SOME SOCIO-ECONOMIC EFFECTS OF LAND REGISTRATION IN VIHIGA

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BY: OBAYO B. L.

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DEDICATED TO MY MOTHER

S E R A O B A Y O

P R E F A C E

The aim of this paper is to unveil the socio-economic effects of land registration in Vihiga area. This is one of Kenya's smallholder areas. Compared with other smallholder areas as statistics show, Vihiga has the lowest acreage of land per person and therefore it is fairly representative of the other smallholder areas in Kenya.

I am grateful to Mr. Shem Ongondo, my Supervisor for his advice and guidance at every stage in writing this dissertation. I would also like to express my deep gratitude for the cooperation I was accorded by the officials of the Lands Registry Office, Kakamega.

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INTRODUCTION

In this paper an attempt is made to analyse the socio-economic effects of land registration in one of Kenya's smallholder areas. Our area of study is Vihiga[1], which is a division in Kakamega District. This dissertation is aimed at unveiling the situation in which a peasant farmer finds himself in after the process of registration of his parcel of land. Special reference is made to Vihiga area because it is fairly representative of smallholder areas in the Republic in comparison with other smallholder areas in Kenya.

The average land holder in Vihiga area has about two acres[2] of land. In comparison with other smallholder areas like Kisii, Vihiga has the least acreage. For instance, the average land owner in Bassi-Boitang'are in Kisii has approximately 3.0 ha[3]. This is just one of the divisional areas in Kisii. But the average holdings in Kisii District as a whole is 2.4 ha[4]. This is still a higher acreage in comparison with the Vihiga mean of two acres. It is therefore hoped that most of the socio-economic effects of land registration experienced in Vihiga area will be fairly representative of the other smallholder areas in Kenya.

This dissertation covers three distinct periods. The first period which covers the first chapter of the paper deals with the historical perspective of land law in Kenya with special reference to land registration. This historical aspect will show the development of land law in Kenya as a whole. This is necessary, as any meaningful study of land registration and its socio-economic effects on the people, whether in Kenya as a whole, or like in this paper on the people of Vihiga can only be fully

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appreciated if it is viewed from its historical context. The chapter will cover the customary land tenure in Vihiga before adjudication, the law that the colonialists introduced and applied in Kenya with reference to land law and finally we shall look at the factors that necessitated the passing of the Registered Land Act of Kenya in 1963.

The second chapter covers the second distinct period of the actual land registration in Vihiga. This section comprises of consolidation, adjudication and the registration of titles in the land register. In this chapter we shall also examine the disputes that arose after land had been registered, the reasons for their occurrence and how they were solved.

The third chapter covers the third period of post-registration. This will comprise of the socio-economic effects of land registration. The chapter closes with the conclusion to the paper.

C H A P T E R O N E

LAND TENURE IN VIHIGA BEFORE LAND ADJUDICATION

(i) CUSTOMARY LAND TENURE

There has been in existence since time immemorial a number of divisions of customary law, based on custom and usages among various tribes in Kenya. One of these divisions is land law. In the earliest stages of development, land belonged to the community as a whole. But later on as the Society develops, the produce from the land belonged to that individual who had worked for it. This process continued until it reached a peak in its final stages of development when persons in clans or tribes began claiming land for individual ownership. We shall now proceed to look at the traditional land tenure in Vihiga area before the process of land registration took place.

Land tenure in Vihiga was both individual and communal. Contrary to what one would expect, such dual claims to land in Vihiga was organized in such away that people in the division enjoyed their respective rights of use to land peacefully. As for communal ownership of land, there were lands to which community members had the same rights of use. Such lands consisted of forests from where firewood was collected by all members of the clan who had need for it. Hunting on the same grounds was another activity that was operated on communal basis. And lastly, the grazing grounds were used equally by all the member of a particular clan that had access to those cleared grounds and valleys within their areas of occupation. Such were the fields where the community's control vis-a-vis an individual was paramount.

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However, there were other areas where private property or individual rights to land were exercised, and respected by the other members of the tribe. This right to individual claims to land arose when one settled on a piece of land, built a hut on it and cultivated part or all of it. This was viewed as occupation by an individual to that particular piece of land. Other members of society could not claim this occupied land during the subsistence of the original claimant on that land.

In other communities in Kenya, like the Kikuyu, such individual rights to land were not only recognized, but there were also systems of boundary demarcation. They marked the boundaries of their land by planting lilies (Gitoka) along their boundary lines.

In its essentials, the system of land tenure in Vihiga differed little from that of many other acephalous agricultural tribes in Kenya.[5] A typical household in Vihiga consisted of the Head of the family, his wife/ wives, their children and in most cases some other female dependants. For instance a widowed mother, an unmarried sister and other relatives. Normally the head of the family was the landowner. But where a man had many wives, they were each given their plots of land. The wives cultivated their plots of land with the help of their unmarried children. As soon as a daughter married, she went to live on her husband's land. As for their sons, whenever a son reached a marrigeable age, he would be allocated some land by his father where he would build his house and establish his home. The son's land would in normal circumstances comprise part of the land hitherto cultivated by his mother. Certain land, often land not suitable for

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agricultural purposes, would be set aside for grazing cattle. All members of the clan or sub-clan whatever the case would have a right to graze their cattle on this land set aside for such purposes.

The Head of the family had extensive powers of control and use over his land. He could make inter-vivos, transfers or grants. The transferee or grantee normally provided a token consideration in the form of services. These strangers who were welcomed and lived on anothers land were called "Abamenya". They were a kind of customary tenants. The "Abamenya" had very precarious rights to lands. They could be evicted at any time for good reasons. On the death of the grantor or transferor, any of his heirs could effect the removal of these customary tenants for the same reasons which would have entitled the grantor to remove them. In mosts cases the consideration or part of the consideration they had given could be refunded back to them. If it was in the form of service, he could be given some goats, a cow or several sheep. His rights could ripen into ownership if he stayed on that piece of land allocated to him for a very long period of time.

Although the paterfamilia had extensive powers of use and control, his powers of disposal of land to strangers was checked by the members of the clan. Access to clan land was guaranteed by membership to the clan. The clan acquired the land by either conquest and/or first occupation. Land was recognized as an essential asset and that is why the clan's integrity to a particular piece of land was jealously guarded by the elders. It was insisted upon that where a member of a clan wanted to sell land, the first priority was to be given to another member of the same family or clan to buy the

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piece of land in question. In the absence of a purchaser from the same clan, a person belonging to another clan but of the same tribe could be allowed to purchase such piece of land. This fact was illustrated in the case of Audiema Bikaye V. Matafali Wekhela.[6] In this case, the defendant entered into a contract to sell "his" land to another person. This action was challenged by the plaintiff who was the defendant's elder brother. The defendant went on and purported to sell the land. When the action by the plaintiff came before the African Court, the challenge was upheld and the Court of review where it was decided held;

> "...under customary law prevailing in North Nyanza, a person cannot sell "family" land without the consent of the family. A transfer without such consent is invalid."[6]

Although this case related to a customary law in North Nyanza, the same principles were applicable in Vihiga. This was so because firstly, most customary practices, usages and rules among different tribes in Kenya are essentially the same except for minor variations. And secondly, because both areas historically are situated in Western Province and the parties involved in both areas are all Bantu speaking people. Hence, the similarity in their customary laws. In Vihiga outright sales of land were not very common. But during the rate occasions when one member of a family wanted to dispose of his land; priority was usually given to his fellow clansmen or members of his family.

The customary rules governing succession to land favoured the paterfamilia system of tenure. The land in a family belonged to the man who was considered to be the head of the family. But where the man who

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owned land had several wives, the general principle was that the deceased's land should be divided equally among his wives, that is if he had not divided his land amongst them during his lifetime. Within each "house" his sons were entitled to equal shares, account being taken of any allocation made during his lifetime. Land reserved for the deceased's own use, that is where he had many wives went to the junior wife or to his last born son where he had only one wife. This system of succession where all sons in a family were entitled to inherit each, a portion of their father's land, more often than not had to fragmentation of holdings.

The task of distribution fell to the clan elders. If the deceased's widow entered into a levi rate union with a brother-in-law or any other close male relative of the deceased. In such cases the levier normally came to live with her. Where such a situation arose, the claims of the sons to their father's land prevailed over all other claims. It did not matter that the claimant had become the step-father of the deceased's sons. This principle was discussed and upheld in the case of Petro Wafula v. Charles Suleman.[7] The land in dispute in this case originally belonged to the appellant's father. The appellant was the son of the deceased and the respondant, who was the appellant's uncle, had also inherited the appellant's mother. In determining the ownership of the land in dispute, the court held that the appellant was the rightful heir to the land. In so holding, the court emphasized that the rights of a true son of the original owner must prevail over the claims of others even where a nephew becomes a step son by virtue of his mother being inherited.

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The above, in outline, was the system of land tenure practised by the people in Vihiga Division before land adjudication. Some features of this customary system still survive today. During the latter part of the colonial period however,rapidly changing socio-economic conditions brought about significant changes in customary law. In particular, the growing importance of the cash economy and the increasing pressure on the land required certain adaptations of the traditional system of land tenure. We shall now proceed to look at the advent of colonialism in Kenya and its effects on the land tenure system.

Introduction of Foreign Land Law In Kenya

The Origins of European Settlement In Kenya

It's worthy noting right from the outset that this sub-topic will only be dealt with briefly. We shall not go into the depths of the historical background of European settlement in Kenya but only touch on those aspects which concern this paper. The European settlement in Kenya was motivated mainly by economic factors. The nineteenth century witnessed the major development of European capitalism. It was during this century that the competitive capitalism was to develop logically to monopoly capitalism. European capital penetrated outside its national boundaries. And consequently Kenya became one of the regions whose economies were penetrated by the British Empire. All this occurred because after the industrial revolution in Europe, there was a need by the European countries for markets abroad where they could extract raw materials to feed their expanding industries.

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There also arose a need for markets where surplus manufactured goods could be utilised. That marked the beginning of the dialectical interrelation between the Kenyan economy and the British one. The result of this relationship was the development for the British economy and underdevelopment for Kenya.[8]

Several exploration expenditions were made into East Africa. One of them which is of immediate interest to this study was that undertaken by Count Teleki who observed the agricultural potentialities of Kenya. Thompson, Teleki and other explorers were scrambling for Africa, and it is no accident that direct colonial intervention followed the efforts of the explorers, missionaries and the Company. Colonial regimes were therefore in effect military conquests and their main aim was to carry out an organized economic plunder in the colonized areas.

On the 1st July, 1895, the area between Mombasa and the Rift Valley was declared a Protectorate. 1895 also saw the start of the construction of the railway to open the interior particularly the white highlands. In 1902, the Eastern Province of Uganda was transferred to the Protectorate. In 1905 the Protectorate was handed over from the Foreign Office to the colonial offices responsibility. In 1920 Kenya became a British Colony. The British administered Kenya under this status until 12th December, 1963 when the Kenyan Africans achieved their political independence.

(ii) THE LAW INTRODUCED AND APPLIED

The land law that was introduced and applied during the colonial period in Kenya was largely the English

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land law. By virtue of section 4 (2) of the Kenya Colony Order in Council, 1921 the law that was to apply in Kenya was stated. This law consisted of the common law, doctrines of equity and the statutes of general application in force in England on the 12th August 1897. The courts in Kenya were empowered to apply this law. The provision had a proviso which was intended to cater for the social needs of the indigenous Kenyans. The proviso stated that such English law would only apply in Kenya in so far as the circumstances of the Colony and its inhabitants permit and subject to such qualifications as local circumstances render necessary, whether this proviso was applied or not is going to be dealt with in the subsequent discussion of what exactly happened during the colonial administration of Kenya and what effects this had on the indigenous Kenyans as far as their land rights were concerned.

Rights to parcels of land in Private occupation were first recognized by the East African Land Regulations of 1897, under which certificates of occupancy for terms of 21 years were issued in respect of such rights to the white settlers. The second recognition of rights to parcels of land was embodied in the Crown Land Ordinance of 1902. This Ordinance which contained only 3 sections, was the shortest Ordinance of them all. The part dealing with sales[9] provided for alienation of land by way of sales of free-hold, although the Ordinance did not say in so many words that land could be alienated. Purchasers could be required to make reasonable boundary markers, and if they failed to maintain them or if they were tempered with then they were guilty of an offence and liable to a fine not exceeding one thousand rupees or two months imprisonment or both.[10] If any purchased land appeared to the commissioner to have been

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unoccupied for more than a year, then, in the absence of a reasonable proof of intention to develop the land, it was normally forfeited[11]. The above provision would appear to have improved the position of the land owner. But this was hardly the case. The section in that Ordinance that is of interest to this paper is Section 30 which stated that:

> "In all dealings with the Crown Land regard shall be had to the right and requirements of the natives and in particular (he) shall not sell or lease any land in the actual occupation of natives."

The strength of this section which was meant to protect the interests of the indigenous Kenyans faded when read with the Section that followed it. It provided that:

> "The commissioner may grant leases of areas of land containing native villages or settlements but land in the actual occupation of natives at the date of the lease shall, so long as it is occupied by then, be deemed to be excluded from the lease."[12]

The phrase used was "shall be deemed to be" instead of "shall be". The effect of this Ordinance was to reduce the status of the natives to that of the squatters. This brought about alot of conflict between the white settlers and administrators vis-a-vis the indigenous Kenyans, especially in Central Province where the people finally took to arms. This Ordinance was repeated by the Crown Land Ordinance of 1915[13] which tried to mitigate the injustices done to the indigenous Kenyans by the earlier Ordinance.

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The Government Land Act of 1915[14] was introduced to regulate the leasing and other disposal of Crown Lands and for other purposes. It provided the law which, together with the law contained in the constitution of Kenya[15] and other legislations for example the Trust Land Act[16], The Land Control Act,[16] among others. These acts govern the relationship of the state and its dealings in land. It was through this Act that the Imperial Government of Britain implemented its policy of European settlement in the Kenya Highland, and of racial segregation in and around the towns of Kenya. Cases like Commissioner for Local Government Lands and Settlement v. Abdulhussein Kaderbhai and another[17] strengthened the hand of the Commissioner in the exercise of his discretion in selecting persons to whom land was to be alienated. The facts of the case were that Abdulhussein Kaderbhai applied for and order of Mandamus addressed to the appellant, the Commissioner of Local Government Lands and Settlement in Kenya. The Commissioner had given notice of an auction sale of town plots at Mombasa at which Europeans only were to be allowed to bid and purchase. The notice contained a further special condition that during the terms of the grant the grantee should not permit the dwelling house or buildings which had to be erected upon it to be used as a place of residence for any African or Asiatic who was not a domestic servant employed by him. This case highlights the social evil of segregation which came as a result of the application of the foreign land laws in Kenya.

The disposal of land then in Kenya was regulated by the Crown Land Ordinance of 1915. The case made by

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the applicant was that under the provisions of the Ordinance the Commissioner was bound to permit every member of the public or, alternatively, all subjects of the Crown to bid and purchase at any auction of any town plots, and is equally bound not to insert in the lease of any such plots restrictive conditions adversely affecting the Asiatic or African population of Kenya. The case of the Commissioner was that the terms of the Ordinance do not prevent him from imposing the restrictions of which complaint is made. Despite the fine points raised by the applicant the Privy Council in delivering its judgement upheld the Commissioner's argument.

A further example of how Africans rights existing under customary law were affected when an area was declared to be Crown Land can clearly be seen in the case of Isaka Wainaina wa Gathomo and Kamau v. Murito wa Indangara and others[18] The facts of the case were that the plaintiffs claimed possession of certain land, basing their claim on the inheritance by them of a moiety of the rights alleged to have been bought by their father and uncle from a Ndorobo, Mainami, for 900 sheep. The plaintiffs filed an action against the defendants for trespass and subsequently the Attorney General was made a party to the case. It was decided by the High Court that the effect of the Government Land Act, 1915 together with the Kenya (Annexation) order-in-council of 1920 and the Kenya Colony order-in-council of 1921 was interalia to vest all land reserved for the benefit of an African tribe in the Crown, so that the rights of Africans in such reserved areas were lost and such Africans became

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tenants-at-will of the Crown. This fitted in very well with the basic aims of the British Metropolitan state. It was to create suitable machinery, for example a colonial state to make the conditions optimum for the exploitation of the colonies. It is no wonder that aims underlined for the introduction of the Crown Land Act of 1915 were mere rhetorics as at no stage was the interest of the indigenous Kenyans considered when passing these legislations. Indeed as A.B. Lyall observed:-

> "...,in so far as paramountcy was intended to mean that Africans' rights to their land was to be guaranteed by law, it posed an inescapable contradiction for the colonial administration. The essential feature of any ruling class is its control over the means of production, backed by powers of enforcement that constitute the state. In an agricultural country such as Tanganyika therefore, the control over land, backed by legal powers, was an essential element of the rule of the metropolitan bourgeoisie. To enact into law that African 'owned' their land and could not be deprived of their possession of it against their will would be ironical to the whole position of the ruling class. Legal guarantees would put vital state powers into the hands of Africans, and no colonial administration however liberal, could bind their hands in such away. It would be tantamount to abdicating the power of the ruling class." [19]

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The 1915 Act however brought with it in Kenya for the first time a progressive system of registration of deeds with provisions for accurate survey and use of the deed plans certified by the Director of Surveys, but which still necessitates the investigation of the title to a "good root" whenever a transition takes place.

The Registration of Titles Act of 1920[20] introduced a form of title registration commonly known as the "torrens system". It was enacted to provide for the transfer of land by registration of title. It brought with it the various features of an efficient registration of titles' system namely, security, simplicity, reduced cost, government guarantee, certainty and finality.

The aforenamed Act came under criticisms particularly from the law society[21] who feared that they would lose their fees owing to the fact that Act provided simple forms for various transactions. At that stage in time there were only a few members of the law society, who comprised of the white settlers. However, even though the Act had substantially altered the law of real property, it had left the Indian Transfer of Property Act 1882 untouched, resulting in some conflict of the laws. The Indian Transfer of Property Act 1882, contained the substantive law applying to all transactions of all real property. This conflict had to wait until 1963 when the Registered Land Act was brought into operation. This was a codifying Act which embodied both the procedural and substantive law of land transactions.

(iii) FACTORS WHICH NECESSITATED THE PASSING OF THE R.L.A.

When the State of Emergency was declared in 1952, most indigenous Kenyans were living on the land in tribal

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reserves known as Native Land Units.[22] Land rights within the land units were governed by the native law and custom, though the demand for individual titles was strong, particularly in the Kikuyu land units. However, administrators were divided about the desirability of hastening the demise of traditional institutions and concentrated their efforts on promoting agricultural development by taking measures against soil erosion and encouraging farmers to consolidate their holdings. It was only when large-scale compulsory land consolidation schemes were initiated in the mid-fifties among the Kikuyu that serious consideration was given to the nature of the title which the owner of consolidated holding would acquire. Many observers then, saw customary law as an obstacle to agricultural development. The customary law relating to the allocation and inheritance of land as discussed earlier, was largely responsible for the considerable fragmentation of holdings that had occurred.

Those who criticised customary land tenure and inheritance rules recommended that it be replaced by a system based on the registration of individual titles. In the Swynnerton Plan for example, it was proposed that;

> "the African farmer... be provided with such security of tenure through an indefeasible title as will encourage him to invest his labour and profits into the development of his farm and as will enable him to offer it as security against financial credits." 22

The economic factor was emphasized by those who opted for land registration. The East Africa Royal Commission recommended registration of land whereupon the land

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registered would become a negotiable instrument whose security could be used for the purposes of securing loans. They stated that:

> "Policy concerning the tenure and disposition of land should aim at the individualization of land ownership, and at a degree of mobility in the transfer and disposition of land which, without ignoring existing property rights will enable access to land for its economic use." [23]

The Kenya Government view was in consonant with the various views, some of which we have stated earlier, about consolidation and registration. They stated that a basic reform in the tribal system of land should be accomplished through acceleration of registration of title to parcels of land. The official Government policy on land registration was explained under policy consideration of sessional paper No. 10.[24] The policy stated, that:

> "Emphasis will be given to the development of agriculture in the former African areas through land consolidation, registration of titles, development of loans, and extension services. A working party will be established immediately to consider and recommend on forms of land tenure throughout the country". [24]

The various benefits and advantages about the registration of land and the economic benefits that would be reaped as a result of having a secure title were echoed in Parliament[25] during the enactment of the R.L.A. Mr. Nyamweya in

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that debate pointed out "that tribal land as it was had no value to any member of the tribe unless the provisions provided in the Bill were put into operation. The basis on which they were to work, he asserted, was to make land a marketable asset.[26]

In essence the Honourable Member of Parliament was talking about the security of title conferred to the proprietor of land by the 1963 Act and therefore the ease of borrowing money on the security of land. There was an over-emphasis on the economic benefits of land registration. In a report from one district a responsible official[27] is quoted to have said that "registration of land is important so that every farmer can get a title deed and can thereafter get a loan to develop his Shamba." This was an overstatement as will be seen later.

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C H A P T E R T W O

REGISTRATION OF TITLE IN VIHIGA

There are two processes which come prior to the actual and final stage of land registration. These two important processes are consolidation and adjudication. In order to have a meaningful discussion about the process of registration, it is therefore essential to look at these two factors first. Registration, as has often been stated is merely the end of the process. It is the final stage of a process. We shall therefore start our discussion by briefly looking at the process of land consolidation.

(i) CONSOLIDATION

Consolidation means, those measures which were designed to remedy the conditions of subdivision of rural property into undersized units unfit for rational exploitation, and fragmentation. Fragmentation is a stage in evolution where an agricultural land holder has separate parcels of land often scattered over a wide area. But subdivision is a process whereby a holding operated by one farmer is split into a number of different holdings operated by different farmers. This process should be distinguished from the process of land parcellation, which is a word used to refer to the way in which a locality is divided into proprietary units. Consolidation therefore is a cure for sub-economic parcellation. It consists in replanning the proprietary units within a given area and redistributing them into units of economic size.

In areas where consolidation was successfully completed, for example in some parts in Central Province, a farmer[27] ended up with one holding in place of the several hold-

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ings he previously possessed. This is one advantage of consolidation. But this applauded and advantageous aspect of consolidation was more pronounced only in cases where the land which had been consolidated had equal or more aspects of fertility and was suitable for the crops which a particular farmer desired to grow on that farm.

Another advantage of land consolidation was the establishment thereby of an exclusive right to one piece of land. This was intended to encourage the farmer to adopt better methods of farming.

Land consolidation was strongly resisted in Western Province which includes Vihiga division, the area of our study. It was resisted because the people did not fully understand what the process entailed. Some elders who we interviewed in the area stated that they feared the loss of their lands or parts of them thereof during the process. The Lawrence Mission appreciated the difficulties and injustices that the people apprehended in connection with the process of consolidation. The report stated:

> "We are in no doubt however, that there are areas where there still exists a strong opposition to consolidation by the formal process of the Act. We are not surprised to find this opposition to consolidation, even though in some cases it is based on misapprehension of the process involved. More often, it springs from the enormous practical difficulties of carrying out the process equitably. Consolidation involves considerable upheaval in the lives of those concerned and presents many human problems".[28]

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One of the major problems which was encountered by those who were conducting the process of consolidation was the translation with any measure of accuracy customary rights into the English type of interests. This was so, because one cannot accurately equate English terms like title, proprietorship, lease etc, with concepts of ownership under the customary rules. It is better to understand the term in the context in which it is used for the obvious reason that we have no better terms to offer which can adequately describe the customary law concepts.

In Vihiga, the possibility of loss both in acreage and fertility of land was imminent. This is particularly so in this area because of its Geographical setting. Some areas in Vihiga are hilly and stony. Other areas are sandy, which makes them only suitable for the plantation of special types of crops like millet, beans and maize. Before consolidation the different pieces of land could offer a variety in what crops to grow especially where the different parcels of land differed infertility. But after the process of consolidation, it was feared though not proved that, the consolidated land may be wholly or partly poor for agricultural purposes. Alternatively, the consolidated land could only be suitable for the plantation of specific types of crops and not all types of crops which a farmer may want to grow.

The Report of the Lawrence Mission on land consolidation and registration 1965-1966 fully appreciated these problems and recommended that consolidation and adjudication be separated. This resulted in Parliament passing a new Act, The Land Adjudication Act of 1968.[29] Consolidation by the formal process under the land adjudication

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Act was actually tried in Central Nyanza and abandoned owing to opposition from the people. However, a form of consolidation was achieved prior to land registration generally in Western and Nyanza Province where the opposition against consolidation was greatest; by the voluntary re-distribution of fragments by traditional clan elders; although in this process fragmentation was often concealed by the device of allocating land and subsequently registering it to sons, some of the several fragments which were held by the father.

Having been unable to carry out land consolidation in Vihiga, it was recommended that in such areas where the people were not prepared for consolidation using the same Act, the Land Adjudication Act,[30] consolidation and adjudication would be separated. Such areas would be processed by adjudication. In the next discussion we shall look at what happened during the process of adjudication.

Land Adjudication

Before dealing with this topic of land adjudication, comes before the actual registration of land, we shall look briefly at the development of the two systems of registration of titles and deeds. This will only concern the topic of registration in its historical perspective and not the actual registration of titles in Vihiga, which will be dealt with after adjudication.

Registration of Titles and Deeds

There were two systems of land registration in Kenya, the registration of deeds and the registration of

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titles. In essence land registration is a system of recording various rights and obligations in parcels of land. The sole purpose of this process is to guarantee boundaries and security of title to individuals whose land have been registered.

Registration of Deeds

The registration of deeds is a process intended to give publicity to transactions in land and to prevent concealed land dealings. It is the deed and not the title which is registered. And this is the only factor which distinguishes the registeration of deeds from the alternative system in which it is the title and not the deed which is registered. Under the registration of deeds, before a transaction can be effected, the ostensible proprietor of land must trace his proprietorship to the satisfaction of the intending purchaser, to a good root of title. But in practice the burden of tracing falls on the intending buyer who cannot risk losing his money on buying land which does not have "a good root of title". This is, a title which the law accepts as good without going behind it. This is done by searching the sequence of recorded events and transactions. Therefore, the registration of deeds was a record of an isolated transaction and was evidence that it had taken place.

Registration of Title

The registration of title is embodied in the Registered Land Act of 1963 which repealed the former system of registration of deeds. In essence, the registration of title is a process whereby the state maintains a register of the proprietors' parcels of land within a given area. This register shows all the relevant

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particulars affecting the land ownership and gives guarantee that those particulars are correct and complete.

The main purpose of the Registered Land Act of 1963 is to achieve two objects. Firstly, to assure title and secondly, to facilitate conveyancing. The title is assured by the provision that a register compiled and kept to date by the State is the conclusive and exclusive evidence of title.[31] Thus while confirming ownership it facilitates conveyancing by completely avoiding both the investigation of title to a good root of title and the investigation of a registered document to establish its validity.

(ii) ADJUDICATION

Adjudication is the process by which a final ascertainment is made of existing rights in land. Its distinctive factor is that it recognizes and confirms rights that are actually in being. The process of adjudication does not alter or create rights, though it may substitute its equivalent under customary law. Such rights need not have existed for any particular length of time. Indeed they may only have been recently conferred by the appropriate land giving authority. But unless such rights are already there in some recognizable form at the time of the adjudication they obviously cannot be adjudicated.

Application Of The Land Adjudication Act Cap. 283

A distinctive feature of the land adjudication programme in Kenya was its use of the local committees at all stages of the adjudication process. This feature was most pre-

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valent in the settlement of disputes. We shall come back to this point about the use of committees later.

Under the Act, firstly, the Minister responsible may at the request of a local authority apply the land adjudication Act to any area. Secondly, the Minister concerned may also apply the Act to any area in which it appears expedient to him that the rights in land should be ascertained. The area in which the Act is applied is known as an adjudication area and in practice to avoid successive application of the Act, usually comprises of a whole district. This application of the Act to a whole district came under heavy criticism from the Lawrence Mission. They felt that the act ought to have applied to specific areas in a given district as some parts of a district might be ready for adjudication while the other parts were not yet ready. We submit that this criticism was unwarranted, because though the Act was applied to a whole district, not all divisions in the district were adjudicated at ago. In Kakamega District, the process was systematic, only those parts or divisions and the subsequent sub-divisions which were ready were adjudicated, while the others which were not prepared for the process of adjudication were getting ready to do so.

The Role Of Committees In Adjudication

Under the Land Adjudication Act of 1968, the Adjudication Officer, a public officer appointed by the Minister of Lands and Settlement is required in each adjudication section to appoint not less than ten persons who are resident within the adjudication area, to the adjudication committee.[32] Large committees had been formerly favoured.

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The Land Consolidation Act required committees to consist of not less than twenty five members.[33] The minimum size of the committee was deliberately fixed to a large number solely as a safeguard against corruption.

Whether this was achieved or not is a matter to be determined in every location in Vihiga Division. In our examination of whether or not corruption was safeguarded by the use of large committees, we shall use one location in Vihiga; South Maragoli to illustrate this point. In South Maragoli, like in most of the other locations in Vihiga, it was an apparent factor that the committees were meant to consist of over 25 members and the quorum half of the total members. In most cases all the committee members attended. Very rarely did any member fail to attend these meetings. This was because after the meetings, the committee members feasted at the houses of the disputants. Apart from the ample food offered to them, they also received money in the form of payments by the disputing parties. This was because no payment was authorized by the Government for the Committee Members.

In South Maragoli, like in other locations in Vihiga, the Committee Members were paid by the disputants a reasonable amount of money. This occasionally had a tendency of winning the favour of the committee on the party who had paid them more money. The Government's view on payments of these committees was that it would be too taxing to the meagre resources of the Government if all Committee Members all over the republic were to be paid. Hence the voluntary nature of the committees should be retained. What the Govern-

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ment failed to realize was that this system of payment by disputants could and actually did lead to bribery and corruption to some extent in Vihiga. The more able and wealthier parties in a dispute did not hesitate to make use of such system to bribe the local members of the committee.

Despite the shortcomings of the local committees as discussed above, there were some commendable features about them. These features include the executive functions that the committees performed. Firstly, they adjudicated on and determined in accordance with customary law the claims of the individuals to rights in land. This function involved them in deciding the ownership of every parcel of land and deciding cases between the disputants. Thus, protecting customary rights that existed in lands that they adjudicated upon.

Secondly, the committees were responsible for setting aside land for the needs of the community such as roads and sites for villages, schools and other public purposes. Also where there was fragmentation and consolidation was to be done, committees were responsible for allocation of land to each individual, taking into account the site, quality and extent of each person's entitlement and for the assessment of compensation payable by one person to another as a result of those allocations. In this aspect they were vested with alot of power.

Adjudication And Registration

Once adjudication has been declared by the Minister, the Adjudication Officer for the area divides it into adjudication sections. An adjudication section may comprise any area of land within an adjudication area.

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In practice, these adjudication sections usually coincide with administrative sub-locations. Vihiga for instance is fairly large and so for purposes of administration, it was divided into 4 locations, each location comprising of several sub-locations. These sub-locations were adjudicated upon at different times.

The date on which land adjudication was due to start in a particular sub-location was publicised by chiefs, sub-chiefs and their junior assistants in advance and those with claims to specific parcels of land were expected to meet the adjudicating team. This team usually consisted of the Demarcation Officer, the Committee Chairman and several Committee Members; usually included those members who resided in the particular sub-location. Also attached to the team was a junior employee of the Survey Department whose task it was to measure boundaries. The Recording Officer was included in this team. His duties included the recording of committee proceedings and finally the preparation of the adjudication record.

In all locations in Vihiga, if no dispute arose as regards boundaries or, any other dispute about land rights, the boundary would be planted on the spot. Or at least sufficient marks were made to ensure that there could be no doubt as to the line it followed. This boundary demarcation was easily obtained in Vihiga because at the time the exercise of land adjudication was introduced in the division, the local chiefs and sub-chiefs had persuaded the people at gatherings in their "Baraza", and even gone round their homes telling them to let their lands be adjudicated.

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After the rights and duties had been ascertained on each parcel of land, the plots were numbered and the names of the owner and those with lesser interests in that land entered on the record of existing rights. This record in practice constituted the adjudication record and it was from it that the Land Register was eventually drawn up. After registration the records were kept in the District Land Registry at Kakamega.

In Vihiga area, adjudication of parcels of land was declared in 1961. The process being a systematic one, ended in 1972 in Kakamega District as a whole, Vihiga Division inclusive. At the end of the process of adjudication and registration in the area, there were about 69, 719 [34] registered land holdings.

The interest conferred by registration is provided in Section 27 (a) of the R.L.A. which provides that subject to the provision of the Act,

> "the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto." [35]

The effect of this section was to confer absolute proprietorship in a registered proprietor of land. Such title on first registration is indefeasible unless fraud on the part of the registered Proprietor is proved. However, land being the only asset of the people in the area at that time, any alteration or interference with it was bound to cause some disputes. The writer contends that these disputes arose due to the inadequacy of translating customary rights into the

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English concept of land ownership.

(iii) WHY DISPUTES AROSE AFTER LAND REGISTRATION

In Vihiga disputes with regard to land arose after adjudication and registration of title to parcels of land. These disputes as the writer contends arose because the rules governing the preparation of the adjudication record rest on two questionable assumptions. Firstly, there was an assumption that it is possible to equate rights over land recognized by customary law with rights recognized by the R.L.A. of 1963. The second assumption was that the Officer charged with the preparation of the adjudication record had the time and expertise necessary to secure the protection of customary rights. As stated earlier, the local committees who were the custodians of customary law had interests in some disputes that arose and their decisions therefore could not be completely impartial. It is our submission therefore that due to the considerable problems involved in the adequate definition and protection of customary rights, land adjudication has often had the effect of depriving some people of their land rights while conferring on others greater rights than they are entitled to under customary law.

It is a cardinal principle of land adjudication that it recognises and confirms rights which actually exist. And therefore since the registration of title to land is not intended to effect any change in substantive rights, the translation of customary land rights into those recognized by the Registered Act, 1963 proved to be a difficult venture. We shall allude to a fact we stated earlier that it is not sufficient to equate English terms like title, proprietors lease etc., with

similar concepts of under customary law.

We submit that such problems of equivalence would not have arisen if customary land tenure had evolved to a stage where it had shed its more characteristic features and adopted a western outlook. For instance, if the "Mumenya" institution had been replaced by a landlord-tenant relationship on the English model. It would have been easier for the adjudication team to ascertain "Mumenya's" land rights as opposed to those of the land owner. In this way, disputes would not have arisen as to the validity of granting them titles to land; that is in rare cases where that happened and disputes arose between the two parties. It is popular opinion that this stage[36] is reached when outright sales of land have become common in an area and the power of the traditional authorities to control such sales has withered away.

Thus, after stating that adjudication does not purport to give the individual any rights which he did not previously enjoy under customary law, the working party on African Land Tenure declared that:

> "...satisfied that the rights enjoyed by individual Africans in many cases had now evolved to something like full ownership and should be recognized as such." [37]

It is this over-riding concern with "ownership" that led the adjudication authorities to ignore lesser interests. We submit that the survival of some aspects of customary land tenure still raises problems even where the power of the elders to control land dealings has disappeared.

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One distinctive factor in relation to the communal lands that all members of a clan used to have access was that during adjudication, these lands were set aside as public places for instance, some were used for markets, schools and for building churches.

We shall now proceed to look at our last Chapter which deals with the socio-economic effects of land registration.

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C H A P T E R T H R E E

SOCIO-ECONOMIC EFFECTS OF LAND REGISTRATION IN VIHIGA

There was an over-emphasis on the economic benefits that would be reaped by registered proprietors of land. The people who engineered the idea of land registration had specific economic benefits in mind when they used to persuade the authorities concerned to initiate the process of registration. We shall briefly state these economic factors that were promised by those who supported the idea of land registration, before dealing with the crucial issue of whether or not these factors were achieved in Vihiga. Those who supported land registration believed firstly, that after a farmer had acquired title to his land, the factor of registration could aid rural development. In so far as a farmer could use the security of his title to get a loan from a financier and develop his farm. Secondly, that the supply of capital could be increased by making farmers put more into capital formation through greater monetary and non-monetary allocations to investment rather than leisure consumption. This second factor is allied to the first one, only that in the latter point, the propounders of land registration assumed that everybody whose land was registered had a substantial acreage which could be easily accepted as security for loans from the financiers.

And finally they contended that the realization of these improvements would increase the agricultural output and rural employment opportunities. This last point on "employment opportunities" being derived from the factor of land registration is not practicable on the smaller farms of 2 acres per family. But the fact that Vihiga has an average of 2 acres of land per family does not mean that every land owner in the area has such a mean acreage. Some farmers in the area have upto ten or fifteen acres of good

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land free of stones as in other areas in the division. They are such people in the area who should get loans and develop their farms. In this way access to employment will be greatly enhanced through the expansion of labour intensive activities such as tea, pyrethrum, horticultural production and intensive types of dairying. Such projects for small farm development would generate much more paid employment. That is as far as the agricultural season is concerned. But during agricultural slack seasons, employment for farm labourers would be provided by investments in soil conservation, drainage constructions and other rural development works.

One successful example of the socio-economic effect of land registration as the agronomic experts had predicted can be seen from the study of one farmer in North Maragoli who obtained a loan from the Agricultural Finance Corporation in 1976 on the security of his registered land comprising of fifteen acres. The loan was both monetary and non-monetary. The latter category included seeds, fertilizers, a tractor and an irrigation equipment for use during the dry weather. Mr. Ali embarked on the plantation of several kinds of horticultural crops. His scheme is so successful that he has no problem in repaying back the loan he took. Some Boarding Schools in the Province, hospitals among other boarding institutions provide a market for his products.

As for other development projects in the area, a poultry project was set up in 1977. Its office is at Majengo Trading Centre in South Maragoli. Prescribers and other members of the Corporation comprise of any interested and prospective farmers in the area. One such farmer who has benefited from the project is the former Chief Kaiga of South Maragoli, on his five acres of land. Other small scale farmers in the area adopted this project of poultry farming. Some are successful while others, for example Mr. Amoi, the former Sub-chief of Magui Sub-location, started the scheme and gave up due to lack of funds to run it.

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In such cases where a farmer though on a small scale is anxious to improve his farming condition but lacks capital, the Government should promote and provide financial as well as technical assistance to such small scale poultry production. Its components include the development of small-scale commercial poultry units, to provide cash income by the improvement of the productivity of indigenous poultry stock. Also the improvements of marketing facilities especially for rural producers should be encouraged.

As we stated earlier, most people in Vihiga Division are mainly peasants. Its only a few who have bigger farms that can be developed for commercial farming. This is an important point which the agronomic experts did not direct their minds to. Because according to them, the conditions of the "new" land owners was supposed to change dramatically after land registration. Also, as tenure programme in Vihiga like in many other smallholder areas in the country was not accompanied by systematic farm-planning, extension services and appropriate technologies to handle the special conditions of the impoverished peasantry, there was no dramatic changes as Swynnerton had anticipated to achieve after registration. However, the little changes in productivity that did take place were the result of inputs such as technology rather than tenure changes per se.

Another socio-economic effect of land registration and the subsequent grant of title deeds is the easeof land transactions. This is true especially as regards land transfers by sale. Registration of land has facilitated land transfers, as there is no longer any need to go through the counts to get a legal recognition of the right of ownership of the land acquired; unless the title to such land is challenged in a court of law for instance where a father wants to disinherit the sons like in the case of Esiroyo v. Esiroyo etc. This recognition of the right of the purchaser, if the Land Control Board gives its consent to the sale, may be an additional

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factor encouraging many to expand their holdings or obtain new holdings. Thus, having a direct influence on the land market.

During adjudication, statements like

> ..."registration is important so that every farmer can get a title deed and can thereafter get a loan to develop his shamba", [37b]

were not uncommon. This was an overstatement as registration of land alone cannot be the license for acquiring loans. There are other factors besides the title deeds like the ability of the farmer to repay the loan if his crop fails and also the size of his farm. Therefore, there is no guarantee that the banks and other financing institutions would accept their lands as collaterals. This is because Vihiga consists of smallholder farmers. And in some areas especially the area bordering Vihiga Administrative Centre, some plots are so small that such peasants with an average of 2 acres of land per family do not need loans to develop their land. They only cultivate their land for subsistence farming. In some parts like the area around the border of South Maragoli and East Bunyore and Maseno, the land is very stony and unsuitable for any large scale agricultural purposes except for subsistence farming and planting of some special type of trees, like what the Forest Department has planted on Maragoli Hills.

However, the dominant factor is that banks are unwilling to risk their money on such small pieces of land especially where the intending mortgagor has no other securities. This only applies to those farmers with over ten acres or so of land which can be developed for commercial production. Another noticeable characteristic in the area in the early 60's was that where a bank gave a loan to a farmer who defaulted, in the event of mortgaging his land, his counterparts normally feared to buy their neighbour's land during an auction. This was so because they felt morally bound to

sympathize with the misfortune of their tribesman. This tendency of people fearing to buy their neighbour's land is disappearing. With the modern way of life people in the area like anyone else in the country have a feeling of individualism. They can purchase land anywhere and under any conditions without feeling morally bound to please the whole clan.

Land Transactions

The propaganda about land registration was concentrated on the opportunities that registration affords for the grant of credit. The following is a list of the total number of registered land proprietors in each of the four locations in Vihiga vis-a-vis those who have benefited from the loan system. From these figures we can be able to ascertain whether or not the economic benefits of land registration that were advocated for were a mere propaganda or a reality. In South Maragoli location out of 17,057 farm units registered,only 408 had received loans in the year 1978 alone. In North Maragoli location, out of 17,406 farm units registered, only 307 people in the area received loans on the security of their various lands. In East Bunyore location with 17,060 registered holdings, only 154 received loans on the security of their farms. As for West Bunyore with 18,196 registered holdings only 136 people had received loans on the security of their farms. This data was collected from Kakamega Land Registry. It is for the year 1978, for after 1979 July Vihiga Division was split up into different locations and therefore the data of the year 1978 is the most suitable for our study of Vihiga prior to the divisions. The farms on which these people got loans as securities range from ten acres onwards. The minimum amount being 10,000 Kenya Shillings. They were financed by the various financial institutions in the District like Barclays Bank, Kenya Commercial Bank and the A.F.C.

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From the above figures of the total registered proprietors of land vis-a-vis the number of those registered proprietors who have received loans on the security of their land, it can be deduced that the percentage is small. It is approximately 1.5 per cent. We cannot blame banks and other financing institutions wholly for the small percentage of those people who have received loans. The financiers are to blame in situations where they refuse to accept the security of a farmer's land without any other guarantee. Otherwise the main problem that the people in this area are facing is scarcity of land. We submit that the Government should resettle some of the people in this area in the former white dominated areas and in any other schemes where land is still available so that both those who remain in the area and those who get settled elsewhere can at least have ten acres of land per family, which can not only be utilised for subsistence farming but which can also be used for small scale farming. Such equitable distribution of land would be in line with the International Labour Office report of 1972 on employment, Income and Equality of some kind in Kenya.

The most common system used in borrowing loans by registered proprietors in the area is the charge system. This is one of the transactions that one can undertake over land. A land owner can charge his land inorder to receive a loan from any of the financiers. This loan has to be repaid back during the times specified by the parties. A look at the land transactions in Vihiga shows that the chargees are using their powers given under the R.L.A. to the detriment of the chargors, in cases of default in payment. Section 74(2) gives the chargee two alternative powers to be exercised where the chargor has defaulted in payment or failed to observe the chargee agreement. The chargee under this section has power to appoint a receiver of the income from the charged property or alternatively, the chargee can

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sell the charged property by auction and realise his money. Most of the chargees operating in Vihiga area usually exercise second alternative in this section. Section 77 of the Registered Land Act terms this power to sell charged land as the power of sale, which is to be exercised by the chargee in good faith and with regard to the interests of the chargor. But in real practice, most financiers do not bother to use the alternative power as stipulated in Section 74(a) of the R.L.A., nor do they take the interests of the chargor into account when selling his land. This applies mostly to banks but the A.F.C. in most cases resorts to the alternative remedy under the R.L.A. of appointing a receiver with regard to the charged property.

We recommend that the R.L.A. system should be rectified with regard to the chargees powers of recovering his money back. The provision authorising sale of property should be altered, to make it compulsory for chargees to use other alternative methods of recovering their money from chargors. We submit that it would be of some benefit to the chargors if the chargees applied to the Land Control Boards for consent to a sale by auction of the chargor's land. In this way the Land Control Board would be able to give the matter thorough consideration, evaluating the needs of the chargors.

Other land transactions in Vihiga are transfers by sale. And in this connection the Land Control Board has to give its assent to all dealings in agricultural land in the country. Transfers of land by sale is a common feature in Vihiga. Thus where the Land Control Board comes in because if people were left to indiscriminately dispose of their land, they would defeat one of the purpose of registration by encouraging land parcellation into small units which are uneconomic.

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The Land Control Act also ensures the protection of the poor peasants against their prodigality and exploitation by people who are economically more powerful. If these poor peasants of Vihiga were left to dispose of thier land indiscriminately, the end result would be that they would be left landless, and possibly heavily in debts. This with time would create a landless class in Society, which is a threat to any socio-economic development of Kenya.

The Land Control Board at Kakamega is now used as a means of maintaining general supervision over dealings in agricultural land and directing them towards attaining the goals of the Government land policy. By controlling transactions in agricultural land especially transfers, it was hoped that the demand of land would be limited. This will have the effect of reducing the rate of price increases in land. It was also argued that inflation will therefore be controlled. The land transfers which in the opinion of the Land Control Board are for speculation purposes and those transfers of land to people who are unlikely going to develop it are among the transactions which are refused consent generally. The criteria for the grant of the consent or refusal is based mainly on economic factors. The board is required to consider the effects the grant or refusal of their consent will have on the economic development of the land. Also those people who already have enough land are not allowed to purchase more land. But unfortunately no celing have been put on how much land can constitute enough land. This has left land sales open, anybody irrespective of whether or not he has enough land buys more land to add on what he already had. The effect of all this is that land sales are very common in Vihiga irrespective of whether or not the seller has any other land elsewhere or not. This defect in the land control Act should be rectified to bar people from selling land

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if they do not have any other land.

EFFECT ON REGISTRATION ON CUSTOMARY LAND RIGHTS.

Land plays an important socio-economic role in the lives of people especially to peasants in a developing country. Such peasants derive their livelihood from subsistence farming. In addition to that in Vihiga land is an essential commodity affording social security. Therefore any attempt to transform the customary tenure system of land in to the modern tenure system as envisaged by the R.L.A. was bound to create some social side effects on the people involved in the process of land registration. Some of these problems of transition are disinheritance. After registration of land, the registered proprietor, under section 27 and 29 of the Registered Land Act has absolute proprietorship over that land. This is an interest incapable of being defeated if it is a first registration unless fraud is proved. The only overriding interests are those specified under section 30 of the registered land Act. Any purported customary rights in the land of the proprietor have been held to be not legally binding on the registered proprietor since they are merely moral obligations. They can only be recognized if such rights are noted on the register at the time of registration.

The facts of Obiero v. Opiyo[38] are typical of the kind of disputes that are coming before the courts. The case is of relevance to this study as the holding in the case was followed in a latter case from Vihiga. In the Obiero case a Luo farmer died leaving a widow, the plaintiff, and a number of sons by other marriages who were the defendants. In 1968 the plaintiff was registered as the owner of a piece of land and in 1970 she brought an action against the defendants claiming damages for trespass and a

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perpetual injunction to restrain them from continuing or repeating such acts of trespass. The defendants claimed that they were entitled to the land under customary law and that this right survived the registration of the plaintiff as proprietor. The court in rejecting this contention held:

> "I am not satisfied on the evidence that the defendants ever had any rights to the land under customary law, but even if they had, I am of the opinion that these rights would have been extinguished when the plaintiff became the registered proprietor. S. 28 of the Registered Land Act confers upon the registered proprietor a title free from all other interests and claims whatsoever, subject to leases, charges and encumbrances shown in the register and such overriding interests as are not required to be noted in the register... Rights arising under customary law are not among the interests listed in Section 30 of the Act as overriding interests."[39]

The judgement given in the foregoing case that the defendants never had any rights to the land under customary law are obiter. However, they merit consideration only because they have been followed in a latter case of Esiroyo v. Esiroyo and another[40]. This is a case arising out of land registration in Vihiga. Here the plaintiff was the registered proprietor of a piece of land on which he lived with his family. A few years previously he had allocated some of the land to his sons, who were the defendants in this case. A few years later the plaintiff brought an action in trespass against his sons and applied for a

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perpetual injunction to restrain them from continuing or repeating their acts of trespass. The court gave judgement for the plaintiff on the grounds that although the defendants did have rights of occupation under customary law, such rights were not overriding interests and they were extinguished on the registration of the plaintiff as the owner of the whole part of land. Part of the judgement in Obiero v. Opiyo and Another[41] was quoted and the reasoning in that case approved and followed.

Under the customary law in Vihiga, a father cannot disinherit his male children. The sons are entitled to their father's land. We submit that such right to inherit their father's land should not be subrogated by the provisions in the R.L.A. Such customary right should be included among the rights of overriding interests and marked on the registers at the time of registration.

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C O N C L U S I O N

In this paper we set out to investigate and unveil the socio-economic effects of land registration in Vihiga. Through researches and interviews with the people in the area and their financiers, we have come to the conclusion that, in Vihiga area, it did not follow automatically that the title holder enhanced his agricultural development by availing himself to loan facilities. Credit institutions in the area are not willing to lend money to small farmers with only their small farms as security. They discriminate in their loaning system. Like all commercial oriented institutions they first assess the ease with which an applicant will refund the money lent and the ability of the debtor to pay for the agricultural equipments given like tractors, fertilizers etc.

We also noted that where registered proprietors in the area have charged their land for money, they are not afforded enough protection in case of default in payment. The chargees are selling off land leaving the chargors landless and without any means of support. The R.L.A. provisions should be altered to make it compulsory for chargees to use other alternative ways of recovering their money from the chargors. It would be beneficial to both parties if the chargees applied to the Land Control Board for consent to a sale of a chargor's land by auction. In this way, we suggest the Land Control Board would be able to give the matter a thorough consideration, evaluating the needs of the chargors.

Having seen the major problem of people in this area as the scarcity of land, we submit that towards a better land utilisation in some areas in the schemes where there

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is unused land, intensification and absorption of the growing number of the landless, there should be an equal and equitable distribution of land in areas where it is available by the government. Thereafter, incase this distribution of land factor will ever be effected by the Government in the future, there should be the industrialisation of the rural areas which harbour the biggest majority of Kenya's population. So far in Vihiga there is only one Pawpaw Factory at Gambogi Trading Centre in South Maragoli. Allied to the provision of more land, the Government should also provide cheap and easily obtainable technological education in the agricultural fields. We advocate for the developemnt of appropriate technologies because technological change is a major driving force in agricultural and rural development.

Another matter that needs to be looked into is with regards to sales of land vis-a-vis the consent of the Land Control Board. The Land Control Board of the area would give consent to a land sale of the intending purchaser is in a better position to develop that land and secondly if he does not have enough land already. But there is no ceiling in the Land Control Act as to how much land constitute enough land. We recommend that there should be a ceiling on the size of land an individual owns in a specific area and the Land Control Board given more powers of control. This would ensure that the land distributed equally and equitably, (in case there will be such a distribution of land at all in future) is not unscrupulously grabbed by the rich, at the expense of the poor. We are advocating for the protection of the poor peasants against the prodigality and exploitation of people who are economically more powerful. Both in future and at present the Land

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Control Board should take the interests of the intending seller of land into consideration when giving their consent. We recommend that the Board should ascertain first whether the intending seller of land has an alternative plot of land elsewhere before giving their final consent. For if the Board continue basing its judgement on the economic strength of the intending purchaser, and the peasants and petty farmers were left to dispose of their land indiscriminately, the end result after several decades would be an inevitable trend towards a landless peasantry. This with time would create a landless class in Society which is a threat to the socio-economic stability and development of the country.

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F O O T N O T E S

1. It is worthy noting that any reference to Vihiga Division in this dissertation has reference to the area prior to the changes of July 1979. Prior to July 1979 Vihiga Division comprised of South Maragoli, North Maragoli, West Bunyore and East Bunyore locations. But after July 1979 the division was altered and now comprises of South Maragoli, North Maragoli and West Maragoli.

2. Data from the National Archives of Kenya - 1974 statistics.

3. Ibid.

4. Ibid.

5. For a detailed discussion see Cotran's, Restatement of African Law.

6. Application No.2 of 1953. Court of Review.

7. (1958) C.O.R.L.R. Vol.16 page 1.

8. For details, see Rodney Wilson. How Europe Under-developed Africa.

9. 5.4 to 9 of the Crownland Ordinance 1902.

10. S.7 of the Crownland Ordinance 1902.

11. Ibid, Section 9.

12. Ibid, Section 31.

13. Now Government Land Act See LN2/1964.

14. Cap.280 of the Laws of Kenya.

15. Act No.3 of 1969.

16. Cap.288 of the Laws of Kenya.

17. 12 K.L.R.12 (Kenya High Court).

18. 9 E.A.L.R. 102.

19. A.B. Lyall, Land Law and Policy in Tanzania.

20. Cap.281 of the Laws of Kenya.

21. The Law Society then, only complained if their privileges were being threatened.

22. R.J.M. Swynnerton. A plan to Intensify the Development of African Agriculture in Kenya. Government Printer. 1954, Section 13.

23. The Lawrence Mission on Consolidation and Registration of Land in Kenya. 1965 - 1966. Government Printer

24. Sessional Paper No.10 on African Socialism and its application to Kenya.

25. M.P. Nyaribali Constituency.

26. National Assembly Debates of 10th July 1963.

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27. Exparte Etha Njau.

28. Lawrence Report Page 24.

29. Act No.35 of 1968.

30. The Land Adjudication Act, Ca.283 Laws of Kenya.

31. Section 27 of the Registered Land Act Cap.300 Laws of Kenya.

32. S. 6(1) Land Adjudication Act.

33. Ibid, S. 9.

34. Data from Kakamega Land Registry (1979).

35. Section 27 R.L.A. Cap.300 Laws of Kenya.

36. What Simon Goldham refers to as "adopting the Western outlook".

37. Report of the working party on African Land Tenure. 1958. Para 34.

37(b) Lawrence Mission page 24.

38. (1972) E.A. 227

39. Ibid, at 228 per Bennet J.

40. (1973) E.A. 388.

41. See footnote 38.

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10. J. W. Haberson: National - building in Kenya - the case of land reform. (North Western Evenston, 1973).

11. R.J.A. Wilson: "Land Control in Kenya's smallholder Farming Areas". IDS Staff Paper No.89, 1971.

12. Allot: New Essays in African Law (Butterworths, London, 1970).

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