCHIBONG[12] the head should certainly keep reasonably adequate accounts and should be capable of furnishing members with adequate explanation of his dealings with family property at specified conferences of the elders of the family.

Also, a clearer conception of the head's duty of loyalty is called for. The pious prescription that a head must administer family property in the primary interest of the family is patently ineffectual unless fortified by more sophisticated rules designed to subordinate the head's personal interest to that of the whole family. For example, a head should be forbidden to invest family funds in his private business even where his financial standing is solid enough to guarantee immediate repayment. Such trafficking in family estate not only exposes the property to risk of loss, but also constitutes improper profiting to the detriment of the family. This is certainly less stringent than the equitable conception of fidelity.[13]

Secondly, the Courts should be more ready to recognise the right of the family to enforce the head's obligations. The tradition of keeping family squabbles out of the public glare should be respected but not to the extent of depriving members of their ligitimate interests. This proposal, in effect, means stripping the head of his procedural immunities. We have already emphasized that the abolition of privileges which otherwise stultify the enforcement of the head's obligations is in keeping with the social realities of modern Kenya.[14] It follows, logically, too that the head should also be relieved of any onerous incidents of his status. Thus the rule which fixes the head with personal liability for costs in respect of litigation relating to

..../34

family property should be abolished. The corporate factor is well established in the customary law, and there is no reason why the family should not be held jointly liable in those circumstances. The preservation of this rule is palpally incompatible with the cocept of fidelity suggested above which is founded on the basic principle that the head must not treat family property as his own. A head who is compelled to pay for family expenses out of his own pocket may argue, with some justification that his interest in family property is superior to other members.

Finally, the individual family members should have the right to prosecute his claims against the head unencumbered by the desires of the majority. This in no way threatens family solidarity and unity. An aggrieved individual must of course first address his complaints to the council of elders. But his ultimate right to invoke the aid of the Courts must be guaranteed, for whatever legal standing of family elders there is no doubt that a head with a forceful personality can browbeat them into submission. The individual' ultimate right of access to the Courts is the best of guarantee against exploiting by the head.

In submitting these proposals we have drawn on the vast storehouse of equity. This however, is a natural result of the interation between the received and the indigeneous laws obtaining in Kenya. Customary law can, and has been, enriched by many a concept borrowed from the common law heritage.[15] No attempt is made to import the common law wholesale, but useful ideas are not rejected by reason only of their foreign origin. It is submitted that this process of judicious adoption could be employed with profit in regard to some aspects of our jurisprudence relating to family property.

CONCLUSION

The paper has sought to examine the "trust' institution in customary law and the weaknesses of this institution vis-a-vis the trust insitution in the English law of equity. Some suggestions for the reform of some of the customary law rules governing the institution were also made by mainly borrowing from the vast storehouse of equity.

Admittedly, customary law has been subjected to strong forces, which have worked in such a way as to diminish its earlier validity. In view of modern economic and related developments, the origianl foundations of the institution are undergoing a severe strain. The increasing sophistication of modern society and the impact of secularization have tended to water-down the extreme religious zeal of the past which often took puritanic proportions. Today the institution of the trust in customary law therefore stands in question purely on its objective merits in the context of contemporary life and not on subjective and cultural considerations.

Customary law is plastic. It may be rapidly moulded and modified by those subject to it contrary to one's picture of it as age-old, imutable, firmly - fixed in the very bones of the people. It has in many places changed rapidly and foundamentally especially in regard to land. The place of an individual has been strengthened vis-a-vis the family, and an individual can easily acquire or accumulate self-property free from family interests by what has often been referred to as progressive individualisation of African tenure. This therefore again means that the trust analogy as understood in customary law is on its way out.

With due respect to the above propositions it is also our opinion that despite its troubled history, customary law and its institutions may yet have a future in this country. This is shown partly by the fact that communities in Kenya are still largely organised in clans, with the extended family as the smallest unit of society. Again, the trust analogy in customary law, especially among the Akamba community seems to be still alive. It would hence be inaccurate for one to assert that the institution is dead. But in view of the above observations, it will slowly decline into factual non-existence. Such a situation can only be saved only if only these values which the Africans shared, and embodied in their customary law find expression in a government that can give effect to them on a national seale,

a situation which is unlikely to happen in Kenya today.

In view of the above, the only other alternative we are left with is to borrow from equity and 'strengthen' the customary law rules as they are. Admittedly, it would be harsh to subject the head of the family to the strict rules of accountability as an English trustee because his control over the property in his charge is considerably less than that of the trustee in English law. The legal ownership of the property is in the English trustee whereas the head of family under customary law merely has control with other members of the family, of family property. Be that as it may, it is suggested that an unscrupulous and callouss head who exploits this custom to the detriment of individual member of the family should not escape liability, and should account when found at fault. If this, and the other suggestions are adopted, the search for a better legal order will be on its right track.

INTRODUCTION - FOOTNOTES

1. eg. Henry Maine's works (like Ancient law)
2. See Kamau, G.K. "Christianity, family law and succession in Kenya", and other publications by the same author.
3. Common law and customary law.
4. Eg. See GLUCKMAN, Ideas in Berotse JURISPRUDENCE
   See also Muguthu V. Muguthu (1971) KHCD, No. 16 Civil case No. 377 of 1968 as per Madan J.
   and also Samuel Andors V. Wambui - Civil Suit No. 1400 of 1973.
5. See ELIAS, Nigerian Land law and custom (3rd ed. 1960), P.143.
   and also OLLENU, Principles of customary law in Ghana (1962) P. 46
6. The writer is himself a Mkamba by tribe, and ~~though~~ through interviews to kamba elders well versed with customary law, plus his personal knowledge of the same law, the research was made simpler than it would otherwise have been.

CHAPTER ONE - FOOTNOTES

1. SNELL, Principles of equity, 27th ed. 1973
2. Hence the term "common law".
3. Kings Bench, common pleas, and Exchequer
4. Described by Maitland as "the King's Prime Minister" and "the King's Secretary of state for all department".
5. Which gave the clerks in chancery a united power to invent new writs. If there already existed a Writ in one case and in a "like case" (in consimili casu) "falling under like law and requiring like remedy", there was none, the clerks were authorised to provide a Writ.
6. Passed by Henry Vll.
7. This paved the way for the passing of the Judicature Acts 1873-1875.
8. The cestui que use has now become a cestui que trust (beneficiary), the feofee to uses, a trustee.
9. Sir Arthur Underhill, Law of Trusts and trustees.
10. Who is called a trustee.
11. Trust property and beneficiaries respectively
12. Judicature Act (No.16) of 1967, sec 3(1).
13. Ibid.
14. Judicature Act (No.16) of 1967, sec. 3(2)
15. Supra (12)
16. Allot, Essays in African Law, p. 31 - referring to Ghana Courts ordinance similar to Kenya's Judicature Act, sec. 3(1) (supra).
17. SOLOMON V. AFRICAN STEAMSHIP CO. (1928) 9 N.L.R.99 at p. 100
18. Jan. 1st 1900 and 12th Aug. 1897 are reception dates of English law for Nigeria and Kenya respectively, and the provisions are almost identical.
19. Park, Sources of Nigerian law. pp.20-24.
20. Supra (12)
21. Subject to local conditions, and circumstances etc.
22. Allen, law in the Making, 5th ed. p.388.
23. The constitution, legislation, precedent and custom.
24. See Kiralfy, "the penal consequences of the English doctrine of conversion (1949) 13 The conveyancer and Property law pp. 362-372.
    see also Marshall, "Anachronisms in equity" 1950 C.L.P. pp. 30-45.

NB: What is said is these articles against the application of the stated doctrines of equity is also true of Kenya as far as Kenya's circumstances are concerned.

25 Agriculture is the mainstay of Kenya's economy.

26 Eg. MUGUTHU V. MUGUTHU (supra), followed in MACHARIA V. MACHARIA H.C.C.C. No. 1410 of 1974 - where the defendant was a registered propriator of a piece of land which was purchased with money provided by the plaintiff. The defendant purported to borrow a sum of money on the security of this land and the plaintiff claimed half share of the loan. It was held that the plaintiff could claim on a resulting trust.

27 Commercial activity is on the verge of speeding up in the rural areas (for as of now it is centralised in the urban areas) as exemplified by the activities of the Co-operative movement operating in all areas of Kenya.

CHAPTER TWO FOOTNOTES

1. Cicero, Marcus Tallius,
   On the common wealth. Tr. with an introduction by G.H. Sabine and S.B. Smith. Indianapolis, Bubbs - Merrill (1929).
   See also Selected Political Speeches by Cicero
   Tr. with an introduction by M. Grant (1969).
2. Paterson, D.E. An introduction to Administrative Law in New Zealand. Wellington. Sweet & Maxwell (N.Z.) 1967
3. White, "African customary law: The problem of concept and Definition" 9 Journal of African Law 86 - 89 (1965).
4. Ibid.
5. Reference is made to "Tanganyika" rather than "Tanzania" since the legislation dealing with Courts and customary law applies to the mainland only.
6. See Uganda Magistrate's Courts Act, Section 37 (1) and Tanganyika Magistrate's Courts Act, 6th schedule.
7. No. 17 of 1967.
8. Cotran, "Integration of Courts and Application of customary law in Kenya". 4 E.A.L.J. 14, 17-20 (1967).
9. Ibid.
10. Like the Akamba of Kenya.
11. Kenya substituted its parallel or dual system of Courts with a fully integrated system, as shown by the Magistrates Courts Act, 1967, and the Kadhi's Courts Act, 1967.
12. Cotran (Supra).
13. No. 16 of 1967
14. ESHUGBAYI ELEKO V. GOVERNMENT OF NIGERIA (1931) A.C. 662 at p.673 (P.C.)
15. E.g. See OSHODI VS. BALOGUN (1936)Z.W.L.R.1632.
16. e.g. Most of the communities in Kenya today are still organised in clans, with the extended family as the smallest unit of society.
17. Fitzerland, Salmond on Jurisprudence (1th ed. 1966), pp. 189-193; 198-203.
18. Ibid
19. Ibid.
20. Natives Rights Act, 1965.
21. For a full and convincing exposition of this proposition, see Gibson Kuria Kamau's works (supra).

CHAPTER THREE FOOTNOTES

1. Maitland; Equity a course of lectures.
2. Meek, "The katab and their neighbours" (1928) J.A.S. 265-273 at p. 266.
3. The term "family" denotes the traditional extended consanguine family which is much more than the onjugal family.
   See Ndti K. Elements of kamba life (ph.D. Thesis 1967- syracuse University) p. 119
   Mbula, J. The penetration of christianity into the kamba traditional family (M.A. Thesis -V.O.N.)P.36
   John S. Mbiti: African Religions and philosophy caps.3 and 13.
4. Quoted by Fiedler, Leslie in "Essays on myth and literature".
5. See Mbula J. The penetration of christianity into Akamba trational life (supra).
6. (1947) 47 African Affairs, 23 at p. 25
7. Preable to the statute of charitable uses, 1601
8. Maitland, Equity, lecture 5.
9. E,g. the proviso to see 28 of the RLA, and sec. 143(2) of the same Act.
10. See MUGUTHU V. MUGUTHU and MACHARIA V. MACHARIA (supra)
11. Fjeliman, S.M. The organisation of Diversity: A study of Akamba kinship terminology (ph.D.Thesis syracuss Un.1971)p.31.
12. Supra (5th paragraph)
13. Penwill, D.J. kamba customary law (Notes taken in Machakos District)
14. Section 53
15. See ESIROYO V. ESIRUYO (1973) EA 388
16. As in the case of tenant for life under the English settled land Acts.
17. Penwill D.J. (Supra). His illustration of the way in which interests in land are acquired and held highlights this point.
18. The former is predicated on the overt intention of the settlor, the latter on his inferred expectations.
19. See Scott, "Constructive Trusts" (1955) 71 L.Q.R. 39 also Waters, "Constructive Trust-Vendor and purchaser" (1962) 14 current legal problems 76
20. Supra (note 14)
21. Hobley, C.M.G. Further researches into kikuyu and kamba

...14

religious beliefs and customs pp. 406-407

22. Ibid.
23. Thus the head is not fixed with exclusive liability for costs
24. Hobley, C.M.G. (Supra)
25. WRIGHT V. MORGAN (1926) A.C. 788
    See also, KEETON, law of Trusts (7th ed.) pp.330-338
26. WILLIAMS V. BARTON (1927) 2 ch.9
27. Re THORPE (1891) 2 ch. 360; BARRET V. HARTLEY (1966) L.R. 2 Eq. 789; Re BARBER (1886) 34 ch.D.77,80-81
    Keeton, (ibid) p. 349
28. Kivuto Ndeti, Elements of kamba life (ph.D.Thesis) (supra)
29. Penwill, D.J. (Supra)
30. Ndeti (supra)
31. Keeton (Supra) p. 349
32. Mbula (supra); Penwill (Supra)
33. Fjeliman, S.M. (Supra)
34. a "Quia timet".
35. Muthiani, J. (Supra)
36. The position of trustees in both systems is one of respect unless there is an abuse of this respect by malpractices on the part of the trustee.
37. Re HALLETS ESTATE (1880) 13 ch.D. 696
38. A head commits a grave violation if he alienates immovable property without the assent or concurrent of the principal members of the family. The family may either ratify the disposition or when the property is still in the hands sue him for rescission. This action does not constitute an affront to the family-head; the cardinal objective of "saving" family property overrides considerations of personal privilege.
39. THORNDIKE V. HUNT (1859) 3 De. G & J 563
40. SINCLAIR V. BROUGHAM (1914) A.C.398; L.J. ch.465.
    Re DIPLOCK (1948) 1 ch. 465
41. Land is the most common property held under trust in customary law and a family can find no problems in recovering it from a third party.
42. Supra.

CHAPTER FOUR - FOOTNOTES

1. In NEWYORK AND NORTH MIDLAND RY V. HUDSON (1858)22 L.J. ch. 529, Romily described the office of directors as "an office of trust" and continued; "A resolution by the shareholders, therefore, that shares or any other species of property should be at the disposal of the directors, is a resolution that it shall be at the disposal of trustees, in other words that the persons entrusted with that property shall dispose entruste with that property shall dispose of it within the scope of the functions delegated to them in the manner best suited to benefit their cestui qui trust".
2. Supra (chapter 3)
3. Supra (chapter one)
4. Ibid
5. See Penwill (supra, pages 32-34)
6. Supra (chapter 3)
7. "What is a Trust?" (1899) 15 L.Q.R. 294, 301
8. Emphasis mine
9. Supra (chapter 3)
10. The place of an individual has been strengthened, for one can acquire individual property in which the family has got no claim.
11. See generally Henry Maine's work's, e.g. Ancient Law.
12. 18 N.L.R. 113
13. On policy grounds there is little justification for fixing the head with liability to disgorge every benefit which is ultimately traceable to family property. Thus, fore example, no real damage is suffered by the family if the head sets up his private business on a substantial portion of family, estate, provided no member desperately needs the space so occupied.
14. Supra
15. For example res judicate, estopel and the principles of matural justice are now incorporated in customary law.

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