THE REGIME OF THE REGISTERED LAND ACT (cap 300) AND ITS EFFECT ON CUSTOMARY LAND LAW. (GENERAL SURVEY)

A dissertation submitted in partial fulfilment of the Requirements for the L.L.B Degree, University of Nairobi

By

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For

Grace and Kiiru (my parents)

and Margaret and Jane (my sisters)

Whom I Love so much.

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PRINCIPLE ABBREVIATIONS AND MODE OF CITATION

A.G.....	ATTORNEY GENERAL
All E.A.L.R.....	EAST AFRICAN LAW REPORT
E.A.P.....	EAST AFRICAN PROTECTORATE
H.C.C.C.....	HIGH COURT CIVIL CASE
K.L.R.....	KENYA LAW REPORT
R.L.A.....	REGISTERED LAND ACT
T.L.R.....	TANGANYIKA LAW REPORT

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INTRODUCTION

It would be impossible to exaggerate the importance of the subject of the land ownership in Kenya. In the industralized civilizations of the west, the people have many sources of income but in Kenya, which is a 3rd world country, land is for the most part the only form of capital and its exploitation the only means of livelihood. Such manufacturing industries as exist are almost solely concerned with the products of agriculture. Land therefore has something of a sacred character and rights over land are more jealously treasured than any other form of rights.

It is of vital importance therefore, that individuals know exactly what quatum of rights they have in a particular piece of land.

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The Kenya Registered Land Act (hereinafter referred to as the R.L.A.) is the foundation of a system by which the interests of an individual holder can be measured in a particular piece of land. It is important to note here that it is not the land that is registered but the interests in that land, so that registration is a system by which those interests are vested upon an individual holder.

This thesis aims mainly at bringing to light what rights and obligations derive from the R.L.A.

However before a through study of the regime of the act can be done, it is important to identify the social, economic and political forces that necessistated the creation of the act.

It will be recalled that Land registration was formerly unknown in Kenya, as communal ownership of land regarded this (land) as a free gift from God to the dead, living and the unborn. It was seen as the primary source of living for every member and therefore each person had free and equal access to it.

From the 1940's onwards this type of notion was slowly departed from. It was felt that communal tenure was proving to be a stumbling block to the needs of development. There was need for improved farming to cater for the increasing population. It was argued that to succeed in fostering production, there was need for security of tenure so that an individual holder could invest in his piece of land as freely as he wished without being tied down by communal rites.

Various legal mechanisms were used to achieve the above. Amongst these were The 1929 - Kenya Land Commission, which recommended individualization of tenure. In 1935 - the East African Royal Commission was appointed to check on adaptation or modifications in the traditional system necessary for full development of land. In 1954 - the Swynerton Plan aimed at developing African agricultural economy to serve the political status quo. in 1956 - the Native Land Tenure Rules were passed and aimed at legalizing consolidation and registration of land rights. In 1959 - Land Registered Ordinance was passed and finally this resulted in the Registered Land Act of 1963 - which is the present Land Act.

This 1963 - Act was found to be the ideal act that would replace all the other land systems so that eventually there would be one uniform land system. However todate this has not yet been achieved.

In the first chapter of this thesis the origins of individual ownership of property rights will be outlined. Particular regard will be paid to the part played by the colonialists in imposing the commonwealth property jurisprudence

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in Kenya and thereby the destruction of the communal type of ownership of Land.

The R.L.A. confers property rights as opposed to any other rights. A right is said to be a power to perform specific functions and that the position where power coincides with exclusive control is referred to as absolute ownership. Sections 27 and 28 of the act confer absolute ownership on a registered holder. It is my intention to spell out these rights, in the second chapter of this thesis.

The act was passed to provide security of tenure to the registered holder, so that such has all the rights vested upon him, to the exclusion of the other members. This system is very secure for any holder purchasing land.

However, it will be recalled that in the communal society, land was owned by a community, not an individual - so that each member had some rights in the communal land. There is a controversy as to where these rights stand vis a vis an absolute holder. The third chapter aims at showing what position customar land rights still hold even with the passing of the act - which was supposedly aimed at universalizing all other land systems.

In the concluding paragraph, the answer as to whether "customary land law is alive or dead with the passing of the R.L.A." will be answered.

CHAPTER ONE

"THE ORIGINS OF THE INDIVIDUAL OWNERSHIP OF PROPERTY RIGHTS IN KENYA"

In this chapter the writer intends to show how colonialism paved the way for an importation of an alien system of ownership of property which affect was the introduction of English property law in Kenya. We shall have occasion to see how Britain "stole" African lands and how through a variety of legislations, she justified this crime. An attempt will be made to show how the dual policy partaining to agricultural development was created and how it worked.

Various reasons have been given to justify the colonization of East Africa by Britain and Germany. Most historians believe that these colonial powers had a view of abolishing slave trade, civilizing the savages and opening Africa for Legitimate commerce. The other reasons given is that the colonial powers aimed at finding markets and raw materials in Africa for their growing industries. The first reason can be taken to be true, if we limit ourselves to the early period when Missionaries ventured deep into the interior to preach the word of God and to discourage slave trade. Such missionaries as Livingstone devoted their time to spread the gospel, fight against slave trade and encourage other forms of trade. However, if we look at what followed this, we begin to doubt that this was the real motive behind colonization.

Partly as a result of the missionary activities in the East African region, Britain and Germany had established some form of influence in this region. In 1886, under the Anglo-German Agreement, the two powers divided the region and Britain took the region that is now Kenya and Tanganyika was taken by Germany. The Sultan's dominions were recognised as including Zanzibar, Pemba and the Ten mile coastal strip. This agreement was proceded by the Berlin Conference in 1885 at which the European powers aimed at dealing with certain disputes which had arisen in West and Central Africa. However by purporting to set out the rules of international law relating to the acquisition and establishment of authority over territory in Africa, the powers gave new impetus to the scramble and acquisition of the territory. Surely it was not that necessary to establish colonies so as to promote religion and trade, for the former needed time and money and was not without consequences, However I am not altogether dismissing it as having not been one of the aims of the colonizing powers, I am arguing that it was only one of the courses, but however not a major course at that. My contention for this is that the aim of the powers was to allocate each power with a certain region where it would make its influence felt by establishing authority over it. Such a power would then have power to exploit the natura resources from its own region and nowhere else. In other words the powers aimed at having a share in the new markets for their economic benefits. Therefore I agree with Gibson Kamau[1] when he says that the European nations lied to the

1. The Trends in Marriage & Succession Laws in Kenya (1806-1972)

world that they introduced their rule in Africa with a view of abolishing slave trade, civilizing the savages and opening Africa for Legitimate trade and that they actually aimed at finding markets and raw materials for strengthening capitalism. In Europe at this time, industries were mushrooming and these needed protection by the state. A German bourgesis economist Heymann states that "Pure enterprises perish they are crushed between the high price of raw material and the low price of finished products". Hence Lenin[2] states that the best protection that can be given to such industries is to combine production, so that in our case the colonial power would have the colony as the source of its raw materials, then back at home process this to whatever products and then bring them back to the colony for consumption. This way, there would be maximization of profits because the cost of the raw materials would be low, so that no loss would be felt. Incidentally even after the attainment of political independence, these countries still serve as cheap markets for both raw materials and the finished products.

To strengthen capitalism back in Europe, it was vital that Britain should have control over the land in the region that it already had acquired under the Anglo-German agreement (1886). However hitherto the only form of influence that she had was of commercial nature which existed at the coast through an agreement[3] with the Sultan. Also for purposes of

2. In his book: Imperialism, The Highest stage of Capitalism.

3. The 1888 concession Agreement.

building the railway, the 1894 Indian Land Aquicition Act was extended to the main land so as to justify Britain's dealing with such lands[4]. By this act it was notified in the gazette that all landslying one mile next to the railway on either side belonged to Britain, Contrary to the expectations of the Britons the railway turned out to be such an expensive affair and ways and means had to be found to minimise these loses. Farming was the only viable alternative and it was decided that white farmers should be imported into Kenya, given land and encouraged to produce cash crops. However Britain was not blind to the fact that she was still a foreigner to the territory and that she was not free to deal with the Land.

The declaration of a protectorate over much of what is now Kenya in 1895 was an attempt by Britain to solve the issue of the establishment of formal jurisdiction. However Ghai and Mc Auslan state that "title to land is not per se relevant to the constitutional status of a country"[5] so that in a protectorate the only effect that the indigenous people feel is the protecting power which mainly emanates from the laws passed by such a power. The issue of land ownership does not arise in a protectorate. He according to international law the country still remained foreign to the British Imperialists and they had no power to deal with any land, other than those lands that they had acquired through legal means[6].

4. the act was extended to E.A. in 1896.

5. "Public Law & Political Change in Kenya Pg. 1 - 34

6. These include land used for the railway the Coastal strip and any other lands acquired through sale or agreement.

However we shall see that though the British imperialists did not reserve this right, under the protectorate they passed various legislations which allowed them to deal with land.

In 1897[7], the British legal system was held to apply in the protectorate. Henceforth the Queen's Regulations and laws were to apply to Africans where there was no contrary intentions. The law officers provided that where Her Majesty had no power to deal with waste and unoccupied land, Her right to do so accrued to her by virtue of her right to the protectorate. By 1901[8] these provisions had become operational so that all crown land in the protectorate was vested in the Commissioners and Consul General. The commissioners could grant or lease crown lands on his own discretion. The following year[9], the commissioners could provide land by outright sales and leases of 99 years could be granted.

From the above examples, we can already see that even though in a protectorate the country remains foreign to the protecting powers and that the indeginous people still retain sovereignty[10], the imperialists were not unduly hindered by the legal limits in their administration. They exercised both the control of the inhabitants and the land. Hence in the words of Ghai and McAslan,[11] the protectorate had both the ownership of the country and the ownership of land. This even becomes more clear when we look at the Ole Njogu case[12].

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7. 1897 - East African Order - in - council.
8. 1901 - Crown Lands ordinance.
9. 1902 - Crown Lands ordinance.
10. Ghai & McAuslam: Public Law and political change in Kenya PP.26-27

footnote 12 or 11 ?

In 1904, the imperialists found that the traditional grazing grounds of the Maasai consisted of rich agricultural land suitable for settler farming. Under some pressure Lenana, the Laibon, together with some senior members of the tribe were induced to agree on behalf of the tribe, to vacate some of these lands and be re-grouped into two other areas. This agreement refered to as the Maasai Agreement 1904 was subject inter alia to the condition that the agreement "shall be enduring so long as the maasai as a race shall exist". It was also agreed that the Europeans shall not be allowed to take up land in the settlements". However due to the white settler population pressure, by 1911 the settlers were pressing for the abrogation of the agreement and demanding that the Maasai should move to Laikipia area. So the Maasai were again moved from this area that was needed for settler farming.

The plaintiff, on behalf of the Maasaiwho had been compelled to move in 1911, brought an action for breach of 1904 Agreement, on grounds that the agreement was a civil contract which still subsisted. He further alleged that the 1911 Agreement was not made with those Maasai capable of binding all the tribe. Damages were also claimed for in tort for the confiscation of some of their cattle. The government raised preliminary objections that (1) the courts had no jurisdiction since the 1904 agreementwere treaties and not contracts (2) That the alleged confiscation of some cattle was an act of state which was not recognisable in a municipal court.

Both these contentions were successfully upheld even at the court of Appeal for Eastern Africa.

On the treaty issue, the court held that since the protectorate was a foreign country, it followed that the Maasai were foreigners in relation to the protecting power. That they were subject to their local rulers. The Maasai therefore had some vestigal sovereignty left with them and such a treaty could be concluded with them. In essence therefore, the courts were saying that both the 1904 and 1911 Agreement were treaties which could not, as a matter of international law, be challenged in a municipal court. Indeed such international issues can only be delt with by an international court if diplomacy is preferred instead of war. The court also ruled that the alleged consfication of cattle was by an act of state which can not be questioned by any court.[12]

The Maasai case highlights the unwillingness of the colonial courts to challenge the legal basis of colonialism. This is a clear case where the Maasai had been disinherited of their rights to their tribal lands by being forced to vacate them, so that the same could be owned by white farmers. While the courts argued correctly that in a protectorate, the protecting power has limited power and that the protected retain sovereignty, it failed to observe the case practically. The limitation recognised in a protectorate arises due to the fact that the protecting power reserves the right to land to the protected and hence the protected are said to have sovereignty retained. However this was not true of the Maasai, because by vacating their lands, they lost their sovereignty and so the alleged

11. Ghai & McAUslan - ibid

12. Ole Njogo & others V.A.G. of the E.A.P. (1914) 5 E.A.L.R. 70

protecting power exceeded its powers to acquire sovereignty. "There can be no fuller exercise of sovereignty over the Land than to compel by legislation a people to vacate their traditional land"[13].

The above case therefore pointed to a paradox of power in a protectorate. In a protectorate there is a residence of sovereignty left to the protected people or state, but the crown has unlimited jurisdiction. However if the limited jurisdiction exercisable in a protectorate is unchallengeable then the distinction between that and the unlimited jurisdiction in a colony is meaningless. Indeed the imperialists could and did use the laws to spearhead their interests. It hence never mattered to them that in a protectorate they had limited powers because 43 years later Lord Denning in the case of Nyali[14] said of this limitations, "in a protectorate" jurisdiction of of the crown "is limited but it may infact be extended to embrace the whole fold of government. The courts can not mark one the limits. They will not examine the treaty or grant underwhich the crown acqired jurisdiction or the lawful means by which the crown may have extended jurisdiction. The courts will rely on the crown to know the limits of the jurisdiction which once established will not be allowed by the courts to be challenged"[15]

To justify their application of their legislations the Imperialists, who did not attempt to understand the structural set up of the African acephalous societies, believed that a society with no settled form of government had no head and

13. Ghai McAUSlan - abid
14. Nyali Ltd v A.G. Court of Appeal (1957) IAll E.R 64
15. Nyali Ltd v A.G. - abid

hence that their land was not held by anybody.

This type of thinking was derived from the English property jurisprudence. Let us look at this concept in connection with imperium (jurisdiction) and dominium (dominium of the soil).

Imperium and dominium are concepts which are said to have been distinguished by the Roman Lawyers. Under Roman Law dominium denoted sovereignty over property and it was the highest and most important right that an individual could hold, being the ultimate title beyond and below which there was no other such right. The actual enjoyment could be passed to another person, but sovereignty remained with the owner[16]. Impreium on the other hand referred to jurisdictional matters and only delt with political issues and had nothing to do with land[17]. However English jurisprudence departed from this because as a result of feudalism it divided dominium (sovereign of soil) into two; dominium directum vests the sovereignty of the soil to the state and dominium utile vests the rights to use land on the individuals. Imperium and dominium were merged together so that the political authority also became the owner of the land. The largest interest in the land was therefore held by the political head; while the subjects held Lesser rights. In English jurisprudence land was held of a lord.

By wholly importing and imposing their property system to the protectorate, the imperialists ignored the fact that in Africa land belonged to a community and that it was seen as "belonging to a vast family of which many are dead, few are

16. Buckland: Text book on Roman Law 3rd edition pp.1

17. Jolowic: Historical introduction to Roman Law pp. 66 - 67

few are living and countless members are still unborn".[18]

We can infact say that communal land tenure was closely similar to the Roman one. This is because, just as the Romans separated political matters from land issues, the African societies had different groups of persons dealing with the two concepts. If I may take the Kikuyu as the example here, we see that the land owning unit was the Mbare (lineage grouping of persons from a common ancestor). A mbari was ussually founded by one person after acquiring a Githaka (land belonging to a lineage). When he died the usurfruct of the land passed to his sons who had equal shares. However the heir was vested with the authority and he was referred to as the Muramati. He was responsible for re-allocation of land and was the final vetto in the admission of the tenants and alienation of land to strangers. Yet this did not give him more rights than his brothers. Every member retained his right to equal and free access to the communial land. Political matters were handled by ageby set under the direction of the Kiama. Generally this group delt with matters partaining to tribal security and when it had to touch specific issues on land, it was in solving desputes among the mbari usually to enforce the authority of the muramati[19]. Hence under this system there was a distiction between jurisdiction and sovereignty.

This terminological confusion misled the imperialists to

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18. C.K. Meek: Land Law & Custom in the colonies pp.76 - 99

19. Journal of the Dening Law Society pp.89 -93

think that the subjects had no firm and secure rights in land but that they cultivated it only by the chief's permission and that to some extend at his caprous will.

The colonialists were also misled by the belief that conceptions in land tenure were subject to steady evolution side by side with evolution of the social progress.[20] Hence their belief that at the primitive stage, land is owned by the clan and that individuals per se hold no tangible rights to land, since it is only in the progressed stage that individuals hold such rights.

We can therefore see that by this forceful importation of this alien system of law, communial land tenure slowly started to disintergrate and became inferior to English Law.

The situation became even worse for Africans when in 1915[21] it was provided that crown land was to include all lands, including those formerly reserved for use by the Africans. It abolished freeholds and instead offered leases for 999 years. Non-Europeans could not buy or manage land in the "white" highlands without a letter from the Governor. Also all interacial transfers of land had to be consented to by him. These were very discriminatory measures to the Africans because they lost all their rights except the mere right to use the land subject to the will of the crown. This discriminatory nature can well be seen in the famous case of Murito v Wainaina. In this case the plaintiffs claimed the possession of the land in issue on the basis that they had inherited it from their father who had bought it from

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20. L Lugard: The Dual mandate in Tropical Africa (1922) pp 281

21. 1915 Crown Lands ordinance.

a Ndorobo tribesman for 900 sheep.[22] The issues that had first to be considered as per Barth C.J. were as to whether the plaintiffs were entitled to the occupation of the land as against the defendants. It was held that the effect of the 1915, 1920 and 1921 orders - in - council was to vest all lands in the crown, so that the land in question was covered by the legislations. Therefore both parties had no right to that or any other land because they were mere tenants at the will of the crown. Thence there was no cause of action.

It will therefore be noted that by the time Kenya was declared a colony in 1920 the protectorate had already taken control over all the land including that formerly reserved for Africans. The African relation to land was that of a mere tenant. The imperial power, through the doctrine of eminent domain, had right of ownership of land which implied that it had power to extinguish land rights without explanation.[23] The communial land tenure was destroyed so that henceforth land rights were not derived from the society, but from the state.[24]

Under the imperialists umbrella the African was left with no capital since he had lost his land to his white master. He was therefore left as a mere tool of production. Walter Rodney notes this of the African: "African workers and peasants produced for European capitalism goods and services of a certain value. A small proportion of the fruits of their

22. Isaka Wainaina & others v Murito Waindagara (1921) K.L.R. 102

23. H.W.O. Okoth-Ogendo: Political Economy of Land Law.

24. H.W.O. Okoth-Ogendo ibid

efforts were retained by them in the form of wages, cash-payments and extremely limited social services, such as were essential to the maintenance of colonialism. The rest went to the various beneficiaries of the colonial system."[25]

Once the crown was vested with all the land in the colony the next issue that needed attention was as to which method of development would be the best since there were two racial grouping: the whites and the blacks. Through the influence of Lugard,[26] it was found that a dual system of development should be adapted so that both groups developed on separate lines.

Under this area we shall consider three racial groups which comprised the Kenyan society.

The Europeans, as we saw, occupied the Highlands. The Highlands covered Nandi, Lumbwa, Sotik, Eldama Ravine, Naivasha, Fort Hall, Kikuyu, Embu, Ulu, Laikipia and Latitude 32° S of Kitui. They also reserved their right to occupy land elsewhere. Whereas the Indians could only own upto 100 acres, the "whites" could get as much as 5,000 acres. The Europeans were not affected by conditions that required that any holder of land had to settle on it within nine months so that all they had to do was to register such lands under their names. In the urban areas, plots were sold by advertisements, so that Europeans were always favoured. This group could also grow any crops.

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25. Walter Rodney: How Europe underdeveloped Africa pp.232

26. Morris & Read: Indirect rule & the search for justice.

However the Indians did not have as much priviledge because it was feared that they were financially well-off since their mother country backed them, and as such they could buy and hence control more land than the Europeans. Infact as early as 1908 Lord Elgen[27] wrote to the Governor requesting that it was not consonant with Her Majesty's wish that Indians be allowed to settle in the Highlands. The Indians were therefore allocated with the lowlands. They could only own upto 100 acreage and they were required to settle either personally or by sending a representative of some kind within nine months. They were often left out in the allocation of plots in the urban areas since the Europeans controlled the sales.

Like anywhere else the Indians realized that he who controls the land is in a better position to influence politics. They opposed European demands for the reservation of the Highlands. Though they sadly lost this claim, they did not give up and an inter-deparmental committee of the colonial office and the Indian office was set up to look into the issue of Indian representation in the Legislative Council and of course on land allocation.However, once again these proposals[28] were refused by the European governmant in the famous Devonshire White Paper of 1923. This paper is also referred to as "Indians in Kenya". The colonial government argued that Kenya was an African territory and that the interests of the Africans had to be paramount and in fact that these African interests were to prevail if the immigran

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27. The 1904 Elgen Pledge

28. Wood - Winterton proposals (1922)

races conflicted. In essence the colonialists were saying that Kenya was a blackman's country and he alone had majority say, so that the Indians should not fight for this position. However this was very untrue because at this time, the African had no say in the government, as it was said that he was not even ready to represent himself. It was only in 1916 that the Chief Native Commissioner was appointed to represent him "until the time comes when the natives are fitted for direct representat

The real basis of the European fear was founded on the fact that the Indian proposals "had given no sufficient safeguard to the European against Indian predominance in the future"[29]. This situation discouraged the Asians from farming and they instead took to commercial business.

The African group had no land to boast of and all that they could still boast of was the labour that they could afford the imperialists thus they already found themselves fitting into the capitalist system as the workers' class. Indeed the blackman certainly had to pay dear for carrying the whiteman's burden, because he was oppressed, exploited and disregarded a great deal.[30]

The settlers who had large tracts of land soon found that they had no financial support to buy enough labour. The colonial governmant had therefore to ensure a steady support of labour. Though at first the indeginous peoples were reluctant to supply this labour, soon the colonial chiefs played a decisive role in

29. Ghai & McAuslan: opp. cit. pp 48

30. Walter Rodney - opp cit. pp 223

compelling them to shoulder unpopular burdens, For many years they were the principal recruiters of labour, rounding up young men and sending them under guard to work destinations.[31]

Soon new and more subtle forms of compulsive labour still remained at the heart of colonial control. Taxation became a factor driving Africans out to work in search for wages. Many Africans became resident labourers to ensure that they had a steady source of income - through the wages were very meagre. The creation of reserves provided marvellous opportunity for this exercise not only did it generate labour but it was a unit of recruiting, organizing and controlling the supply of labour.[32]

Having been disinherited off their lands, the Africans had nothing to count on as their own sources of income. They were forbidden from growing most of the lucrative cash-crops that their land could support, and which would give them profits. Among these cash-crops was coffee. Though the case of Koinange Mbiu[33] comes much later, itemphasises the point that Africans were prohibited on racial grounds from growing coffee. In this case, Mbiu had his coffee seedlings confiscated on racial grounds. Such prohibitions only helped to underdevelop the African even more, so that one wonders how such a person could still be said to be the paramount benefactor as the argument was put across in the "Devonshire White Paper"

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31. Tignow: The colonial Fragmentation of Kenya pp 1 -14

32. H.W.O. Okoth Ogendo - Development and the Legal process in Kenya.

33. (1951) 24 (2) K.L.R. 130 (Supreme Court of Kenya)

The 1915 Kipande system regulated the African movement in and out of the reserves. The system which literally required that every native possess a kipandeis a sign of belonging not to oneself but to another. It was a constant reminder that the worker belonged to 'his' master. Hence all in all the white settlers were right when they said "we have stolen his land. Now we must steal his limbs. Compulsory Labour is the corollary of our occupation of the country".[34]

The working conditions were not pleasant. Contractual obligations were re-enforced by criminal penalties to ensure the Africans' stay on the farms. The wages were deliberately kept low so as to ensure continual and equal access to the labour.

The most adverse effect of this labour policy was that it deprived the African economy of the able bodied men and women. Women had to shoulder their husband's economic burdens because their husbands had to mind the whites farms. There were gross abuses on labour supply, such as encouragement of child labour. Most of the wages went into the purchase of the imported goods.

All in all we can say that the African land relations were grossly affected by the settler systems because the creation of reserves introduced a measure of territoriality so that ethnic boundaries were limited to certain areas. The colonial process reduced African land rights to mere beneficial occupation so that in effect any rights claimed by the Africans became rights derivable from the crown.[35]

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34. Walter Rodney: opp eit. pp 180

35. Stanely Kahahu v A.G. (1936) K.L.R. 5

Landlessness arose in the "white Highlands", central province Rift Valley and parts of Western Province.

This state of affairs created the awareness among the Africans of the existing injustices. At the same time there was an outcry by settlers that the African landless class was increasing and these had settled on their land as squatters labourers. Also at this time, a new class of Africans had emerged from the reserves consisting of learned young men from the missionary schools. This group was deeply aware of the injustices and pioneered the first acts of protest aginst land alienation and government attitudes towards Africans.

It will be remembered that upto this period the Africans were not represented in the Legco. This is because the intial assumption was that Africans were unable to represent themselves and that it was therefore necessary to appoint a member of another community to speak on their behalf. "The African did not know what was best for him". In 1923 the white paper had recomended that a missionary be appointed for this purpose. The Governor and the Chief Native Commissioner continued to be responsible for African welfare. The Africans found that these representatives did not have any knowledge of their affairs and as such they were not being represented at all. They urgued that they were capable of representing themselves since they knew what was good for them. Following this, in 1934 two members were now appointed to represent them, this time a retired civil servant being added to the missionary. In 1944, the first African, Eliud Mathu was nominated. In 1946, F.W. Odede joined him. By 1952 there were six African members

in the Legislative Council.[36] It is this participation in the government process that gave the Africans the impetus to agitate for their stollen lands.

In 1914 Koinange Mbiu launched the first written complaint in which he appealed to the Governor to return the land taken from his family for European settlement.[37]

Soon the agitations began to take a different shape so that it was politically organised. Such political organizations as the Hurry Thuku Young Kikuyu Association (1921) and the Kikuyu Central Association (1924) had already been formed, and they campaigned for the return of the "stollen lands". In 1928 representatives of the associations gave evidence before the Hilton Young Commission. In 1930 the late Mzee Kenyatta, the the secretary of Kikuyu Central Association, went to England for the same issue of land.[38]

This growing sense of insecurity brought to the government notice that there was need for the clarification and the final solution of the land issue in Kenya. In 1929 the Kenya land commission was set up to study the land problems with particular reference to the Africans. It had the task of finding a parmanent solution to the desputes of land alienation between the Africans and settlers. It also had to reccomend suitable boundaries between the reserves and the alienated areas.[39]

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36. Ghai & McAuslan: opp cit pp. 62

37. Sorrenson: Land Reform in Kikuyu Country - opp eit: Chap.II

38. Sorrenson: ibid

39. C.K. Meek: Land Law & custom in the colonies pp 76-99

The commission issued its report in 1933. This year marks the dawn of the new era in the history of land rights in Kenya. It recommended that it was a proper function of the government to secure the development of land to the best advantage and that while private rights were recognizable, a power of intervention had commonly to be preserved to the crown by land acquisition Acts, and limited legislation in order that it may be able to secure proper development. It also recommended the division of lands in Kenya into European highlands and Native Lands. Some land was to be added to the reserves as compensation for Africans. Thus, the commission attempted to absorb the Africans, their tenure system and grievances into the colonial system of land holding without hurting the interests of the colonial government and the settlers.

Though the commission recognised some form of customary land tenure, it noted that "the Kiambu district is already launched on a system of tenure, quite exceptional in tribalism. It is not yet individual tenure since the rule seems to be that of cousins separate, but brothers do not and the group is therefore rather wider than a single family. And it is not even in all aspects, private tenure since a right of communial pasturage remains. But these restrictions are disappearing and individual tenure is well in sight".[40] Thus in their opinion, the African communial tenure system was slowly dying away and that the "natives" on their own initiative were adapting individual ownership. Of course this is not true because communal land tenure was forcefully broken down by the imperial

40. C.K. Meek - ibid

initiative and it is because the Africans were put into a dilemma, that some actuall opted to individual land tenure. Also the introduction of the money economy advocated individual ownership of land. This report was hence a disappointment to the Africans since instead of solving their problems, it was instead attempting to reconcile the Africans to accept the idea of land alienation as a parmanent aspect. The new system was to exist side by side with the African land tenure and it was hoped that gradually the African tenure system would face a breakdown, thus allowing for the total assimilation of African land rights into the new tenure system based on English system.

To implement the report, district areas for Africans were created. Native Lands Trust Boards were set up to look into the affairs of the Africans.[41] It was also supposed to encourage African development towards individual ownership of land. Shifting cultivation was shunned as harmful to soil and as unreproductive and anti - soil erosion measures were introduced and Africans were encouraged to grow perenial crops and cash crops.

This attitude of the imperialists towards Africans land problems only created more problems. It should be noted that this was also the period within which, despite the fact that Africans were politically organized, they did not have any means to express their views. Hence grass-root level unrests grew and soon societies organized themselves politically.

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41. 1939 - Kenya Order in Council.

By 1952 - the Mau Mau had already retreated to the forest which was to be their fighting arena.

The colonial government hence realized with horror that the problem still existed. To solve the problem once and for all, the colonial government appointed R.J.M. Swynerton the Assistant Director of European Agriculture, to carry out a research which could act as a plan to intensify the development of African agriculture.

Swynnerton then came out with the famous plan called "A plan to intensify the Development of African Agriculture in Kenya". Swynnerton indentified the major constraint to development of agriculture by Africans as being their system of tenure. He stated that all the Africans lands in Kenya suffered from low standards of cultivation and income. This was due to the fact that the African land tenure and inheritance purported fragmentation whereby one family could posses several fields scattered at wide intervals so that they could not be developed economically. He reccomended that these scattered pieces should be amalgamated into economic units so that they could yield greater returns for the Kenyan economy. Conditions were to be created to ensure that sub-division did not take place below an economic level.

In the strongest of the terms the plan advocated a system of land tenure which could avail an individual with a unit of land and a system of farming whose production would support his family. Security of tenure was therefore to be afforded to him through an independent feasible title so that the individual could be encouraged to invest his labour and profits into the

development of his farm. He could also offer his title as s security against financial credit.

To enable the African to comprehend these new methods of farming, agricultural education had to be encouraged from the lowest levels to the university levels. The graduates, whom he noticed considered field work as "infra dig" were to be encouraged to change this attitude so that they could help to effectuate this reforms.

Methods of land preservation were suggested and in such semi-arid areas as Ukambani afforestation was to be started to curb soil erosion. The Africans were to be encouraged to grow such cash - crops as coffee, pyrethrum, tea, wattle, pineapples, sisal, sugarcane, cotton, tobacco, oil seeds, maize and rice.

Swynnerton foresaw that "this will create a landed and a landless class"but he noted "this is a normal step in the evolution of a country.

The plan might have looked to potray a very positive attitude of the colonialists towards the Africans but this was not the case because it had underlying motives. The international capitalists had realized they needed some support from within the Kenyan community itself, which would have similar interests with them and hence automatically ally with them against the land hungry masses. Individual ownership of property would give these few Africans the financial support they needed to accumulate more land. Of course only a few individuals could own land, because family land would be registered under one or a few individual(s). The rest of the members would have no land. Hence a landed and landless class was infact created.

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The landed class was to become a buffer between the settler interests and the landless. At this time also the colonialist found that they could use the land to reward the loyalists and they also hoped that this dishing out of land would lure the Mau Mau back from the forest.

The plan was effectively directed towards the final destruction of communial land tenure and the establishment of individual ownership or private ownership as the best line of development. Infact what follows is mainly based on this plan since the final document, as contained in the "Registered Land Act",[42] is wholly based on private property. Even the development plan adapted in 1965[43] was a further advocate of this idea of individual ownership.

When in 1952 a state of emergency was declared in the whole country the government had a chance of launching this polices of individual tenure without problems. By this time the system of consolidation was already in motion in certain areas The initiative to provide security of tenure had started as far back as 1900. This started along the coast. Whereas in the mainland, land was communally owned, at the coast some individuals owned land. Such were the rich arabs who kept ex-slave, freed men and tenants on their farms. In the same place there were Africans who lived in reserves. Hence the tenure system was rather chaotic. It was necessary to identify the land that belonged to the crown. Hence in 1901, a registration of

42. 1963: Kenya Registered Land Act.

43. African Socialism: Sessional Paper No.10 of 1965.

documents was created.[44] This provided for official records of deeds purporting to create transfer of [illegible] interests in land. However this process soon proved to be cumbersome since there were numerous documents.

Another system was created in 1908[45] and this was used to solve the problems existing at the coastal belt. It was presided over by the Recorder of Titles. It was to adijudicate upon land claims in the coastal area and issue certificates of title to the succesful claimants. There was to be certificate of ownership, certificates of mortgage and certificates of interest. Any lands without certificates of ownership were to revert to the state by the doctrine of Bona Varantia[46]. This was the first act to introduce a title with a state backed guarantee in Kenya. It was based on the Tasmanian Torrens System. However this act provided only for the adjudication of claims, but it never set out any procedure as to how the register was to be maintained. It also proved too expensive.

In 1915[47] the Government land ordinance provided for the registration of deeds. This was mainly concerned with the protection of crown lands. Transactious in government lands were made compulsorily registerable. Even todate the act still provides for this registration[48].

Under the 1915 ordinance, various volumes for various areas were created. Each volume covered a big area and each piece of

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44. The 1901 Registration of Documents Ordinance.
45. The Land Titles Ordinance (1908)
46. Rowton Simpson: Land Law & Registration chap. 21.
47. 1915 - Government (crown) Lands Act.
48. Government Lands Act sec. 99 - 100

land in it was given a Folio number, On each Folio all transactions affecting that piece of land were entered in a chronogical order. However the details of this are scanty. To provide such details a register was kept providing photographs of every registered instrument or document. However this act lacked state backed security.

In 1919 another ordinance [49] was passed which established the Registration to Title Act. This act was framed by the Australians following the Torrens system. It provided for the registration of title. It aimed at converting the Land Title Act and the Government lands Act into the new process. But the convertion was never made compulsory. This process also proved expensive.

It will be noted that these attempts did not solve the problem of conveyancing which remained complex.

Hence in 1957 a working committee was set up to govern the process of systematic adjudication consolidation and registration. This was borrowed from the Sudan Land Settlement and Registration ordinance of 1925. Following this in 1959 a bill was passed.[50]

Further steps were taken to ensure a measure of registration In 1961 an unofficial committee drafted a bill which they believed would provide for the practical needs of the land owners of Kenya with respect to securing a proof of title to provide facility for creating and transfering interests in land. It was based on the report of a working party on Registration of ownership of land in Lagos published in 1960 containing a draft Bill for an act called the Registered Land Act".[51]

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49. Registration of Title ordinance - 1919.

50. The Native Lands Registration ordinance - 1959.

51. The present Kenyan Registered Land Act - Cap 300

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The essence of the proposals was that the ordinance should itself provide a clear and firm platform on which all ownership of land had to rest whether the owner was an individual the family, 'white chief' or the state.

The ownership was not an estate in land but it was absolute ownership out of which would come certain registrable rights in land. Anything not on the register and which was not an overrinding interest created no right or interest in land.

It will be observed that though this bill accomodated some aspects in the 1882 Indian Transfer of Property Act, and was therefore influenced by the English property law, it became one major instrument by which the rights of private holder of property is protected by the state. The draftmen of the Kenyan constitution in Lancaster House Conference (1960) adapted this line by making private property sacred. The Kenyan constitution protects private property.[52]

Also the general direction of development plan [53] states that " we rejected both Western capitalism and Eastern communism and chose for ourselves a policy of positive non-alignment".[54] In this paper African socialism which has been adapted is defined as conveying the African roots of a system that is itself African in its characteristics. However it is also stated that "we must draw on the best of African traditions" and must be "adapted to new and rapidly changing circumstances" The adaptations to be accomodated by the African traditions is the new tenure system which was based on individual tenure. The

52. Sec. 75

53. Sessional Paper No. 10: 1965: opp cit.

54. Sessional paper no. 10 - ibid: opening

plan recommended that consolidation and registration would make farm credit and modern methods of agriculture possible. Land had to be opened for sale so that loans could be borrowed on the security.

It was argued that any selfishness that might arise from private ownership was to be curbed through government acts such as licencing acts which would control land use. By this means it was highly hoped to create a country where men and women are motivated by a sense of service and not driven by a greedy desire for personal gain".

Hence we can say that communal land tenure was completely downgraded and even after independence, the African government did not make efforts to save it, but continued to support the new land tenure based on individual ownership. Our system is based on private ownership, hence the need for this change in land relations.

We can therefore say in the words of Walter Rodney by 1963 - "the most serious blow suffered by the colonised is being removed from history and from the community".[55] The Africans had lost their roots, by letting their communial life disappear.

55. Walter Rodney: opp cit. pp 245

RIGHTS DERIVED FROM THE REGISTERED LAND ACT.

In the foregoing chapter we saw how in 1961 an unofficial committee drafted a bill which would provide for the practical needs of the landowners in Kenya with respect to security and proof of title, and for creating and transfering interests in land. This bill, as we saw, contained an act called "The Registered land Act". All ownership of land, whether based on the individual, family' or state was to be hitherto regulated by this act. In the same chapter we saw how the term 'ownership' did not refer to an estate in land, but was absolute ownership out of which would come certain registrable rights in land.

In this chapter the writer intends to outline what class of rights derive from the said act, and especially as to whether the act has fulfilled its role of protecting the individual holder, by affording him the security of title. To do this, in the first phase of the chapter I will mainly show what type of rights are derived from and recognised by the act and in the 2nd, I will deal with the notion of the security afforded to the individual holder.

(i) Rights derived from the R.L.A.

The R.L.A has called the private holder absolute proprietor. Section 27(a) of the act provides that....."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 priviledges belonging or appurterant thereto" ..... and section 28 further continues to state that....."The rights of a proprietor whether acquired on first registration subsequently for valuable consideration, or by order of court, shall be rights not be defeated".....

From these two sections we can already begin to see the theme of absolute holding emerging in that an individual upon receiving the title certificate, which is the evidence that all procedural requirements regarding registration have been met, in vested with a whole 'bunch' of rights over that piece of land. The holder is assured of two things here, absolute rights and total protection from any other person claiming similar rights over the same piece of land.

~~The holder is assured of two things here, absolute rights and total protection from any other person claiming similar rights over the same piece of land.~~ This is especially true for a first registration, for which under section 143 (1) it is provided that the court may order rectification of the register by ordering that the registration be cancelled if it is proved that there were elements of fraud or mistake in the process of registration; on subsequent registration, but not first registration.

The courts have been keen in ensuring that the above provision is strictly preserved as is given. This can be seen in the Kenyan cases of Sela Obiero v Opiyo and Esiroyo v Esiroyo. In the first case the plaintiff who was youngest wife of Obiero, was registered as an absolute of the family land.

The defendents were the sons of her co-wives. The plaintiff brought an action in court praying for an injunction to restrain the defendants, their wives children and servants from trespassing on her land. On their part, the defendents, inter alia claimed that the plaintiff's registration was obtained through fraud. On this issue, Bernet J stated that neither mistake nor fraud had been proved so as to justify rectification of the register. He specifically noted that even then, had there been proved the presence of these two elements, the register would still not be rectified because according to the Act first registration could not be defeated.

In the second case (Esiroyo v Esiroyo) under the Act, a father was held to have absolute rights in the family land, so that he held a title free from all other interests and claims whatsover.

So far we have seen what types of rights derive from the act. For the sake of the discussion under this chapter, I will refer to these rights, because they are given prime recognition by both the act and the courts. This obviously implies that there are lesser rights which though being secondary to these are also recognised. Section 28 of the act provides that the rights derive therein "shall be free from all

1- (1972) EA 277.

other interests and claims whatsoever, but subject .....". The same section states these interests to include leases, charges and other encumberances which will be noted on the register. Section 30 states that ...." unless the contrary is expressed on the register, all registered land shall be subject to ..... overriding interests as may for the time being subsist and affect the same wihtout their being noted on the register.."

Already, we have two contradicting concepts here. On the one hand we have the primary rights which are held by the holder absolutely so that his rights can not be liable to defeat under first- registration, while on the other hand the Act recognises the existence of secondary rights held by those that are not absolut holders. These two concepts are infact problems in themselves, and there has been much controversies as to how to reconcile the two.

The problem is not so much created by the 2nd concept, but the first. Therefore to try and solve the problem I wish to consider the term "absolute ownership" as used by the act and if possible study the context in which it is used; so as to derive the meaning that it is supposed to convey.

Austin defines ownership as a right in point of user, unrestricted in point of disposition and unlimited in period of duration over a determined thing. In this sense, a holder who proves ownership has absolute rights of use, abuse and disposition. There are no limitations whatsoever. Another jurist, Professor Honnoe defines the term ownership as the greatest possible interest in a thing which a system of law recognises, A simple English pocket dictionary defines ownership to mean inter alia, the act of possesssing or occupation. From these definitions, we can denote that the term ownership can mean different things depending on the context in which it is used. It is against this background that we have to look at our Act. As we have already seen the rights derived from the act are not and were not intended to fit into the Austinian notion of ownership; because they are limited by various other rights[3]. Also section 75 of the Kenya constitution while recognizing the sacred

3 : these include rights noted on the register Sec. 28(a) & (b) and those not noted (sec 30).

nature of private property, acknowledges that this right is subject to such other rights as compulsory acquisition by the state. These are, but a few examples illustrating limitation to absolute ownership. In due course we shall be looking at the others. We can not therefore say that the act gives absolute rights in the sense that holders held all rights with no limitations.

Professor Honre defines ownership as the greatest possible rights in a thing recognised by a system of law. Here the absoluteness of the rights will depend on what the particular legal system recognises. In this context, ownership is not an abstract concept,but it reflects what society recognizes to be ownership. In this sense, the term is used contextually. When Honroe formulated this definition [illegible], he was highly influenced by the English legal system which in fact he was referring to. In England all land is owned by the crown, but held by individuals under certain estates. The highest of these estates is the fee simple. Therefore under British jurisprudence, ownership can be defined multireferentially. It can refer to individual rights over a piece of land or a power of possession and disposition. Such rights are never absolute and their exercise is in most cases limited by a number of restrictions and controls. Honroe's definition is therefore contextual.

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Since the Act provides that the rights derivable therein are absolute, we can not argue that it is otherwise other than what is given. The Kenya legal system therefore recognizes a private holder as having absolute rights, despite the limitations. We can therefore rightly use Honroe's definition of ownership when refering to Kenyan Registered land Act. At this juncture I wish to compare the right derived from the act and those held under an English fee simple to see whether they are similar. This is important because the Kenyan Legal System is highly influenced by English jurisprudence.

Under the common law there exist three groups of property rights; (1) an estate (2) servitude and (3) encumbrances.

Here were are mostly interested ~~with~~ an estate. An estate determines the length within which an interest in land is to be held. It differs and should not be confused with the term tenure which merely denotes conditions upon which land is held. There are freehold and non-freehold estates. Freeholds are those estates the duration of which is not certain or capable of being so ascertained. Under freeholds are freeholds of inheritance, which devolve on the heirs of the owner 'adinifinitum.' These freeholds of inheritance contain a fee simple estate which devolve on all heirs and it is considered completely unlimited in both scope and duration. The fee simple was the largest interest that an individual could hold. A holder of a fee simple is said to hold absolute ownership, in the sense that these are the gretest rights recognized by the English legal system. The Crown owns all the land and a holder of a fee simple holds all rights short of ownership. His rights are therefore similar to those of the Kenya Act. However in the Kenyan legal system, the term fee simple applies to rights in a lieno solo (rights over someone's land). Examples of these are mortgages, charges lease holds and licences. Looking at the two estates, we can deduce that the Kenyan act is a disquise of the English fee simple in that they have rights that are almost similar.

Having seen that the act gives rights which are limited in certain wasys, let us now look at the nation of security and protection that is supposed to be afforded to an individual holder.

(ii) The protection afforded to an absolute proprietor.

Other than the limitations laid down in the act,[4] there are constitutional and statutory limits recognized by law. Section 75 of the Kenyan constitution states that - " no property of any description shall be compulsorily taken possession of ... except where .... the taking is neccessary for public safety, public order, public morality ....."

4. sec 28 and 30 - supra

Here we can observe that though the constitution upholds the fundamental right to the protection of private property the right is not absolute, but is relative to the rights of other persons. It is commonsense knowledge that absolute powers are prone to grave abuses. John Locke, a great jurist of the (15th states that ... " though this be a state of liberty yet it is not a state of licence, though man in that state have uncontrollable liberty to dispose of his person or possession, yet he has no liberty to destroy himself or so much as any creature in his possession .... that all men must be restrained from invading others rights and doing hurt to one another ".[4] One only need look at the various historical events that have invaded mankind to see the logic in locke's contention. During the (17th there arose in Europe a school of thought knwon as Positivism.[5] John Austin can be said to be the father of this school of thought. This gentleman argued that the proper subject of jurisprudence is positive law. Law, according to him was to be defined as it was as apposed to what it "ought to be", so that it was to be divorced from any other normative aspects. He then came out with a definition of law that stated that law was a command of a sovereign backed by sanctions. Morals could not fall under this definition of law and hence, they were not recognised as such. The followers or the admirers of this school of thought justified the suppression of the individual freedoms under the laws formulated by such tyrants as Mussolini and Hitler- whose commands became law once they were pronounced. Nearer home, the South African regime formulates aparthied laws, which in the Austinian sense are actually valid laws. We are all too aware of the injustices being committed against the blacks in that country. The point that I am trying to illustrate, is that whatever type of law is passed, must take note of morality in society. An individual should not use his property in such a way as to destroy himself or others. This is the only way that harmony can exist in society. However when such limitations are unreasonably used, they loose the public benefit notion, and may become a threat to individual freedoms of property. Here I think the courts should be called upon to determine whether the limitations, especially where there is

4. In his book "civil Government"
5. lloyd on Jurisprudence.

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compulsory acquisition are genuine so that the person loosing his rights on the land is left satisfied that no injustice was done to him. This will also check the misuse of power by the state on such occassions.

The statutory limitations include the land control Act,[6] the Magistrate's Jurisdiction (amandment) act 1981 and the land acquisition Act[7] of these and only wish to deal with the first one.

The land control Act is used by the state to control and regulate dealings in land held by private holders. Section 2 specifies which lands fall under the term agricultural land. The controlled dealings include sale, transfer, lease, mortgage exchange, partition and division. Section 8 (1) provides that consent must be acquired within six months, failure of which renders the said transaction void as provided by sections[7]

In Chemilil Sugar Limited v Makongi[8] there was a purported lease between the appellant company and the respondent, by which the respondent held some agricultural land belonging to the appellant. This area was under the land control Regulations of 1961, which meant that the appropriate consent had first to be sought. However though this consent was not sought within the required time, the respondent continued paying the rent prescribed. The court finally held that the lease was void for lack of consent from the appropriate land control board.

The requirement of consent is in itself a kind of protecting shield because it ensures that an individual holder does not transfer his interests in land so as to divest himself to the same. The board looks at the substance of the transaction and where it finds that the transferor is financially unable to farm well, or that he has enough land, or that the land wont be used profitably for the intended purposes, no consent will be granted.

Section 9 goes on to state that where such division or transfer will reduce productivity, or involve other sub-transfers or even where this will create injustice to one of the parties, consent will be denied. Also a person with sufficient shares in a private company will not be allowed to receive more land. A holder is protected from loosing his interests to a person

6. Cap. 302
7. Cap 295
8. (1967) E. A. 116

who has accumulated a lot of property. The act also protects the individual against loosing his land to foreigners. Infact it is said that the act was aimed at preventing the foreigners from acquiring land; so that the idea of the africanisation could be effected. In essence therefore the owner is not really denied absolute rights to his land, but he is protected against lossing the same. However the act creates problems by formulating some exceptions to the rule. One is left to wonder whether these exceptions, which I am about to state, will not create some injustices to the individual holder especially because they are not checked.

The Act empowers the president[9] to exempt by gazette notice any land, share or any class of land or share or any controlled transaction from the power of the land control boards. Such groups will include foreigners, private companeis and individuals. Here, the exercise of the power given will determine whether an individual will actually be protected or otherwise that his rights may be infringed upon if the said powers are misused.

Another weakness of the act is that while striving to proctect private property, it has omitted certain important areas that should also be checked. Transactions to which the government is a party are left out. Also exempted are lands under the Settlement Fund Trustees, and also those under a county council. Transmission of land by virtue of will or intestacy are also not covered unless the sub-division will result in the creation of separate titles (section 6). I think that it is mostly in these area that checks should be applied so that the individual holder's rights are not infringed upon by the government, in such an extreme manner. If the transaction is between an individual and the government., Settlements Fund Trustees or a county council, then the individual who will not be protected by the act, will be left at the mercy of these strongly financed bodies. Perhaps the the assumption here is that these bodies are expected to follow the right procedures; however it is obvious that an individual will not have the same contracting power and may loose his land injustly.

9. section 24:

Its my contention therefore that the act is tilted too much towards individual property, while it leaves the public section alone. If it has to award proper protection to an individual holder, it should also control dealings of land under the public section.This of course needs a change in the law so as to accomodate the new attitude.

Another limiting factor that an individual holder may encounter is that based on claims under customary law. This does not fall under the overriding interests. This limiting factor is more of judge-made law, than any of the above. It will be recalled that in the two cases we refered to ; Sela Obiero v Opiyo and Esiroyo v Esiroyo, the courts refused to recognise any existence of customary claims after the land has been registered under an absolute holder. In the words of Justice Kneller " "the matter is taken out of the purview of coustomary law by the provisions of the R.L.A. ". These judges followed the strict interpretation of the law, since infact other than by mere implication, the law did not expressly provide for the recognition of coustomary claims, unless they were noted on the adjudication register.[12]

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However gradually the attitude of the judges began to change and in Muguthu v Muguthu[13] it was held that a person who registered as a sole proprietor of family land, only held it as a trustee for the other members. Madan J further stated that it was not obligatory to register a customary trust which might be described as a custom of "prime geniture" holding and has been by consent of everyone concerned. The same issue reached the Kenya court of appeal in the case of Alan Kiama v Ndia Mathunya and others[14]. Though the judges of appeal did not agree on the nature of interests the respondents had in the suit land, Madan J. held that the land was transferred to the appellan

11. Esiroyo v Esiroyo (supra)
12. section 11(3) R.L.A.
13. H.C. No.337(1968 unreported)
(14) court of Appeal at Nairobi Civil appeal No.42 of 19

subject to the respondents' existing rights of possession, occupation and cultivation, which amounted to overriding interests by incidence.

Customary claims cannot however be said to be such a strong limiting force, because they have not been put down into the law books expressly, so that their limitations are only realised where a certain court decides to recognise their existence. It cannot be said with certainty that they are widely recognised. However it is my contention that the law should recognise these claims as limitations to an individual holder's rights, so that persons' with lesser interests in family land can be protected against absolute appropriation of their claims by a registered holder. The law should not just recognise and protect one person, but should protect the whole family. This will check against the disinheritance of family members and obviously minimise the problem of land pressure.

In stressing the above, I am not totally unaware of the fact that the law, as evidenced by the recent magistrates' juridiction (amendment) act, has begun to advocate this need. All that I am asking parliament to do is to enact certain clear and unambiquous provisions regarding customary claims so that the elders will know what law to apply whenever a customary claim comes up. I do not wish to go deeper into this issue, because I will be dealing with it in the next chapter.

With those few examples, I think one can say that the act affords some measure of protection to the individual holder. Of course we can not expect 100% protection, but if reasonable protection has been given, then the act can be said as having done its work. An individual has security of title through which he can create and transfer interests in his land. A secondary holder of claims is also protected, as evidenced by the courts attitude towards customary law claims.

In the next chapter, we shall continue with the issue of customary claims, to see especially whether these claims have completely been rendered non-existent or are still recognised under the law.

CHAPTER 3

THE POSITION OF CUSTOMARY LAND RIGHTS UNDER THE R. L..A.

In chapter two, we saw that though section 27 and 28 of the Act confer absolute rights on an individual holder, there are other secondary rights belonging to other non-absolute holders that are recognised. These secondary rights, we found, are stated as overrinding interests which need not be noted on the register. There are also those under section 28 (a) and (b) that should be noted on the register. We also saw that the only express provision in section 11 (3) dealing with customary claims, states that "a right of occupation under African customary law recorded in the adjudication register shall be deemed to be a tenancy from year to year."

In this chapter my aim is to locate the position of customary land rights under the Act. What happens to the claims that are not recorded in the adjudication register, are they complet unenforceable in the courts of law? My discussion will fall under two sub-headings - (1) Customary Land Rights under communal society (2) under the R. L. A. Act.

(1) CUSTOMARY LAND RIGHTS UNDER COMMUNAL SOCIETY.

There is no single definition of customary law that has been agreed upon by lawyers, jurists and social anthropologists and others who may be concerned. This is not surprising because the word 'custom' and 'law' may be used in a number of ways depending on the requirements of the writer's approach.

It must also be remembered that African communities differed in their way of arrangement. Some communities were politically

arranged so that there was a centralized government with a Chief, King or such a political head. The Maasai for example, had the Laibon as their political head. On the other hand, there were societies that were acephalous. These had no political heads as is evident among the Kikuyu community,

However, despite these differences, one can draw major similarities, as regards the way in which harmony was maintained in the society. In all these societies bodies of rules existed to define the appropriate reciprocal behaviour of individuals and mechanisms to maintain the social order. With this in mind, efforts have been made by different jurists to fomulate a general definition of the term customary law.

Allot[1] has a collection of definitions of the term 'customary law'. In Bechuanaland Native Courts Proclamation 1942 the term is defined "in relation to a particular tribe or in relation to any native community outside any tribal area the general law or custom of such tribe or community as the same may be uncompatible with the due exercise of His Majesty's power and jurisdiction or repugnant to morality, humanity or natural justice, or injurious to the welfare of the natives. In Tanganyika, the same term is defined as "any rule or body of rules whereby rights and duties are acquired or imposed, established by usage in any Tanganyika African Community and accepted by such community in general as having the force of law", In the Ugandan Magistrates Court Act 1964 it is defined as "the rules of conduct which govern legal relationship as established by custom and usage and not forming part of the common law nor formally enacted by padiament."

1. Customary Law: Its place and meaning in contemprory African Legal systems: A journal of African Law.

I do not wish to study these definitions, but I wish to show that upon observing their contents we can draw some common features - we can see that customary law is comprised of rules of law established by usage and recognised by community as having the force of law. Let us now look at these rules with regard to land.

R.W. James[2] states that customary land tenure could be defined as " the right to use or to dispose of use; rights over land rest neither on the exercise of brute force, nor on evidence of rights guaranteed by government statute, but on the fact that they are recognised as ligitimate by the community the rules governing the acquisition and transmission of these rights being usually explicit and generally known though not normally recorded in writing". By the practice of using land for an unlimited period, certain rules governing dealings in land have gradually been formulated. These rurles are therefore not laid down by anybody, but they have been recognised by communities as existing.

In the African community land had some religious aspect, in that it was regarded as a free gift of God to all his living things to be used now and in the future. It was therefore considered as the mother of the community being the primary source of life. This sacred attribute held for land may have been basis on the fact that a person was born on a particular piece of land. he lived up on it and died on it, leaving it there, so that it was, is, and will be there. None could explain how such land had been brought into being and therefore it was held as having been created by the supremebeing C.K. Meek[3] states that in Africa land was regarded as

2. In his book: 'Customary Land Law in Tanzania'

"belonging to a vast family of whom many are dead few are living and countless members are still unborn." Land was therefore held to be very vital.

Due to the fact that land belonged to all, every individual was recognised as having free and equal access to it. What was freely given by God to all, was obviously meant to be for all at all times, for who could claim greater rights. These rights were not in any way influenced by the type of society that one came from. Even in politically organized societies the political heads did not have any authority on the use of land but their rule was may limited to tribal security. The colonialists were especially misled by this notion, and confused it with the English type of ownership where the crown holds all land, while its subjects merely hold secondary interests. Gluckman[4] noted this confusion when he stated that "since the people themselves spoke of the chief as the owner of the Land the English tended to think that his subjects had no firm and secure rights in it, but cultivated it only by the chiefs permission and to some extend at his caprous will." In the African community, such political heads had limited jurisdiction in land matters. They could be called upon to settle land desputes or to give consent for alienation of land outside the tribal unity. In acephalons communities, and especially in the Kikuyu community there were two arrangements dealing with land and political matters. The Kiama controlled political affairs and it contained age sets who formed warrior bands. The inner

4. "Ideas in Barotse Jurisprudence" chapter 3

councildirected their operations. The Mbari, on the other hand delt with land issues. It was a lineage grouping with a common ancestor. A mbari was founded by one man who aquired an estate (Githaka) aften extending over a complete ridge when he died, the lineage was named after him. This way the property which formerly his own personal property reverts to common property of his descendants although each cultivated their own piece.

In the African community therefore, every individual had free access to land. Land was claimed ~~individually~~ communally, because it was as a source of life for all, but not a commercial asset. I think that the need for individual security of title arises when land is viewed as a commercial asset because then one can sell his own piece of land R. W. James[5] notes that among the restraints imposed by customary land tenure on proper and rapid agricultural development is the fact that there was no free market on land as land was not a selleable commodity, so that even unproductive land had to be borne with. Under African communal ownership land was not held to be selleable commodity and so infact it was recognised as tribal, clan and family land in " a tree - like manner". An individual could not alienate his rights except by the consent of the family.

Oginga Odinga[6] states as follows of his Luo community - "the Luo regarded the land as their mother and the tribe as a whole was the proprietor of all the land in its area. Within the tribe, clan or sub-clan the individual laid down claims to

5. Customary Land rights in Tanzania (Supra)

6. "Not yet uhuru" - his autobiography.

a shamba or several depending on his deligence but he used the land for the benefit of his family and as long as he lived in the community, as soon as he left to live somewhere the land reverted to the community and was allocated to their nearerest neighbour or given to a new commer joining the community. A piece of land left uncultivated for a reason could be used for grazing by anyone in the clan without his having to ask permission or pay fee". Though individuals held some individual pieces of land there were some common areas where members watered or grazed their animals. Also commonly held were wells, bathing pools, rivers. Sacred groves were also commonly used for religious purpos

We saw that the words 'custom' and 'law' denote rules come to by usage and recognised as so by the community. In the African society, shifting cultivation was practised so that it was impossib for a person to stay in one place all the time. Since this was recognised as the ~~pattern~~ pattern of life, this is partly why society could not recognise the fixing of concrete rights on an individual, so that a person could only have access to one piece of land. This would have been contrary to their practice. The introduction of territorial boundaries by the colonialists created land pressure because there was no equal access to land. This disinheri some people, an idea which was not common in communal society.

Under communal ownership, land was transfered through inheritance, when a father died his land passed to his sons and the elder son became the "trustee" of the family. He had similar rights to the land as his brothers. Inheritance was however not an automatic thing because it was subjected to the type of relationship a father had with his son. In Esiroyo v Esiroyo (supra) the judge mentioned that the father could withold this

right if the sons did not deserve it. I think this is the reason as to why children, even now, fear being cursed by their parents. Obviously the most effective curse is to be told never to step on the family land.

Among the Kikuyu community there existed some recognised secondary rights. Sorrenson[7] states that certain tenants systems were recognised. Land could be held by a Muguri by way of a loan of stock. Hence, though the word can be translated to mean a 'buyer' in English, land could not parmanently be a lienated to such. Cases of land alienation completely outside the tribe were rare. Therefore transfer of land by sale was rare. In the same society there existed a group of holders who held no particula rights to land. Such a person was known as a Muhoi - translated in English the term refers to a beggar. Such a person could be given temporary right to cultivate land, mainly on the basis of friendship. He paid no fee, but could give annual attributes of beer and fruits. A Muthami was a person who was a new-comer to the community. We have seen how Oginga Odinga's definition states that such individuals could have free access to unoccupied lands without fee or permission.

We can therefore say that communal land was held to be sacred in that it was a gift from God to all his living creatures. It was the mother of the tribe, because all life came from it. Due to these notion, members could not part with it and even where there was an ought from these lands were the small plots they were allowed to farm in return for their labour. Communal land tenure was further destroyed by the introduction of new land

7. Sorrenson: Land Reform in the Kikuyu Country (Supra)

use during the colonial period it was urgued [8] that communal tenure imposes major constraints on developmant. The major constraints were set out as (1) It prevents the incentive to w ork hard because "what is everybody's business is nobodys business", (2) that community is tied to customs and traditional habits in the farming techniques, (3) Lack of free - market - because communal land is inalienable and hence individuals can not part with such. (4) fragmentation destroys land and (5) lack of title denies credit facilities to individuals. If this had been the true state of affairs the Africans would have been helped to adapt better methods of holding and using land, other than disinheriting them. The introduction of new crops eg coffee, tea, pyrethrum, sisal etc was not an effort to help the Africans but to underdevelop them, because they were not allowed to grow them. One Koinange Mbiu [9] had his coffee seedlings confiscated not because he grew coffee outside the required areas, but because he was an African.

Due to the above problems, uneasiness among the Africans arose and people began to agitate for the return of their stolen lands. In 1914 one Koinange Mbiu personally petitioned for return of his family land. Soon the agitations became organized in form of political parties i.e. the Kikuyu Central Association 1930. This growth of uneasiness led to the creation of the Kenya (carter) land commission in 1932. This commission was supposed to make reccomendations on African claims to alienated lands. In chapter one we saw how the commission reccomended

8. R.W. James (supra) - an article by Dr. J. Nyerere.

9. (1951)24 (2) K.L.R. 130 (Supreme Court of Kenya)

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that some lands should be added to reserves as compensation to the Africans. To implement this report distinct areas for African's were created. Native Trust Boards were set up to look into the affairs of the Africans. These boards applied customary law. However, even in this area, Africans had Limited rights. This idea is well shown in the case of Stanley Kahahu s/o Wangati v A. G.[10] In this case both the plaintiff and the defendant were members of the Kikuyu tribe living in a Kiambu Reserve. The defendant was claimed by the 1st plaintiff as having sold him land. The plaintiff therefore claimed that he was the sole owner of three portions of land in the reserve or alternatively that he was entittled to beneficial occupation, use and enjoyment of the same in his own right. The issue that the court had to decide in this case touched on jurisdiction and whether natives had any rights in the reserves. As per the first issue, Thacker J. stated that the supreme court had jurisdiction over civil and criminal matters in the colony, native tribunals included. On the second issue, Barth C. J. stated that the effect of the 1915, 1920,1921 Order - in - council was to vest all reserved land to the crown, and that consequentially all rights in the Githaka system disappeared. Natives in occupation of such lands became tenants - at - will of crown. It however noted that the 1920 Native Lands Trust Ordinance and Native Tribunals Ordinance, which came after provided for the reservation of some land for use by the natives. However, he stated that, even in these reserves, the natives had no right to alienate land so that they still had similar rights as those granted in 1915. Thus, even at this period, we cannot say that communal land

10. (1939) K.L.R. vol.XVIII pg.12

tenure was being revived, because the colonialists merely aimed at reconciling the Africans to accept the idea of land alienation as a parmanent aspect. Infact the colonialists were not helping solve the uneasiness, but were merely determined to destroy the last vestiges of the communal tenure. The real solution that they thought would solve tenure problems was security of title.

Other than these colonial incentives to destroy communal tenure, there were individual efforts to the same. Some people believed that the only way to protect their interests, was by getting title. This was especially true in Kiambu where the carter commission observed that "individual tenure is well in sight". The emergent African middle - class bought out clan lands. The colonialists were quick to notice this new development and in 1954 the Swynnerton plan was brought into operation.

From this period henceforth, Africans were prepared for security of title, which could come through the process of adjudication, consolidation and registration. This process, as contained in the Registered Land Act, was to be the platform upon which all ownership of land would rest.

Thence, though we can not say for certain that communal tenure had completely been swept away, it is evident from the above contentions that the entire framework upon which communal rights stood was shaken. Apart from the role played by the colonialists in breaking this; other forces were intervening. The introduction of money as a mode of exchange brought the need for free market in land. A person could obtain credit facilities through the security in land. Also if a person wished to sell unproductive piece of land and buy

another, he would do so if he had a free hand in land. Since population was increasing, there was need to produce enough for this. Better production could only be achieved by modern methods of farming which would not be tied down by any constraints In this sence, I agree with Lugard's view that the universal development is from communal to individual tenure. We cannot therefore except communal tenure to be wholly recognised. One problem here is that after converting customary tenure to individual tenure, what is the fate of the residual holders of customary claims. It is these people's rights that we are interested in.

In the next phase, we shall examine how the Registered Land Act has treated customary land rights held by non-absolute holders.

(ii) CUSTOMARY LAND TENURE UNDER THE R.L.A.

In the foregoing phase, we saw how the colonial legal system was characterized by a racial jurisdictional duality of the African courts for Africans and the other courts for non-Africans. After independence the government launched a move to remove this duality and establishing a unified and integrated court system. This was vital for the centralization of loyalty and consolidation of national unity and the end of colonial injustice. The establishment of the Magistrate's Courts Act 1967 abolished the Native Tribunal. Hitherto the Native Tribunals administered customary law in cases between Africans under a lay magistracy. However under the new system, all courts were open to all regardless of race. Among other things, the Act[11] was to deal with customary claims regarding land held under customary tenure, matters affecting status of women, widows and children including

11. Judicature Act 1967.

guardianship, custody, adoption and legitimacy, succession both testate and intestate and administration of estates not covered by wills or written law. At this jucture one would expect that communial land tenure would be treated fairly by the African government. Yet it is in this same period that we notice things take a different turn.

As some writer[12] has stated on many African countries, independence has brought an upgrading of the status of customary law in the legal system, but this has not happened in Kenya because customary law seems to have been downgraded. Under the old system, the Africans courts were required to adiminister and enforce African customary law while under the new system all courts are required to be guided by African customary law. This means that the courts still have discretion to decline to be guided by this law, If it is repugnant to morality and justice. Indeed section 3(2) of the Judicature Act 1967 provides that ..... "The high court and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay". In the case of Kimani v Gikanga[13] there was an action involving questions as to the title of land and other rights in land in Kenya. The issue was whether the appllant had been given land in circumstances in which under Kikuyu customary law, he had become

12. The Reform of the Law - an article by Ghai & McAuslan.

13. (1965) E.A. 735 (Court of Appeal)

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the owners of land. Sir Charles Newbold, the then vice - Preside of the court of appeal, observed that both the circumstances in which land had been given and the existence of the relevant Africna customary law as to land ownership were questions of fact which had to be proved by the appellant. In effect the court was saying that it did not recognise customary land rights as such. Hence this is one of the numerous instances where a party relying on customary law had the burden to prove it by calling witnesses. The standard of proof was also high because "as is the case with all customary law, it has to be proved in the first instance by calling witnesses acquinted with the native customs until the particular customs have by frequent proof in the courts became so notorious that the courts take judicial notice of them".[14] This notoriety rule ignores the fact that expert evidence is held admissible by the Kenya Evidence Act,[15] and therefore Mr. Munoru's evidence needed no further corroboration. The repugnancy clause as stated in 1902 was re-enacted in the judicature Act 1967 substantially unchanged. Hence customary law had to undergo the test of morality and justice.

However the most interesting bit here is that this concept of morality and justice was tobbe based on the British standard. In a Tanzanian case of Gwao Bin Kilimo v Kisunda Bin Ifuti[16] Wilson J states that "morality and justice are abstract conceptions and every community probably has an absolute standard of its own by which to decide what is justice and what

14. Angu v Attah (Ghanian case)

15. Sec 48 (1)

16. The East African Order - in - Council 1902

is morality. But unfortunately, the standards of different communities are by no means the same. To what standard, then does the order in council refer to - the African standard of justice and morality or the British Standard - I have no doubt whatever that the only standard of justice and morality which a British court in Africa can supply is its own standard.[17]

All these qualifications and caveats only surbodinate customary law to Western law. With such a background, we cannot expect much from the law applying to land issues. The same view about customary law has been carried forward because the law has not changed much and also because the bench has not fully been Africanised. Most of the judges ~~are~~ now on the bench were those present during the colonial period. Obviously we can not expect them to have changed their atitude towards customary law overnight. In the colonial period the judiciary applied as a safeguard of foreign interests. Said lord Denning in the Nyali case (supra) "the courts will rely on the crown to know the limits of the jurisdiction which once established will not be allowed to be challenged by the courts". This is an instance that shows that the courts were to protect the laws passed by the crown. In post-independence, the judiciary still does the same job. As I have already said most of the judges, who are regarded as superior judges, are those that had an ultimate touch of colonialism. Even the African judges, most of whom have been educated abroad have this notion. Touching on the effect of socialization on them, Scrutton L.J. says "the habits you are trained in, the people you mix with lead

17. 1938 - T. L. R. 403

to your having a certain class of ideas of such a nature that when you deal with other ideas you do not give as sound and accurate judgement as you would wish".[18]

It is therefore against the above background that we are to study the position of customary land tenure under the Registered Land Act, an act enacted in 1963.

The occassions when customary claims in land held under the R.L.A., create no problems is when " a right of occupation under African customary law recorded in the adjudication register shall be deemed to be tenancy from year to year".[19] This, in my opinion, seems to be the only express proviso which recognizes the existence of a customary claim. The problem that then arises is as to what happens to those rights that are not recorded, because for example in central province during the process of adjudication consolidation and registration, many people were still in the forest and if a holder of a family land did not state in the register that he was holding for the family, then he became an absolute holder of such land.

Under the Act the only proviso that deals with unrecorded rights is section 30 which deals with overriding interests. Section 30 (9) states that "the right of a person in possession or actual occupation of land to which he is entitled in right only or such possession or occupation serve where inquiry is made or such person and the rights are not disclosed." But whereas one might expect customary claims to be included in this section, the courtshave in the past refused to do so.

18. "The role of a judge with special reference to civil liberties" (1974) E.A. L.J. 147 - AKINOLA AGUDA (quoted from elsewhere)

19. Sec. 11(3) R.L.A.

In the landmark case or Sela Obiero v Orego Opiyo,[20] the plaintiff had been registered as a proprietor of the family land and claimed for an injunction to restrain the family members from interfering with her quiet possession of the land. Though the defendants claimed that they too were entitled to a share of those rights under customary law and that registration was obtained by fraud, the judge stated that the plaintiff held title free from encumbrances. He further explained that customary rights were not overriding interests because if the legislature had intended them to be so, this would have been expressly provided for. In essence therefore, the courts refused to recognise customary rights as rights of occupation or possession. This is contrary to what the colonials thought of customary rights. It should remembered that they argued that the Africans practised a system of holding whereby the land was held by a chief or clan head and that the other members only held usuafructuary rights.

That case was followed by Esiroyo v Esiroyo[21] in the following year. Here the father was suing his sons, to evict them as trespassers upon his land uponwhich he had been registered as a proprietor. Justice Harris observed that once land has been registered in the name of the proprietor the matter is taken out of the purview of customary law by the provisions of the Registered Land Act. Thence that the rights of the defendant sons had been extinguished and that rights arising

20. (1972) E. A. (227) Supra

21. (1973) E. A. 388 (Supra)

out of customary law are not overriding interests listed in section 30.

It can be seen that the courts applied strict construction of the law as laid down. The judges did not seem to be enthusiastic about understanding the nature of customary rights and they were not even ready to imply anything on the same in section 30. They ignored the fact that they too had a duty to influence the law making process by making changes on such laws so as to reflect the needs of society. This Austinian-type of construction of the law has even made it impossible to cause the rectification of the register, in respect of first registration, on grounds of fraud or mistake[22]. In these first instances also the court refused to recognise customary trusts. We have already seen that the customary trust has its basis in the fact that land was highly cherished in the African society and the communal holding ensured that every member of the family or clan had a share in it. Furthermore the act under section 28 takes cognisance of the fact that registration shall not relieve a proprietor from any duty or obligation as a trustee. For example in Esiroyo v Esiroyo (supra) since the court didnot find that the sons right to inherit from their father had been waived, it ought to have recognised that in society, a father holds his land for the family members especially the sons, and consequently therefore recognise a customary trust.

However, we can not say for certain that customary land rights have been totally neglected. Indeed the law relating to the existence of customary rights has not changed much.

22. Section 143 (1) R. L. A.

However there has been great and new changes in the attitude of the courts. Such changes can be seen to have existed as early as 1972 when Justice Kueller in Mungora Wamathai v Muroti Mugweru recognised a customary trust. In Mwangi Muguthu v Maina Muguthu[23] Madan J. stated that it was not obligatory to register a customary trust which might be described as a custom of "prime geniture"holding by consent of everyone concerned. This was aland mark decision and has been regarded as stating the correct view in regard to customary trust. Following this contention Simpson J also recognised a customary trust in Hosea v Njiru.[24] However the matter had never reached the court of appeal until the landmark case of Alan Kiama v Ndia Mathunya and others.[25]

In that case, the appellant was the registered owner of a parcel of land of 47 acres in Embu. He averred that during that year (1958) and subsequent thereto, the respondents had wrongfully and unlawfully broken into and/or trespassed upon the said land and continued to do the same. He prayed for an ejectment order on the respondents from the land and an injuction and damages in addition. The respondents contended that the appellant had obtained the title to the land fraudulently through the assistance of one Karuru Kiragu. It was stated that the parcel of land belonged to Agaciku/Kabareki clan of which the respondents were members and that their forefathers had cultivated this land since time immemorial.

23. H. C. C. No.337 of 1968 (unreported)

24. 1974 [illegible] 526 (H. C.)

25. Court of appeal at Nairobi App. case no. 42 of 1978

At the time of land consolidation Karuru, without the knowledge of the clan registered himself as owner of the suit land and he later transfered it in the name of the appellant in exchange for his 15 acres. The respondents asked for the dismissal of the appellant's suit and also counter claimed a declaration that a trust existed wherein the appellants held the parcel of land as trustee for the respondents as members of the clan. Alternatively they sought declaration that the appellant held the suit land subject to the rights of possession, occupation and cultivation of the respondents.

Justice Muli held that the parcel of land belonged to the clan whose members had decided that it should be adjudicated in the name of Karuru Kiragu, but without giving it to him absolutely and could not claim it as his own; that he held the land subject to a trust under Kikuyu Customary Law; the transfer and subsequent registration of the suit land was a secret deal, having been done fraudulently. The trial judge therefore ordered the rectification of the register in the respondents' favour under section 143 of the Registered Land Act.

On appeal the appellant argued that as purchaser of Land for valuable consideration from an absolute proprietor who acquired it on first registration the appellant himself as the absolute registered owner of the land had an indefeasible title.

Madan J stated that the clan members themselves had decided to register the land in the name of Karuru as a trustee they themselves had created the trust, therefore there was no trust resulting otherwise by implication of law or under

Kikuyu Customary Law. Law J. A. submitted that there was fraud since when the appellant acquired this land in exchange for his smaller plot, he knew that it was occupied by the respondents; and that Kiragu too was aware of his obligations to the respondents but still gave up 47 acres to which he could have a clear title.

The court ordered for the rectifications of the register to substitute the respondents as owners of land.

If this court of Appeal dicission is anything to go by, then it can be said that the harshness of the act will not be let to prevail. A registered proprietor of land will hold the land subject to the rights either arising from the fact of occupation or cultivation or from customary law. However the efforts to recognise customary rights have been done by the courts, so that the law is not very clear on those new developments. It is the writer's hope that the legislature will be influenced by these decisions so that certain laws protecting these rights can be enacted.

CHAPTER 4: Is customary land law alive or dead (conlusion)

The act provides that those customary land rights recorded on the adjudication register will be recognised as rights of tenancy from year to year.[1] Section 28 also provides that the duties of a trustee are not affected by the Act so that if one holds himself as a trustee of family land in the register, he is recognised as such. The law of Succession also provides for the transmission of land rights from a deceased person to the next of his kin, in cases where he died intestate. The procedure is such that the nearest of kin come first so that they fall in the following order of priority - (1) father (2) mother (3) brothers, sisters, children of deceased's brothers and sisters, (4) half brothers, half sisters and any children of the deceased's half brothers and sisters, (5) relatives who are in the nearest degree of consanquinity[2]. I think the law has not introduced any new elements in this area but merely aims at offering more protection to family land, by using customary law itself. The elders have been appointed to arbitrate in any desputes that may arise in this area. Since the Act[3] does not provide what law the elders are to apply, it can only be presumed that they will apply customary land law.

1, Section 11(3) of R.L.A.

2. Section 3[illegible] (1) Law of Succession Act 1972

3. Magistrates jurisdiction (amedndment) Act 1981

From the above, we can deduce that customary law is not dead. However one wonders how long it is going to survive under these half-heacted legislations that are its supporting pillars. Whatever recognition customary law has been afforded under the law is merely secondary in character. Section 11(3) which is the only express provision dealing with customary law state, that the recorded customary land rights merely recognised as tenancies and not parmanent rights as such. The position of an absolute holder then remains superior. I think that the legislators have done very little in this area and they ought to change the law so as to protect this branch of law from dying. However one wonders whether there is any possibility in the change of law, because the laws of a particular system are such that they serve the interests of the dominant class. In a capitalist country like Kenya, the ruling class must hold land which is the major means of production. The laws relating to land are framed so as to protect this system. This is why the act emphasised on individual ownership as opposed to communial holdings. Therefore unless the whole system is changed we can not have a change of the law. Hence looking at it from this view, it seems impossible to achieve any changes.

Even the protection given to customary law by courts is not strong enough. In the cases of Sela Obiero v Opiyo and Esiroyo v Esiroyo the courts were reluctant to imply that customary land rights were covered in the overriding

interest section. The courts also refused to imply customary trusts. In the case of Allan Kiama which I have already discussed, it was merely emphasised that an absolute holder so holds, subject to equitable rights of possession on actual occupation and cultivation. Hence customary land rights still hold an inferior position. In any case the courts merely apply the law that has been set up, because like other organs of the state, they too have a purpose to fulfil in the system. If Kenya was like those countries where courts participate in the law making process then parhaps we would have expected changes that may favour customary land law to occur.

Looking at the future of customary land law, one only sees no possibility of change, unless the system changes. Customary law still holds a secondary position to the law as stated in section 27 and 28 of the act. It is likely that it will remain in this position for some time.