

THE EFFECTS OF LAND REGISTRATION ON
KIKUYU CUSTOMARY LAND TENURE WITH
PARTICULAR REFERENCE TO NGENDA LOCA-
TION OF GATUNDU DIVISION, KIAMBU
DISTRICT.

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A Dissertation submitted in partial
fulfillment for the LL.B. Degree,
University of Nairobi.

BY

N J U G U N A C H A R L E S K A M A U

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The writer wishes to thank all those people who helped him in making this paper appear the way it is now. I would like to extend my gratitude to all the people I interviewed especially Mr. Waithaka the then Divisional Officer at Gatundu (presently the District Officer at Kajiado), members of Gatundu Land Control Board, the Senior Resident Magistrate at Thika Mr. V.V. Patel, and Mr. Kungu the court clerk in District magistrate court Gatundu who permitted me to peruse the court files.	
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INTRODUCTION:

A lot of literature on land Registration in the former trust lands has appeared. This thesis examines the effects of Land Registration on Kikuyu customary land tenure in one part of the Kiambu District, Kenya. This will involve an examination of

(i) The application of sections 27 and 28 of the Registered Land Act by the Courts (ii) The origins of Land Registration (iii) The work of Land Control Boards which derive their power from the Land Control Act² and (iv) The objectives of Land Registration and the extent to which these have been fulfilled.

The thesis has four chapters. Chapter one surveys the general African land tenure. It shows the true nature of African interest in land as opposed to the British view of African interest in land. Different customary rules pertaining to the various African tribes and communities are examined to show that the British misunderstood the nature of African interest in land especially as concerns communal ownership.

In Chapter two Kikuyu customary land tenure before land Registration and British Colonisation will be discussed. Here an attempt will be made to show the extent or quantum of interest that an individual had in land, the interests of neighbours and other citizens and the remedies that were available where one interfered with a neighbour's land. Transactions dealing with land will also be examined such as land sales, redemption acquisition and inheritance, marking of the boundary and reservation of common places.

In Chapter three Kenya Land policy after 1886 will be discussed. This chapter will show how the British explained their stealing of land from the Africans and the subsequent Registration of land that followed. The part played by the Britons in Kenya and their friends such as legal officers and the policy makers will be examined. The motives behind British interest in Kenya which led to colonization will be stated as they to a large extent explain the motives behind Land Registration.

CHAPTER ONE

AFRICAN LAND TENURE BEFORE 1886:

In Chapter four the Registered Land Act and application are examined. The right accruing to a proprietor of land under the Registered Land Act will be considered and the effects these rights have on people who would be entitled to have some interests under Customary Law. In this Dissertation an attempt is made to show that courts find it unfair to enforce some rights conferred by the Registered Land Act as a lot of injustice will result and public order may be endangered.

The reasons behind the enactment of the Land Control Act which my research shows pays much attention to the enforcement of Customary land rights are discussed. This study shows that the original purposes of the Registered Land Act have failed. This is because most people follow customary law and the obligations that arise under it, and as such they pay little attention to the Registered Land Act. It can however be said that the British succeeded in one of their aims that was behind the replacement of customary land tenure with the Registered Land Act in that their political motives were fulfilled. This is supported by the fact that Kenya is a neo-colonial state³.

The Kenyan Government legalised the stealing of land by the British and declared in the independence constitution that compensation was to be paid to any Briton who wanted to sell his land. This continues today.

The conclusion shows the role customary land tenure plays in land transactions and disputes. It is argued that customary tenure is still operating⁴. The adjudication of land disputes by elders as directed by a Resident magistrate is a good example⁵. His philosophy is centred around maintaining personal immortality⁸. He believes that the good life can only be realised if life is communal in that means of production are held by the whole society or family and the extended family is the best institution of enabling him to lead the good life.

Africans regarded land as a free gift from God to all his living things to be used now and in the future⁹. It was viewed as the primary source of life¹⁰ and so every member of the society has equal access to it. In dealing with the question of land it is necessary to comprehend the basis of land holding because this may help to indicate the rights

CHAPTER ONE

AFRICAN LAND TENURE BEFORE 1886:

Kikuyu land tenure before 1886 was to a large extent similar to that of other African tribes before colonization. The word tenure is used to describe the relationship which exists between man in society and land. Western writers who have attempted to show the nature of African interests in land have to a large extent misunderstood them because they have not shown familiarity with the African way of life partly because they conducted their research shortly after Darwins Evolutionary Theory which applied to different races. The Africans were taken to be inferior human beings undergoing evolution. This view is supported by Lugard in Chapter fourteen of his book where he suggests that the universal development of land is from communal holding to individual holding of land⁶.

A thorough analysis of the aims of customary land tenure is necessary to understand why the Africans held their land in the way they did. This can only be understood by attempting to understand the African philosophy of life and their attitude towards land.

Customary land tenure refers to African ideas concerning holding of land. It indicates the African's perception of the proper relationship between man and land on earth. This relationship is based on a people's perception of what in nature they are and what they see to be the meaning of life.⁷ To understand customary tenure we have to see how the African sees himself and what he sees to be the end of life. First he sees himself as a human being like any other irrespective of colour. His philosophy is centred around maintaining personal immortality⁸. He believes that the good life can only be realised if life is communal in that means of production are held by the whole society or family and the extended family is the best institution of enabling him to lead the good life.

Africans regarded land as a free gift from God to all his living things to be used now and in the future⁹. It was viewed as the primary source of life¹⁰ and so every member of the society has equal access to it. In dealing with the question of land it is necessary to comprehend the basis of land holding because this may help to indicate the rights

which a community or a particular individual holds over a particular piece of land. The work ownership refers to powers and privileges which an individual may have over a particular piece of land against other persons. The African systems of land holding has also to be viewed against their philosophy of life.

Individual ownership of land did not exist in Africa as it was in the West. On the contrary an individual had in the Western sense rights that enabled him to lead the good life. This was normally expressed by the fact that every member of a community had a right to cultivate land since it was the focus of existence. The capitalist economy with which individual holding of land goes did not exist. The individual had rights he needed for purposes of cultivation, rearing animals, gathering food as hunting. This meant that every member of the community had equal access to land since it was the focus of living with dignity. The allocation of land to the members, of the community and settlement of disputes was done by elders who were versed in customary land tenure¹¹. The African system of land holding can be said to have been communal but not in the sense understood by the Western writers. The true position of African customary tenure was explained in the case of MULWA GWANOBI AND OTHERS (REPRESENTING THE JIBANA TRIBE V ABDULDRASOOL ALIDINA VISRAM¹², where a person purported to sell land to the defendant which he alleged had been acquired by his father from the Jiban by purchase. It was stated that "The Wanyika believe that land belongs to God and cannot be sold either by an individual or by the elders of the tribe, and the right to use the land is common to all members of the tribe. On the other hand individual ownership is recognised in the results of an individuals Labours on the land. That is to say, he can sell trees planted or inherited by himself, and he can sell the right to make the use of a clearing prepared by him for cultivation of short crops, but in neither case can he convey any title to the ground on which the trees stand or which has been cleared for cultivation".

The same view was expressed in the case of TIJANI V SECRETARY OF SOUTHERN NIGERIA¹³. The appelant as the head of the Oluwa family was

his people's consent. This impliedly supports the view that ownership of land was tribal or communal. In Kenya in the case of ANDREIA BISAKHY V MATAPALI WAKHWELA¹⁴ it was held that the plaintiff had no power to alienate family land without the consent of the family and so the land was supposed to revert

to his family.

This attitude of the Africans towards land explains their dealings in land during the colonial period. A good example is land redemption which was observed in Muranga.¹⁷ There could be no outright purchase of land as it belonged to the clan. The sale of usufructuary rights was firstly offered to the family members. The owner of the land could redeem it and in most cases clan elders could redeem the land to prevent it from passing permanently outside the clan. The view that land could be sold was totally alien to the Africans. This view was adopted erroneously as regarded land transactions between the Kikuyus and the Dorobo. The latter sold their usufructuary rights to the Kikuyus (i.e. their rights of occupation and cultivation). In the case of *KIMANI V KIOI*¹⁸ Maxwell I held that the plaintiffs had inherited land from their father who had originally bought the land many harvests before 1889. It was further stated that "the theory of individual ownership of land is absolutely foreign to the mind of any African until he has begun to absorb the ideas of an alien civilisation. Buying and owning land mean nothing more than that a man has according to native custom paid for inheritors or otherwise acquired the rights of occupation and cultivation over a certain area of land, which are his to use until he abandons them either directly or indirectly.

This background of the African tenure tells us that African interest in land has to be viewed against the mode of production that existed in Africa. Africans were either cultivators, pastoralists or hunters whose life was largely communal. Cultivators practised shifting cultivation and as such it was not necessary to have a specific piece of land since the cultivator would be forced to look for a new farming area as the former one got exhausted. As far as the pastoralists were concerned the value of the land was tied up with the availability of grass and so it was not necessary to have individual ownership of land. A good example is the Masai who roamed with their herds over a large part of Kenya searching for grass. A hunter's occupation of a place depended on the availability of animals. They had as a result

CONCLUSION:
subsequent. Chapters that customary law is not quite dead but still plays a great role in land transactions.

officially?

CHAPTER TWO

to more in accordance with the availability of animals and so could only have communal land.

KIKUYU CUSTOMARY LAND TENURE:
The communal obligations still prevailed often the introduction of colonial rule. If a person wanted to sell his land he gave the first offer to a member of his family¹⁹. In Kinship groups some form of tenancy was recognised. This tenancy was different from the British nation of tenancy. The tenant was not expected to pay rent and secondly he did not have any fixed time limit. The tenant could not acquire ownership of land by using it and thereafter claiming prescriptive limitation.²⁰ Customary law did not advocate unjust enrichment as was advocated by capitalism and its laws.

It is thus clear as shown above that land was communally held among the Africans because they believed in equality. It was believed (and reasonably too) that treating land as a commodity subject to ownership could lead to enslavement of some people by others. The Kikuyus believed that land belonged to the living and the dead. The tribe was seemed to be a trustee of the deceased and failure to look after the interests of the deceased would bring calamities to the land as evil a spirit would cause destruction to the people and the land secondly land was the only means of livelihood and so everybody had to have access to it otherwise he would perish.

CONCLUSION:

From the discussion above it can be said that African land tenure was not communal in the sense of tenure in common. The main feature is that every individual had a right to use the land and this was based on the belief that everybody counts in society. The good life as perceived by the Africans was to be realised by not allowing a few people to own the land and then dictate the terms on which the land is to be used hence the appointment of elders. It is notable that more security was enjoyed under communal ownership as land could not be acquired compulsorily and rents were never paid. The whole structure of land holding changed later due to the introduction of English Law but it will be shown in the subsequent. Chapters that customary law is not quite dead but still plays a great role in land transactions.

officially?

CHAPTER TWO

KIKUYU CUSTOMARY LAND TENURE;

Havings examined the main characteristics of African customary land tenure in general before colonisation my intention in the chapter is to show how that background fits into Kikuyu customary land tenure. An attempt is made to explain how far it can be said that the Kikuyu held their land communally as claimed by the British, This can be explained by going back to the early stages of Kikuyu life and see how they acquired land and how they held the land after acquisition. The study will however be confined to Kiambu District Central Province.

It is believed that the Kiambu Kikuyus migrated from Muranga²¹. and that they acquired their lands from the Dorobo a hunting tribe which occupied the present Kiambu area. The Dorobos held land communally²². As argued in chapter one, the Kikuyus only paid the Dorobos for the clearing done, as the African's did not have the notion of land sale. The acquisition theory was however rejected by the 1929 land committee which stated that the Kikuyus claimed that the hunters were merely Kikuyus pioneers who had obtained their letter through first clearance²³. Lambert however claims that the Kikuyus were cheating for political reasons as they did not want to prejudice their case. The Kenya land commission on the other hand concluded that Kikuyus claims were based on a process which consisted partly of alliance and partnership and partly of adoption and absorption. The Kikuyu who migrated could be adopted by the Dorobo. The theory of land sales from the Dorobo is not convincing because we do not have information as to who sold had the land to the Dorobo and in any case, the conception of land as a marketable commodity was unknown to the Africans. The Dorobo could only sell their hunting rights. An old woman of 140 years who I interviewed told me that she never witnessed nor heard of the legends of land sales from the Dorobo. She stated that she witnessed the acquisition of land rights in my village. The process was that if a person wanted to acquire a piece of land, he would plant lilies around it and thus would indicate to the other people that the land had been occupied.

The buying and selling of land rights could have taken place if the Kikuyus and Dorobos were neighbours. It has been claimed by Lambert that payment could have been made in girls. In such a case land would have been given as bride price. I believe this could have been possible for the Kikuyus were primarily agriculturalists and they placed great importance on land. It has also been claimed that land could be acquired in lieu of blood money that is compensation for homicide²⁴. This would apply to the Dorobo as the Kikuyu needed goats as compensation. A few Kikuyus would accept land as compensation. Rights to cultivate land could be acquired by pledge²⁵. This meant acquiring rights in land against the temporary accommodation of goats. This was a redeemable sale and it is believed to have resulted from the Muranga Kikuyus who migrated to Kiambu²⁶. I believe that the theory of first clearance is more acceptable because we do not have information as to where the Dorobo came from.

The most common form of land acquisition was and still is inheritance. At the outset land belonged to the individual or to a small group of relatives. Later the owners of the land increased due to overpopulation. All the descendants of the original pioneer would occupy the land. Community feeling among such a kinship was strong because of the need to protect themselves from wild animals and the need to clear forest to make way for farming. This feature led to the birth of the ancestral land to which descendants of the original pioneer became deeply attached. This mode of acquisition tied with reference to the ancestors led to the family (mbari) or clan tenure of land as opposed to either communal or individual ownership.

SALIENT FEATURES OF THE MBARI TENURE:

All the land belonged to the mbari and any member of the mbari had the right to utilize it so long as no one had made claims to the portion. Non clan members such as friends, in laws and tenants were also given occupational rights so long as they were of good behaviour and provided the consent of the whole mbari was sought. After the introduction of capitalism which was introduced by the British from 1886 mbari land could also be sold but any such sale had to be approved by the mbari, whose members had the first option of buying it. No purchaser of land could sell it to a third party without the consent and approval of the vendors to whom he had to make the offer in the first instance, land could only be sold to

outsiders if members of the mbari could not redeem it. It thus appears that under customary law, sale of land in perpetuity was limited.

This traditional land tenure was undermined by alienation of land to the European settlers and the impact of the cash crop economy. In 1896 European settlers began to settle around Fortsmith and later when the policy of creating a whiteman's country was accepted a series of land laws was drafted to facilitate land alienation to the settlers. This involved the eviction of a number of families and mbaris from their lands.

BUYING AND SELLING OF LAND

Before 1900 land was exchanged with goats. The sale was to be effected by the performance of some rites. After the coming of the whites land was bought with money. It has been contended that the sale of land depended on where and how the land was primarily acquired²⁷. It has been argued that if land was acquired from the Dorobo the owner could give it to anybody but I feel that this is wrong because the owner had to discharge his family obligations as he owed the family a duty of care to provide land. The sons of the owner of the land had automatic access to the land and the elders would intervene if the father refused to give his sons land.

INHERITANCE:

After the death of a father the land passed to his sons and the eldest son assumed the father's role³⁰. The land then became family land and the eldest son assumed the title of (Muramati). Trustee but he had equal rights with his brothers³¹. He could not sell the land without the consent of his brothers. Land disputes were settled by a council of elders.

MURAMATI; HIS APPOINTMENT AND ROLE

This title was firstly accorded to the original founder of the land³². When the father died the title was given to the first son of the first wife. If the first son was not well behaved he could not be appointed. The rationale behind the appointment of the first son was that he was familiar with the land history and dealings around the place³³. He had to see that the land was properly used. His position did not give him more land rights than his brothers but in ceremonies connected with

agriculture he was the figurehead. He could give a Muhoi³⁴ or Muthami³⁵ cultivation rights but this was subject to the approval of the other members of the family. A Muhoi was given land subject to the condition that he would behave nicely and if he didn't he could loose his surights. The right of eviction was vested in a Council of elders who always passed judgement in favour of the Muramati. A Muhoi was however given sufficient notice to find another land and to harvest his crops. If a Muramati failed to carry out his obligations and a quarrel arose between him and his juniors the village elders were summoned to divide up the land equally among the male representatives of the family group. It was therefore clear that though the Muramati had more rights as far as administration of land was concerned, these rights were merely honorary and could be erased if he misbehaved. This as explained above was because he was a trustee.

CEREMONY OF MARKING THE BOUNDARIES:

This was the most important and decision factor as to the ownership of land. Ceremonies were performed to mark land sales. Since the Kikuyus regarded the earth as the mother of the tribe land sales were treated as if it was a marriage ceremonies³⁶. If the sale involved two Kikuyus been was brewed like when someone is asking for another persons daughter. If the sale involved a Dorobo a different ceremony was performed. Firstly the agreed amount was paid and the durume ya Gwatura (The ram for marking boundaries) was supplied by the purchaser. This was slaughtered and the Tatha³⁷ was taken for the ceremony of the marking out of the boundary. Then the Dorobo led the way pointing out his marks on the trees and holes in the ground which marked his hunting area. Four or five Kikuyu elder followed planting lilies and other marks along the boundary accompanied by a Dorobo witness. Each lily planted as a boundary had its roots first smeared with taatha. If a tree was the boundary mark it was blazed with an axe and tatha was smeared on the blaze. When the boundary had been marked they would go and sit doewn and the Dorobo claimed the knife which had cleared the tract, the axe which had blazed the trees, a branding iron used for making honey barrels, which indicated that he would remove his honey barrels and youngewe. This ewe was called Mwati wa njegeni

CHAPTER THREE

KENYA LAND POLICY AFTER 1886

(the ewe of the stinging nettles). The latter was to compensate him for the stings sustained in marking out the boundary. The ewe and the ram sealed the contract. The sale was absolute and there was no possibility of redemption.

PASTURE LAND AND PUBLIC PLACES:

In every District there were pasture lands where livestock grazed in common. There were also salt licks and mineral springs to which everyone had free access. There were public places reserved for meetings and dances public paths and sacred graves where sacrifices were offered to God. Though the lands were privately owned, the owner could not bar the public from using natural amenities such as water. If a man was poor the elders gave him another piece of land. There were pasture lands reserved for that purpose only.

Thus because of the relationship which existed between the individual and the clan the Kikuyus regarded land as the property of the clan. The Europeans interpreted this to mean that among the Kikuyus land was held communally and that there was no individual ownership. This was to some extent true because no individual could claim ownership of a piece of land and exclude all other members of the family. But this falls short of communal ownership as understood by the British in that each individual within a family had absolute rights in a particular piece of land.

The position among the Kikuyu can be said to have been that during the early stages individual ownership existed, but with the extension of the kinship system as population increased this resulted into family ownership and clan ownership. Though a person could have absolute rights in a piece of land he could not sell it to an outsider as the members of the mbari had the first option.

From this discussion it can be seen that Kikuyu customary land was not different from the tenures of the other African tribes and as indicated above was marked with a sort of a communal feeling.

CHAPTER THREE

KENYA LAND POLICY AFTER 1886

In chapter one, we saw that before the coming of Europeans African land tenure could be described as communal and as stated earlier this was due to the mode of production. In this chapter it will be seen that changes occurred to African land tenure because of the imposition of British rule. An attempt is made to show how the British stole African lands and their subsequent legalisation of their actions. The creation of the dual policy pertaining to agricultural development and the discrimination that went with it is depicted. It is also shown how the Europeans managed to keep off the Indians from the highlands under the pretext that they were protecting the Africans whose rights were declared paramount in the Devonshire White Paper of 1923.

Great interest in East Africa started in the 1880's after several explorers had been to Africa. The scramble for Africa among the European powers led to the Berlin Conference of 1885 at which the European powers agreed to colonise Africa, civilise the Africans by spreading Christianity and build up railways to help open up Africa to commerce³⁸. Besides these proclaimed intentions other powers wanted to get colonies in Africa for prestige (e.g. Portugal) economic reasons and strategic reasons. This led to the establishment of claims by various European powers over the Coast of Africa and an underdefined portion of the hinterland. In East Africa Britain, Germany and France were the main contestants for the acquisition of colonies. France however later gave up and Germany and Britain were the main competitors. This led to the sending of expeditions to East Africa by the two powers. Among the prominent personalities who came to East Africa were Karl Peters who signed treaties with chiefs in Tanganyika and the Denhardt Brothers who signed a treaty with the chief of Witu. This led to an outcry from the public in England as they felt that Germany would occupy most of East Africa and there was need to protect the source of the rubber and the British missionaries in Uganda. This led to the Anglo-German agreement of 1886 by which East Africa was divided into British and German spheres of influence. The Western limits of these spheres were not defined. This led to further quarrels among the two nations because each of them was trying to expand westwards. The Anglo-German agreement of 1890 resolved this conflict. Uganda was declared a British sphere of influence and the Germans agreed to abandon their claims to it.

was being eroded in English constitutional theory. Britain did not

At first the British Government was not eager to establish an administration. Instead Britain asked British East Africa Association to administer it for her. In 1888 the Company got a Royal Charter and it was renamed the Imperial British East Africa Company. It was responsible for the administration of East African British possessions but it failed due to financial reasons.

This led to its withdrawal from Uganda and the other part between Uganda and the Coast. As a result of its withdrawal Britain declared a protectorate over the remaining territory between Uganda and the Coast. The East Africa Protectorate was declared in 1895 and in 1920 the interior of the protectorate was annexed as Kenya Colony. The Coastal strip remained a protectorate under the nominal sovereignty of the Sultan. The Imperial British East Africa Company had failed to make profit in East Africa because the British merchants were not willing to invest in Kenya and secondly the Company's officials did not have time to shoot for ivory and the Africans did not produce and commodities that could be exported³⁹. It was therefore found that for the effective development of East Africa Communication had to be improved and agricultural development had to be fostered. The British East Africa Protectorate was not at first regarded as a country with a high agricultural potential. This attitude however changed in 1902 when the Foreign office transferred the Eastern Province of Uganda to the Protectorate and the areas transferred became the Kisumu and Naivasha Provinces.

LAND POLICY AND LEGISLATION.

Land in the interior of British East Africa was originally owned by the indigenous Africans who did not treat it as a commodity that could be bought and sold. They believed that land was a free gift from God to all the people and as such a person could not exclude other people from it or sell it. At around 1833 the British Government had been advised by the Law officers that the exercise of a protectorate over a state did not carry with it power to alienate land contained therein. Control of land therein was deemed important because of various reasons. Firstly it was considered that he who controls the land is in a good position to influence the Government and secondly if the Colonial authorities could not grant parcels of land they could not attract settlers. In 1890's the distinction between a protectorate and a Colony

land. The Commissioner could grant a 99 years certificate of occupancy. The

was being eroded in English constitutional theory. Britain did not know the rights she had over land beyond the Sultan's dominion. By 1891 the Imperial British East Africa Company realised that there were many Europeans who purported to buy land from the Africans. The company's administrator Sir Francis de Winton made a proclamation which forbade land dealings between Europeans of whatever nationality and Africans outside the dominions of the Sultan of Zanzibar. The aim was to protect the land of the Africans. Land hungry Europeans pressunised the Company to uplift the ban on land transactions. In 1894 the company realised that there was much vacant land and thereafter decided to give leases for twenty one years, for residential and grazing purposes. In 1894 the foreign office added a regulation which limited the power of the I.B.E.A. Company to grant leases outside the Sultans place unless the place was effectively controlled by the Company and permitted by the acting Commissioner of the East Africa Protectorate. The provision was passed as a result of imperial Government's realisation that there were areas where the Company's rule was not effective and hence the necessity to regulate the acquisition of land by non-Africans. In 1897 provisions were made to legalise sale of a land outside the Sultans Dominion. This encouraged many people to buy land, but there were some limitations as indicated in the 1897 Land Regulations. According to the latter no document purporting to transfer an interest in land outside the Sultans dominion would have validity unless there was approval by the administrators such as collectors. The aim was still to protect the Africans. The 1897 order in Council passed under the Foreign Jurisdiction Act made the Indian Land Acquisition Act applicable in East Africa. This was a recognition that there were some Africans who owned land and they had to be paid compensation when it was taken away. The 1894 regulations were unsatisfactory to the Europeans as they did not get any secure tenure to enable investment. The government could not give freeholds as it did not know the rights it had over land. The 1897 regulations gave the Commissioner power to enact laws for peace, order and good government of East Africa. The Commissioner acting section 45 of the Protectorate order in Council made the 1897 Land Regulations with the sole aim of meeting the demands of Europeans outside the Sultan's dominion. The 1897 Land regulations indicated that the British Government did not know the rights it had over land. The Commissioner could grant a 99 years certificate of occupancy. One

could not tell whether it was a freehold or a Licence and so there was no secure tenure. In the Sultans land the crown knew its rights and freeholds could be granted as indicated in THE SULTAN OF ZANZIBAR V AG⁴¹. No protection was given to Africans. The Legal position of the railway Zone was however different. The Uganda railway Act of 1896 provided for the construction of the railway and the sale of land in the railway Zone was however different. The Uganda railway Act of 1896 provided for the construction of the railway and the sale of land in the railway Zone. There was a need to perfect the crown's title to the Zone. The Zone was appropriated in may 1897 by a proclamation made under the land acquisition Act of 1894.

The settlers demand for freehold land. After the 1897 Land Regulations led to the Colonial Government's appeal to Law officers of the crown for advice. In 1899 the Foreign office case was submitted to the law officers. The case consisted of a long recital of the history of the problem. The recital began by distinguishing between two types of protectorates. The first type was exemplified by Zanzibar and the Buganda kingdom with a developed administrative and judicial system and a recognised system of Law regulating the tenure and transfer of land. It was further stated that these protectorates presented no great problem as shown by the 1895 agreement with the Sultan of Zanzibar. The recital indicated however that the situation was different with other types of protectorates represented by the interior of the East Africa Protectorate. In such a Protectorate the recital contained "Soverignty if it can be said to exist at all is held by small chiefs or elders who are practically savages, and who exercise a precarious rule over tribes which have not yet developed either an administrative or a legislative system, even the idea of tribal ownership is unknown except in so far as certain tribes usually live in a particular region and resist the intrusion of weaker tribes. The occupation of the ground in which a seasons crops have been sown or where cattle are for the moment grazing furnishes the nearest approach to private ownership in land, but in this case, the idea of ownership is probably connected with crops and cattle than the land temporarily occupied by them" 42.

This erroneous view of the nature of African land tenure was supplied to the Foreign office. The Law officers reply in 1899 was favourable. The Foreign office's facts were not questioned and the points of law involved were not discussed. It was concluded that the right to deal with unoccupied land accrued to her majesty by virtue of her right to the protectorate, and so

section was weakened by s.31 which empowered the crown to grant leases to she could declare the African lands crown lands or make grants of land to individuals in fee or for any term. This meant that all the land in Kenya belonged to the crown.

The legal officers opinion of 1899 was given effect by the East Africa order in council of 1901, which defined crown land as

"all public lands within the E.A. Protectorate which for the time being are subject to the control of his majesty by virtue of any treaty convention or agreement and all lands which have been or may hereafter be acquired by his majesty under the lands acquisition Act of 1894 or otherwise howsoever".

This definition of crown land was ambiguous. It was not clear what was meant by "public lands". The order in council laid it down that outside the Sultans dominion there were no private lands. The term public was not defined and so the colonial administrators were left with power to assume title to and alienate any land in the protectorate.

In 1902 the Commissioner promulgated the crown lands ordinance which provided for outright sales of land and leases for 99 years. Europeans Settlement in Kenya started in 1903. Rights of Africans in land were seen in terms of occupation only. In the same year the crown made the 1902 East Africa order in council which replaced the 1901 East Africa (lands) order in council. The latter vested the crown lands in the Commissioner. There was also given power to make grants or leases of any crown lands, and could make ordinances for the administration of justice peace and good government of all persons in East Africa. The Commissioner was thus given power to grant freeholds and leases to the settlers who were to be the occupants of the whiteman's country. Provision was also made for the protection of Africans in section 12 (3) which stated.

"In making ordinances the Commissioner shall respect existing native laws and customs except so far as the same may be opposed to justice or morality"

Acting under s. 12 the Commissioner made the crown lands ordinance of 1902 by which he could sell freeholds not exceeding 1,000 acres in area. The secretary of states approval was needed for the sale of larger areas. He could grant leases upto 99 years. The settlers obtained land in the highlands under the ordinance between 1902 and 1915. S. 30 stipulated that regard was to be paid to the rights and needs of natives in all dealings with crown land. Land in actual occupation of natives was neither to be leased nor sold. This

The Europeans attempted to have a self-government but failed⁴³.
The section was weakened by s.31 which empowered the crown to grant leases to
Europeans in lands containing African villages or settlements, but these
were to become part of the leased land only when Africans ceased to
occupy it. It is important to note that Europeans got land in the
highlands formerly occupied by Africans and no compensation was paid.
Regard was not paid to natives rights and occupational needs due to
Europeans demand for land⁴³. A land owning class was to be created but
the Africans were to be exempted. The demand for land was very great and
as a result the Masai were forced to leave their best pastures to Europeans⁴⁴.
An agreement was made with the Masai, but when it was breached later the
East Africa court of Appeal said that it had no jurisdiction as the agreements
were treaties. This was ofcourse very poor justification as the Masai
were not a sovereign. The decision shows that as the judges were apart
of the ruling class and racists they could not pass a judgement in favour
of the Africans.

The land policy formulated by the Colonial government disappointed
the settlers because it did not allow them to own large pieces of land
secondly in freehold. The settlers however succeeded in keeping Indians
out of the highlands⁴⁵. Since the colonial government wanted to get
rawmaterials. It feared that granting freehold titles would cause land
speculation. The settlers wanted crown land to include land occupied
by Africans and this demand was met in the 1915 crown lands ordinance⁴⁶.
By section 5 crown land was to include all land occupied by native
tribes of the protectorate and all lands reserved for the use of any
members of any tribe. The settlers did not get freeholds of agricultural
land, but the Governor could grant leases of 999 years. Sections 70 to 83
empowered the Governor to veto transfers to members of different races.
So the Africans and Asians were to be kept out of the highlands. By
section 27 (c) the Commissioner of lands could exempt some people from
the auctioning of leases in town plots⁴⁷. The 1915 crown lands ordinance
was a victory for the settlers and a land became a part of the crown.
Section 93 provided that disputes between whites and Africans as to
ownership of land were to be referred to the Provincial Commissioner
but obviously he could not be impartial. By section 54 the Governor
was empowered to reserve land for use by the Africans, but this was
still crown land as stated in WAINAINA V MURITO⁴⁸. Taxation and land
alienation were introduced to force the Africans to work for the whites.

The Europeans attempted to have a self - government but failed⁴⁹. The reasons for the denial are given in the Devonshire White Paper of 1923 entitled Indians in Kenya, where the paramountcy of Africans was stipulated though the whites were still to retain their privileged position in the highlands. The settlers had up to this time been successful in land legislation and and policy, but they feared that their settlement would fail as they were a small number. They had learnt from the first world war that the African was a human being and could also kill. This led to the invitation of soldiers to settle in the African lands⁵⁰. I think the settlers had in mind the view that soldiers would be used to suppress the Africans if there was a rebellion.

The WAINAINA V MURITO decision caused bitterness among the Africans, and this caused fear among the settlers. This led to the appointment of a commission⁵¹. The commission reported that the unrest was caused by the colonial situation which had resulted in the alienation of Africans land to Europeans. It recommended that native reserves under the 1915 crown lands ordinance could be proclaimed. By 1926 only two reserves had been proclaimed. The rest were proclaimed in 1926. In 1926 the crown lands ordinance was amended to protect the interests of Africans⁵². Sections 54 and 55 of the 1915 crown lands ordinance were amended to state that where land was leased to non-natives its purpose had to benefit the inhabitants of the reserve. This was ofcourse an impossibility.

The Hilton Young Commission was appointed to look into the problem of native lands. It recommended that a native land trust ordinance be enacted to provide for the reservation of the land of the natives forever and ensure that Europeans would not get interests greater than leases of thirty three or ninety nine years. The ordinance would also provide that compensation would be paid from crown land. If any native areas were taken for use by the Europeans. The reserves declared in 1926 were set aside for natives forever. Though the 1930 native lands trust ordinance was passed to fine effect to these recommendations it was found that it was a failure and could not protect the Africans. This was shown by the discovery of Gold in Kakamega in 1932, when the Africans were forced to move from their lands and compensation was not paid.

It was realised in Britain that the land problem had not been solved. This led to the appointment of the Kenya Land Commission under the Chairmanship of Moris Carter in 1932. The terms of reference of the commission included the application of a dual policy. It recommended that

the Africans were to be provided with more land and a trust board was to be established to protect their interests. It recommended the establishment of a similar reserve for whites, but the latter would not be concentrated in the highlands because some of them had land in Kip Karen and Kaimosi, which were rural areas,

The settlers were still few in number and feared revenge from the Africans. This led to the appointment of a Committee to look into the possibility of attracting pre-settlers.⁵³ The committee's recommendation was positive and it led to the enactment of the land control ordinance.

By the latter a land Board was established to Control Land transactions. The policy was that land was to be in the hands of those who could reutilise it. Though the government accepted the committee's report the second world war made its implementation impossible.

In 1945 it was decided that schemes were to be established to assist agricultural development. All people would have schemes but the Europeans would have three classes of settlers. These were to be tenant farming schemes where ex-servicemen would have a priority, assisted ownership scheme which would cater for the needs of those Europeans who had money to buy and develop land, and a tenant farming scheme for those Europeans who were already in Kenya. The Government was to provide funds to purchase farms to enable settlers to begin farming. No similar provision was made in African schemes. The settlers were still unhappy with the colonial government because it refused to convert their leases into freeholds. In 1959 the settlers succeeded in convincing the Colonial government that leaseholds should be converted into freeholds, to protect themselves against any more by an independent government that would forfeit the leases,

The Dual Policy meant the African was to provide Labour for the whiteman to live happily⁵⁴. There was rise of population in the reserve and it was considered that if the Colonial government was to survive production in the reserve had to be increased. The government did not support the using of the highlands for the benefit of the Africans. There was no decision as to whether customary tenure would be encouraged. In 1952 the Africans took arms to expel the imperialists. African lands by the Europeans but certainly this was a betrayal of the freedom fighters.

The outbreak of violence was attributed to economic mismanagement and a commission was appointed in 1953 to see how land could be used to support the people. It was recommended that customary tenure was to be replaced by English tenure. The attribution of the emergency to economic mismanagement was hypocrisy as the whites knew that this was caused by their stealing of African land. In an attempt to end the war the sroynnerton plan was formulated in 1954 to apply to all African lands⁵⁵. Political heads were detained to prevent opposition to the scheme. The main aim of the plan was to defeat Kenyan nationalism by creating a Landed class of conservative people.⁵⁶ The process of replacing customary land tenure with English land tenure in Central Province was effected from 1954 to 1960. From 1954 - 1956 there were no legal sanctions. The 1956 land tenure rules were promulgated to validate the consolidation, Adjudication and Demarcation before 1956⁵⁷.

The working party on African land tenure was appointed in 1938 to recommend on substantive legislation that would be applied to the native areas⁵⁸. The Committee noted that in native areas a form of individual ownership had emerged. It recommended that land Registration was to be governed by a native lands Registration Bill. This was enacted in 1959⁵⁹. It further proposed that a land Control Bill be enacted to erase the problem of land transfer between different races. It Bill was passed to that effect and it was modelled on the 1944 Land Control ordinance.

The Land Policy in 1959 was that colonial structures would be retained. Racial classes were to be replaced by economic classes. Some Africans would join the land owning members and so they would oppose the Africans who wanted to expel the Europeans who had stolen their lands. The Africans were to replace the whites. The whites were also allowed to convert their leases into freeholds. Some land in the highlands was given to the landless. The Africans still contended that the whites had stolen their lands but the whites denied it. This caused problems in the independence talks. The independence constitution however recognised the rights in land that had been acquired by the Europeans before 1963⁶¹. The trust lands were vested in the county councils.

It is therefore clear from the above that the colonial government adopted a dual policy and used all ways administrative and legal to discriminate the Africans. The independent government however validated the stealing of African lands by the Europeans but certainly this was a betrayal of the freedom fighters.

CHAPTER FOUR

REGISTRATION

In chapter three we saw that the Colonial government adopted the policy of separate development ~~adopted the policy of separate development~~ and the Africans were to help in the development of the European economy by providing labour and giving up their land when it was needed by the Europeans. The apartheid of the colonial government which led to the creation of the dual policy could not however live long as the African reserves became very overcrowded and there was need for more land. The Africans had earlier on been used to shifting cultivation and could not change to the other farming systems immediately. As a result of the shortage of land it was feared that the Africans would revolt as they did in the 1950's. Measures were therefore necessary to counteract the upsurge of African nationalism.

This chapter deals with the change of land policy, the commissions which were set up to recommend the change of land tenure, and the legal measures taken to give effect to the new land tenure, and the subsequent legalisation of the stealing of African lands by the Independent Kenya Government. The discussion concentrates on African areas, as the European areas, had some sort of registration though this was short of freehold ⁶². It will also be shown how the Europeans argued that they were entitled to the benefits of Registration which the Africans got not-with-standing the fact that earlier on they had better terms of holding land than the Africans. The Europeans argued that if their leases were not converted into freehold, there would be discrimination in land holding.

Agricultural officers had been advocating land consolidation since the 1920's as a necessary precondition for rural economic development by the Africans but this was not supported by the government because colonial land policy served political rather than economic needs before 1954. As seen in chapter three, the Europeans were encouraged to settle in the East Africa protectorate to finance the Uganda railway. They latter sought to dominate the country politically and economically, by occupying the white highlands. The Africans who had formerly been occupying the white highlands believed that their land had been stolen but they were comforted by the Devonshire White Paper of 1923.

Due to land shortage, steps were taken to conserve soil fertility in the reserves in the 1940's but not much was achieved. The agronomists were convinced that the main problem in African land relations was in tenure and that the best way was to reform the tenure system. It was also observed that African land tenure encouraged fragmentation, was conducive to incessant land disputes and thus disincentive to long term capital investment and an insecure basis for generating agricultural credit. It was also argued that inheritance procedures encouraged subdivision of holdings thus leading rapidly to units of sub-economic sizes, which rendered proper land use impossible. It was thus argued by colonial experts that African land tenure had to be reformed and be replaced with a system of tenure based on consolidated and individualised holdings.

It is however submitted that this reasoning was erroneous, because soil erosion in African areas was caused by the deprivation of Africans of their land. The reasons also display paternalism which obtains in many societies, as there is a tendency for people to think that what they do is the right thing. The reason also displays the hypocrisy of the colonial authorities as it is clear that land reform was not motivated by economic but rather by political reasons⁶³. It has been argued elsewhere⁶⁴ that land reform was undertaken to check and counteract the development of African politics rather than to give economic progress a positive and tangible political significance for rural Africans.

The need for the reform of African land tenure led to the appointment of the East Africa Royal Commission in 1953; its work was to conduct an enquiry into the economic conditions in the three East African territories⁶⁵. The proposal was made by Sir Phillip Mitchell who informed the Commission that:-

"Small scale family cultivation of land under tribal conditions of tenure and according to traditional African methods, is unable to do more than provide a low standard of living, settle above bare subsistence"

It was noted that the expanding population of Kenya was outgrowing its means of survival even at the bare level of subsistence and it was therefore the Government responsibility to see that land should not be reduced to desert as a result of overpopulation by man and his stock⁶⁶.

In terms of reference the commission was asked to frame recommendations with particular reference to the adaptations or modifications in traditional tribal systems of tenure necessary for the full development of land. The commission was not pleased with the subsistence economy which was practised by the Africans as it was dependent on deteriorating physical conditions. It advocated the gradual adoption of a new economic order which would make possible the attainment of improved living standards, social security and political purposes.

The commission favoured increased degree of economic mobility designed to ensure, among other things that the land and the other factors of production will find their way into the hands of those best able to use them in the interests of the community as a whole. Two problems were to be encountered in the achievement of this, one being that the Africans were opposed to change due to the clans control of land and the Government's paternalism displayed in the in the land policy of Kenya, with its waterright African land units and in the legal and administrative arrangements which elsewhere perpetuate the tribal conception of land holding. The development of modern exchange economy could only be achieved by abolishing the two mischiefs. The commission supported the formulation of a land policy which would encourage individualization of title in African land and the corresponding reduction of communal and other restrictive controls over African lands. It also advocated mobility in the transfer of land, which would enable access to land for economic units. Individualization of title was to be encouraged by the process of adjudication and Registration.

The administrators were however not impressed, for they feared that such a reform would lead to a premature breakdown of traditional controls this increasing the problems of maintaining order in the reserves⁶⁷.

A meeting of the colonial civil servants of East Africa and Central Africa was also held in Arusha in 1956 to look into the question of land holding in the three East African territories and they also recommended individualization of land holding in African areas⁶⁸.

The process of replacing customary land tenure with English land tenure went on without any legal sanction from 1954 to 1956. In some areas land consolidation had been started earlier⁶⁹. This had been done by the local people for convenience as opposed to the colonises who wanted to introduce title, the creation of lesser interests, succession, bankruptcy, trusts and the control and Registration of transactions in land. The commission was

it the to political and not economic reasons. It has been argued elsewhere and rightly too that land consolidation was introduced as an emergency measure, aimed at rewarding the loyalists and punishing the nationalists⁷⁰.

In 1956 the Native Land tenures rules were made under the Native lands trust ordinance to govern the four processes, adjudication of peoples interests in land consolidation of the scattered fragments, demarcating the consolidated pieces and registening the new interest in land.⁷¹ The determination of peoples interests in land was done by elders well versed in customary law, as it was customary law rights which were to be registered⁷².

In 1954 the sroynnerton five year plan to intensify the development of African agriculture in Kenya was submitted⁷³. The plan favoured security of tenure to be provided for Africans through the granting of an indefeasible title. The intention of the plan was to raise output especially in the African areas of high Agricultural potential by improving farming methods and raising cash crops. The plan called for the recognition of individual land tenure. It was argued that the letter could be negotiable creating a new mobility in land transfer and disposition. the 1956 land tenure rules.

In reality the plan was aimed at creating a conservative middle class which would be too busy on the land to worry about political agitation. The fear of the field officers that some nationalists might under the work which had already been done was cured by the 1956 land tenure rules⁷⁴. The legal status of holdings consolidated under the rules was not clear though it was assumed that entry into the adjudication Registered conferred legal title on the individual holders. The rules did not mention that entry into the adjudication Register could extinguish customary rights and interests not shown on it, and they therefore hadn't that effect. The colonisers had also realised that independence was inevitable and the colonial economy had to be sustained, by allowing the Africans to hold land on the same footing with Europeans. It was also necessary to assure the Europeans of the security of their lands. It was therefore found necessary to change the policy of the government concerning land holding. The need to determine the kind of law that would apply after Registration led to the appointment of a working party in 1957⁷⁵. It was instructed to recommend substantive Legislation to provide forethe adjudication of rights consolidation, enclosure and demarcation of holdings, Registration of titles, the nature and form of title, the creation of lesser interests, succession, bankruptgy, trusts and the control and Registration of transactions in land. The commission was

also to advise on the machinery required for establishing registers and the financial implications of the various recommendations. The proposed legislation was to be applicable to all native lands and the commission had to take into account the recommendations of the East Africa Royal Commission and the Arusha conference on African land tenure. The working party recommended, that the title to be issued was to be a freehold. It also claimed that it had observed that something close to full ownership as known to English law had grown amongst the Africans, but its observation was based on political observations. Co ownership was also to be discouraged to safeguard against fragmentation. Ownership of up to five people was to be allowed. It also recommended that a land Control Bill be enacted to deal with the four problems which the Royal commission had foreseen and recommended that they would be solved by legislation viz 1 chronic indebtedness, land speculation and landlessness, land fragmentation and problems of transfer of land between members of different races⁷⁷.

Land Registration was to be governed by the Native lands Registration Bill, which was enacted in 1959,⁷⁸ and replaced the 1956 land tenure rules. Control of land transaction was to be governed by the land control (Native Lands) ordinance 1959,⁷⁹ modelled on the 1944 land control ordinance.

The working party's report and the two ordinances gave effect to the swynner to plan. It was also at the time that there was a consideration by the Europeans as to how the colonial structures would be retained as independence was inevitable⁸⁰. It was planned that the racial classes were to be replaced by economic classes, which would return create divisions among the Africans, who claimed that their lands had been stolen⁸¹. People of all races were to be allowed to occupy land in the highlands, and racial reserves were to be abolished. However only a few Africans whose presence was necessary for the purposes of the imperialists were to be allowed to our land in the highlands⁸². It was assumed that when the Africans (qualified) gained control of the government their fellow Africans would not oppose them.

The Europeans who held agricultural leases for 999 years were also to be allowed to convert them into freeholds⁸³. It was also found necessary to allow some Africans to occupy land in the highlands to neutralise nationalism. The landless Africans had to be bribed by being granted some land in the highlands. The Africans were still dissatisfied as they were still convinced that the Europeans had stolen their land, this caused obstacles in the constitution

CHAPTER FIVE

talks which led to independence⁸⁴. The Europeans however succeeded⁸⁵. The independence constitution confirmed all the rights and interest in land that had been acquired under law before 1963⁸⁶. It also provided how land belonging to the settlers could be bought and be used for settling Africans in enforcement of the then current land policy.

By 1964 four systems of land laws had been established namely the land consolidation Act, the adjudication Act, the land control act, and the Registered land Act. These laws were to cater for the whole country.⁸⁸

The part played by courts in the interpretation of statutes will be examined to show the extent to which customary land law has been ousted.

It has been argued elsewhere that the reasons advanced to justify the introduction of statutory land tenure have not been achieved⁸⁹. The effects of removing customary land tenure and applying the Registered Land Act especially sections 27 and 28 concern the nature of the absolute proprietorship. The Registered Land Act replaced the 1959 ordinance. It has been argued elsewhere and rightly too that the Registered Land Act is a codification of English Law⁹⁰.

The common law is the residua law to apply where there are gaps⁹¹. The aim of Registration was to record customary land rights and interpretation of statutes deals with customary land tenure before it was acted on by the free enterprise economy. The treatment of land as a commodity which could not be sold by Africans before colonisation was based on the belief that it was a free gift from God to all his living things, and as such everyone was entitled to have access to it. This holding of land was rooted in the Africans belief that everybody counted equally. They knew that treating land as a thing that is subject of ownership would lead to enslavement of some people by others, because those who own the means of production (land) have the power to dictate the terms on which those without it will be allowed to support their lives as it has been since the establishment of the colonial rule. The free enterprise economy advocated the individualisation of land holding as, it opposed the belief in human equality. Land Registration as pointed out in chapter four aimed at rewarding the loyalists and punishing the freedom fighters and serving colonial purposes. This is why today in Ngenda Location the loyalists have big tracts of land. The present writer was also informed that land

CHAPTER FIVE

THE EFFECTS OF REGISTRATION:

consolidation was not based on consent of those holding land under customary law. Some people were forced to leave their traditional lands and were given poor tracts of land⁹². The people hoped that this injustice would

In chapter four we saw how the British succeeded in replacing customary land tenure with English land tenure in some parts of Kenya. This chapter deals with the extent to which the expectations of land Registration have been achieved and the extent to which a Registered owner has absolute proprietorship conferred by sections 27 and 28 of the Registered Land Act⁸⁸. The part played by courts in the interpretation of statutes will be examined to show the extent to which customary land law has been ousted.

It has been argued elsewhere that the reasons advanced to justify the introduction of statutory land tenure have not been achieved⁸⁹. The effects of removing customary land tenure and applying the Registered Land Act especially sections 27 and 28 concern the nature of the absolute proprietorship. The Registered Land Act replaced the 1959 ordinance. It has been argued elsewhere and rightly too that the Registered Land Act is a codification of English Law⁹⁰.

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Courts apply sections 27 and 28 strictly where customary land rights consolidation was not based on consent of those holding land under customary law. Some people were forced to move away from their traditional lands and were given poor tracts of land⁹². The people hoped that this injustice would be erased by the independent government, but the people who had got good land through the wrong means planted cash crops like coffee to make the land expensive to redeem.

The effect of the Europeans occupation of Kenya from 1886 was to deprive the Africans of their land. The 1899 legal officers opinion established the view that in a protectorate land was vested in the crown. It was held in 1921 in *WAINAINA V MURITO*⁹³ that the Africans were tenants at will in their country. The effect of the free enterprise economy on customary land tenure has been to make smaller the community that holds land. The introduction of the free enterprise economy affected Africans in that some tribes like the Masai were moved out of their best pasture lands under the 1904 and 1911 treaties⁹⁴. The Kikuyu land was also taken away⁹⁵.

The role of courts in land disputes is important because they are the ones which have replaced the elders in settling disputes concerning land. It have been argued that the courts are not competent because they are manned by foreign personnel and secondly because the local magistrates are not trained in customary law⁹⁶. As a result the Resident magistrates court at Thika direct land disputes to elders who are well versed in customary land tenures. The High court on the other hand does not take into account the opinion of the elders, because of various reasons such as the back ground of the judges⁹⁷ and the fact that most of the personnel in the high court is composed of expatriate judges who have a foreign legal training⁹⁸.

In examining the role of courts, we shall see whether they have interpreted to fit changing conditions. Their decisions have also to be viewed against the land history of Kenya. As it has been argued above the aim of Registration was to record customary land rights and as such since no freehold was recognised by customary law, registration did not create a freehold. The application of sections 27 and 28 of the Registered Land Act depend on an individual judge.

created by
the State

Courts apply sections 27 and 28 strictly where customary land rights exist. In *ESIROYO V ESIROYO*⁹⁹ the plaintiff who was registered as a proprietor of land (customary) wanted to evict his natural sons from the land. He sued them for Trespass and an eviction order was granted. It was established that the land in question was ancestral land but Kneller stated that customary land rights were erased by the Registered Land Act. As a result people were denied their shares accorded by customary law. The land control Act was introduced to prevent rural indebtedness and to prevent people from becoming destitute due to freedom of land sales¹⁰⁰ but section 28 of the Registered Land Act as shown in the case above is doing this.

In *OBIERO V OPIYO*¹⁰¹ the same conclusion as that in *Esiroyo* was reached. The plaintiff had been registered as the land owner fraudulently as it was family land to which her co-wives were entitled to share. She sued the co-wives and their sons for trespass and the defendants claimed that they had rights to the land under customary law and the registration was fraudulent. Bennet I stated that the registration of the plaintiff as the owner of the land extinguished customary land rights and secondly even if the registration was obtained by fraud the title was not challengeable as it was obtained by first registration. The effect of the two cases is to abolish customary land tenure as a result of which land does not serve the needs of the community as a whole. As opposed to customary land tenure, registration a proprietor very powerful. According to the traditional land tenure the father has no power to deny the other members of the family and his children the access to the family land. The R.L.A. has according to these two decisions destroyed the ties between the family and the ancestral land.

In the case of *MUGUTHU V MUGUTHU*¹⁰² it was held by Madan I that the plaintiff had held land under a customary trust which was inherent in the Kikuyu custom. The decision has not been followed in any other reported cases. It was not referred in the *Obihero* and *Esiroyo* cases. It is submitted that the two cases were decided per incuriam. The two cases were decided by English judges familiar with the English way of life especially the fee simple Estate. It was not noted that the Africans had a different conception of ownership and upto today the society is still communal oriented. The judges did not take into account the fact that during the colonial times the superior courts served as instruments of colonial policy opposed to traditional customary land tenure patterns of land holding¹⁰³. Madan gave the right decision because he is

acquainted with the African way of life. The two cases were decided per incurium because as argued earlier the aim of Registration was the recording of customary land rights. The cases were decided in ignorance of the constitution the supreme law of the land, which in sections 117 and 118 declares customary land rights property rights. A person has to be compensated when these rights are taken away. Section 10 of the constitution also guarantees protection of life and consequently the taking away of land rights amounts to deprivation of life indirectly.

Magistrates in the lower courts still administer customary law where there is a conflict with the R.L.A. This is because the magistrates are generally familiar with customary law. People in Ngenda location still cherish their customary land rights and it is normally succession cases that reach the courts. The parties who go to the courts firstly agree as to how they are to share the land, and if they have not the magistrate refers them back to the elders ¹⁰⁴, or advises them to agree as to how they will share it. The writer during the fourth term clinical programme in August 1977 noted that the Senior Resident magistrate at Thika refuses to administer land rights under the R.L.A. as he is not competent because as he said, he is not familiar with land transactions in the rural areas. Courts in the area of study have developed a way of curing the defects of the R.L.A. The magistrates are aware of the fact that land belongs to the family and during Registration a person could be registered on behalf of the other members of the family as a trustee. The land adjudication committee was made up to elders were versed in customary land rights, and it carried on adjudication in accordance with customary law. There was no provision stating that registration conferred absolute and exclusive rights. Land Registration under the R.L.A. does not extinguish customary land rights.

The absolute proprietorship conferred by S. 28 of the R.L.A. is not guaranteed as social considerations will continue to govern court decisions. It might do less harm if section 28 applied to people who buy land and not those who inherit ancestral land. But even this concession is unjustifiable because purchasers too know that land is held by families. Land Registration has led to crimes such as fraud which is very prevalent because of the current ability of people to change their names ¹⁰⁵. This has also led to crimes such as assault, when people are deprived their only means of living. Under customary land tenure it was not possible to steal people's land.

It was hoped that land tenure reform would provide the basis for an agrarian Revolution. This was hoped to be achieved through

- i) Consolidation of scattered fragments; this would put to an end division of land into subeconomic sizes, and thence facilitate the planting of cash crops and improvement in the technique of farming,
- ii) Indefeasible titles were to be issued to provide security against litigation which was said to be prevalent under customary land tenure, this would lead to reduction of the time spent in courts and it was hoped that the people would spend more time developing the land.
- iii) Individual titles would guarantee security of tenure. This would make land a marketable commodity freely transferable and chargeable as security for raising credit for agricultural development.

An examination of what has been taking place in Ngenda shows that these intentions have not been fulfilled.

LAND FRAGMENTATION:

The working party on African land tenure recommended ownership of up to five people as co proprietors or division of the land into five shares. The divisions were not to be below economic sizes. It was laid down that compensation was to be paid to the heirs who did not obtain land by those who obtained it.¹⁰⁶ These recommendations were incorporated in sections 101 and 120 of the R.L.A. Annual reports show that an average of fifteen succession cases were registered each year from 1970 to 1975 and in 1977 twenty succession cases were registered. This does not mean that only fifteen people die in Ngenda in each year. The people have recently become aware of the need to register transmissions, but there aren't many cases involving succession of more than five people and subsequently there hasn't been much disfussion of land after Registration. Fragmentation still continues on the ground because in polygamous families each wife is given a separate piece of land to cultivate which is not registered in her name. Most sons continue to cultivate their fathers land together with their wives and so though registers may show that the land is viable for agricultural development this is not the position on the ground. The land control Boards are not concerned with economic acreage when giving consent to land transactions.¹⁰⁷

To some extent consolidation and Registration have facilitated the planting of cash crops in Ngenda location. Money lending is therefore done on the basis of granting the land title as security. After consolidation people have been able to take of their crops well if they are in one place. Farming equipment is however necessary for improved agriculture but not many people get loans to buy farming equipment. The normally use manual labour. Land consolidation and Registration have not succeeded in preventing fragmentation and improvement of agriculture has not been as extensive as it had been hoped.

LAND DISPUTES:

Land disputes were not prevalent in Kiambu before the introduction of the R.L.A. They were resolved by the elders. Land disputes were intensified by the British who introduced their new concepts of land holding which forced the Africans to confine themselves to a certain piece of land. Assuming that customary land tenure was conducive to incessant land disputes, It is questionable whether Registration has succeeded in either lessening or erasing the disputes. Before Registration much evidence would be needed to establish a claim. Land disputes arise from grounds connected with the working of Registration. These normally concern return of the purchase price and trespass with an eviction order. In some cases parties agree on a land sale, the seller receives the purchase price and spends it, but when the time comes to go to the Land Board for consent he fails to appear or alternatively he agrees to sell a piece of land and is later lured by a person who offers more money and so repudiates the contract with the first party. The courts have not been willing to grant specific performance in such a case. Alternatively a buyer who does not know about the functions or existence of a land control Board may buy land, build on it, cultivate and improve it in many other ways. The seller may in this case get another buyer who wished to pay more money and may sue the person for trespass. Great injustice results as the first person cannot get compensation for the improvements he has made on the land and secondly he cannot get the land. The magistrates of African origin however take a different stand in such cases, and they grant specific performance but they are always overruled by the High Court¹⁰⁸. If the land transactions discussed above took place under customary land tenure there would be no disputes and injustice so long as the transaction was entered

into in the presence of some elders as witnesses. Land reform has therefore failed to prevent incessant land disputes.

SALE OF LAND:

Individualization of land was also aimed at making it a marketable commodity freely transferable so that the owner could sell, lease or change it without family control¹⁰⁹. The land control Boards have however ignored this because in granting consent they are more interested in preserving the traditional rules than in facilitating land development. This is normally because of the constitution of the land control Boards¹¹⁰.

Traditional rights of inheritance continue to determine the farmers freedom of disposition. The directive that the registered owner is not subject to considerations and duties based on customary law and that the Board may take into account family matters if they consider it necessary have been ignored¹¹¹. The Gatundu Division land control Board does not consider this warning¹¹². If a family member objects to subdivision of land the Board withholds consent. The Board also withholds consent if the sale of land will cause hardship to a family. Before granting consent to a land sale the Board examines whether the applicant has any other land where he can settle because if he hasn't this will lead to poverty, landless and social economic problems. The Board in preventing landlessness has hindered the treatment of land as a marketable commodity.

Some people however sell land, but they usually sell it to buy bigger pieces of land elsewhere especially in the Rift Valley. Though some people buy land in the Rift Valley, they still retain their small pieces in Ngenda.

The land Board does not bother much about uneconomic subdivisions. The agriculture officer who is supposed to determine whether subdivision will result into uneconomic sizes can be overruled by the Board. The absolute proprietorship granted by section 28 of the R.L.A. has not been achieved due to the social considerations by the land Board members. The Board withholds consent if an absolute proprietor of land wants to kick out traditional owners and sell it to other people.

The land Control Act was intended to prevent accumulation of land in the hand of a few rich people for speculative purposes. No ceiling has however been laid down indicating the average agricultural land that one should own. This makes it easier for people to buy land with speculative purposes. Land

Registration and control have not succeeded in preventing accumulation as a person can buy pieces of land in many places. This inturn facilitated fragmentation. It is noteworthy that since registration land transactions are very many. Every person can inturn buy land in any part of Kenya as opposed to the old times when land could not be sold to a person of a different clan or tribe. Land has also lost its traditional significance as it is not the only means of living. The making of land a marketeable commodity has however place some peopke in a better position for they can buy as much land as they can and latter sell it at exorbitant prices.

FARM CREDIT. the people, and so it was difficult to achieve its desired

Registration made land a transferable asset. The granting of title deeds was aimed at making it possible for people who wanted to develop land to obtain credit from credit giving institutions like banks. The title deeds were to be used as security to charge land¹¹³. The land Boards approve all charges. They are however less concerned with the improvement of agriculture which granting consent. The loan rarely ends up in the farm as there is nobody to supervise. Some people use the title deeds to get loans from the banks which ask for the title. It is only the Co-operative Union Bank which does not ask for the title deed but for the security of any cash crop which might be on the farm. The farmers are usually members of such a bank. These institutions do not ensure whether or not the loan is used for the purposes it was obtained. The banks do not acdept title deeds alone as security. The applicant has to show that he has other sources of income to enable him to pay the loan. It is unlikely that the banks will accept land as the sole security if a person has no any other source of income. Lack of supervision renders agricultural development impossible.

The argument that individualization land would give the farmer security with which to obtain credit for agricultural development is false as far as the peasant is concerned because as stated above the cannot get loans on the basis of land as security alone. The people who get loans use them to improve other businesses and not to further agricultural development.

It can be said that Registration has facilitated the granting of credit in some way but this has not resulted to great agricultural development as expected.

land speculation because it is difficult to determine what is adequate land. The land Boards use the concept of willing buyer and willing seller. Registration and the Land Control Act have therefore not

CONCLUSION:

Most of what I would say in the conclusion is in chapter five which discusses the effects of land Registration on customary land tenure. To avoid repetition I will only pinpoint out why the aims of registration have not been fulfilled and the measures necessary to bring about the desired results.

The aims of Land Registration were political rather than Economic. Registration was aimed at creating a landed middle class which would oppose the 'political agitators'. As seen in chapter five Registration was forced on the people, and so it was difficult to achieve its desired results.

It was hoped that Registration of land would make it possible for the farmers to get loans to develop their land because the land title would act as security for the loans. This has not been achieved in a significant way because the banks require other forms of security apart from land titles to grant loans. The small farmer who does not have any other property besides land cannot get loans. The people who get loans do not use the money to further agricultural development, but they used it to improve their other businesses. As stated in chapter five some people buy land so as to be able to use it to get loans to improve their other businesses. Some buy it for speculative purposes because the price of land goes up as years go by. I feel that loans granted to farmers are not used on the land because of lack of supervision. Some farmers who get the loans and wish to use it on the land do not utilise it properly because they lack the knowledge relating to modern and scientific farming. This mistake can be remedied if the agriculture officers visit the farmers and instruct them. The granting of loans should assume that land is sufficient security if the small farmer is to benefit from credit facilities.

The land control Act 1967 which aims at improving land use by controlling transactions in land has not helped in the improvement of agriculture. As seen in chapter five, the Land Control Boards grant consent where the land is to be sub-divided into sub-economic units. This is usually dictated by social considerations especially where if subdivision is not effected one of the parties will be rendered landless. The Act has also failed to eradicate land speculation because it is difficult to determine what is adequate land. The land Boards use the concept of willing buyer and willing seller. Registration and the Land Control Act have therefore not

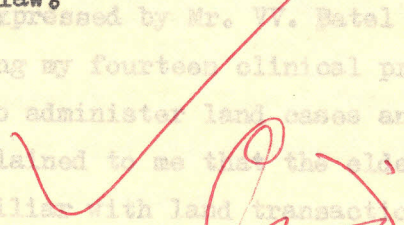
succeed in preventing fragmentation of land. I feel that if this is to be stopped alternative means of living such as employment in industries have to be created.

Registration as pointed out earlier has caused much injustice by making the stealing of land easier by first Registration which is unchallengeable and also by use of prescriptive limitation. It also legalised the stealing of African lands by the Europeans and this frustrated the independence expectations of the freedom fighters.

The injustice which results from the Registration of land has been reduced by some magistrates who refer land cases to elders who are familiar with land transactions in the rural areas. However much injustice results in the High Court as we have expatriate judges who are either not well versed in customary law at all or well. Africanization of the bench is therefore necessary or alternatively the judges should be required to study customary law. Customary law should also be made a compulsory subject for law students by the council for Legal Education. If total justice is to be achieved an overhaul of some of our laws should be done such as the Inducement Act. Courts should not be guided by customary law but should follow customary law.

The Registered Land Act has therefore failed to confer absolute proprietorship upon a person Registered as a landowner, because people still have a communal feeling, and the Land Boards reduce a Land owner's powers. As argued earlier customary law still governs the land in the rural areas because very few people know the provisions of the Registered Land Act except the title they get. To most people Land Registration does not make much difference as in their minds they hold the land under customary law.

This view was expressed by Mr. W. Batel the Senior Resident Magistrate at Thika. During my fourteen clinical programme I noted that the magistrate was reluctant to administer land cases and preferred to refer them to the elders. He explained to me that the elders are likely to do more justice, as they are familiar with land transactions within their areas.



FOOTNOTES.

1. See (a) Report of the East African Royal Commission 1953 - 1955
(London, June 1955) Ch. 23
(b) Report of the working Party on African Land tenure 1955 - 59
(Government Printer, Nairobi) Ch. 12 and 13.
(c) Republic of Kenya, Report of the mission on Land Consolidation and Registration 1965 - 66 (Government Printer, Nairobi) Ch. 16
The land consolidation Act and the Adjudication Act are based on this Report
(d) Report of the Conference on African land tenure in East and Central African(Arusha 1956) Para 22 - 24.
(e) Njeru W.E. The effects of land Registration on Embu customary Land tenure. (A dissertation submitted in partial requirement for an LLB Degree: University of Nairobi 1977).
2. Cap 302 Laws of Kenya a + p. 233
3. See (a) Colin leys; Underdevelopment in Kenya (Heinemann London 1975).
(b) Walter Rodney; How Europed underdeveloped Africa (Tanzania publishing house 1974)
(c) Njeru W.E. Supra.
4. G.K. Kuria; the role of customary land tenure in rural development (mimeo)
5. This view was expressed by Mr. VV. Patel the Senior Resident Magistrate at Thika. During my fourteen clinical programme I noted that the magistrate was reluctant to administer land cases and preferred to refer them to the elders. He explained to me that the elders are likely to do more justice, as they are familiar with land transactions within their areas.
22. See Footnote 9
23. Lambert HE. The Systems of land tenure in the Kikuyu land unit
Communication from the school of African studies
No. 22 Feb. 1950 p. 7.
24. Mariuki G. Background to politics and nationalism in Central Kenya: The traditional social and political systems of Kikuyu people.
An article from politics and nationalism in Kenya edited by
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6. Lugard The Dual Mandate in Tropical Africa (Frank cases & Co Ltd. London, 1965) Chapter 14.
7. See (a) G.K. Kuria Marriage and property Laws in Africa (Mimeo)
(b) G.K. Kuria Supra
8. Mbiti JS African Religious and Philosophy (Heinman,) 1969
9. Nyerere S.K. National Property in Freedom and Unity (Nairobi, Oxford University Press 1967) p. 53
10. Jomo Kenyatta Facing Mount Kenya Heinman Books 1938
11. (a) Kiprono Arap Koros V. Langat (1979) C.R. L.R. 2
(b) Report of the Committee on native Land tenure in the North Kavirondo (Government Printer Nairobi) p. 4 - 10
12. 5 E.A.L.R. 141 fuctation at page 145
13. (1921) 2 A.C. 399 p. 404 - 405
14. Munoru G.G.S. The concept of Customary sale of land today (Journal of the Denning Law Society) Vols 1 Nos 1 - 4 p. 89 - 93.
15. (1919) Ac. 211 (PC) a + p. 233
16. Vol. 1 CR. LR. p. 2.
17. Simmonce AJF. Land redemption among the Forthall (Muranga) Kikuyu Vol. 5 JAL p. 75 - 81
18. (1920) 8 E.A. LR 129 at p. 131
19. This continues today. Most of the people interviewed said that they prefer to sell their land to their family member rather than strangers.
20. See Njenga FX. African Land Tenure concepts in Kenya in contemporary Setting Journal of Denning Law Society vols1 Nos 1 - 4 p. 265 - 283
21. See (a) Sorrenson M.P.K.; Land Reform in Kikuyu Country OUP 1968 page 4
(b) The same view was expressed by an old woman of about 140 years whom I interviewed
22. See Footnote 9
23. Lambert HE. The Systems of land tenure in the Kikuyu land unit Communication from the school of African studies Eastern and Central Africa Government Printer Nairobi 1929 p. 50 No. 22 Feb. 1950 p. 7.
24. Muriuki G. Background to politics and nationalism in Central Kenya; The traditional social and political systems of Kikuyu people. An article from polities and nationalism in Kenya edited by Bethwell Ogot.

25. Lambert H.E. Supra p. 79
26. Report of the Kenya land commission cmd. 4556 1934 p. 93 Nairobi 1955
27. Lambert infra p. 111
28. Lambert Supra p. 103
29. Kenyatta J. Facing mount Kenya Heinman 1961
30. In essence the eldest son was regarded as the most mature and as such capable of representing the family in land dealings.
31. This view was expressed in MUGUTHU V MUGUTHU 1971 K.H.C.D. 16 also see Mukunyas Dissertation LLB TII 1977
32. Sorrenson MPK Supra p. 10
33. This information was given by my uncle who was a Muramati before land Registration.
34. A Muhoi is one who acquires cultivation rights on the land of another or family unit on a friendly basis without any payment for the use of the land.
35. Muthami - IS a man who acquires cultivation and building rights on the land of another man or clan.
36. See footnote 4.
37. Tathat is the undigested stomach contents of grass eating animals.
38. Lord Lugard Supra Chapter 3.
39. Kuria G.K. the role of customary land tenure supra
40. Mcgregor Ross Kenya from within Frank cass & Co Ltd. 1968 London
41. Sorrenson M.P.K. Supra Chapter VIII
42. OleJogo and others V. A.G. of E.A. Protectorate 1914 E.A.L.R. 70
43. Sorrenson MPK Supra Chapter 10.
44. Ordinance No. 12 of 1915
45. Kaderbhai V Commissioner of Local Government lands
46. 9 KLR. 102-K. Kuria Supra p. 41
47. MCGREGOR ROSS Supra chapter 21
48. Discharged soldiers Settlement ordinance 1920 No. 13 of 1920
49. Report of the Commission on closer Union of the dependancies in Eastern and Central Africa Government Printer Nairobi 1929 p. 50
50. Sorrenson MPL Land Policy 1895 - 1945 In History of East Africa, Edited by Ronald Oliver and Crevase Matthew, Oxford Claredon Press 1965 volume 2
51. No 22 of 1926
52. Settlement Committee Report. Government Printer Nairobi , 1939

53. McGregor Ross Supra Chapter 20
54. Sronynnerton R.J.M. A plan to intensify the Development of African Agriculture in Kenya Government Printer Nairobi 1955
55. Srpmynnerton Infra para 12
56. L.N. 452 of 1956
57. Report of the working party on African land tenure 1957 - 58. Government Printer Nairobi 1958.
58. Ordinance No 27 of 1959
59. Sessional Paper No. 10 of 1958 modified by No. 6 of 1959/60
60. L.N. 245 of 1963 S. 193
61. The 1915 crown lands ordinance allowed the Europeans to have leases of 999 years.
62. Harbeson J.W. Land Reform and politics in Kenya 1954 - 70
Journal of Modern African studies 9 (1971) P. 231 - 25
63. Harbeson Ibid
64. The East African Royal Commission and African land tenure 1956 J.A.A. P. 69
65. Chapter 23 East Africa Royal Commission Report.
66. Harbeson J.W. Nation Building in Kenya Northwestern University Press 1973.
67. Report of the Conference on African land tenure in East and Central Africa, Arusha 1956 para. 19
68. Sorrenson M.P.K. Land Reform Supra Chapter VIII
69. Sorrenson M.P.K. Supra Chapter VII
70. LN 452 of 1956 and land Reform in Kikuyu Country pp. 121-134 and Chapter 12
71. See (a) Report of the working Party on African land tenure 1957 - 1958 Government Printer Nairobi paras 24 & 25
72. (b) G.K. Kuria Supra p. 41
73. See footnote 70
74. LN 452 of 1956
75. Report of the working Party Supra
76. Para 54 of the Report
77. Para 34 of the Report
78. East Africa Royal Commission Report Supra Chapter 23 paras 28 - 36.
79. The Native Lands Registration ordinance No. 27 of 1959.
80. No. 28 of 1959

106. This information was supplied by Mr. Mburu the head of the police force investigation branch in Kiambu.
81. Land tenure and control outside the Native lands sessional paper No. 10 of 1958/59 Government Printer Nairobi as modified by sessional paper No. 6 of 1959/60.
82. See para 17 of the 1958/59 sessional paper supra
83. Blundel M. So rough a wind weidenfeld and Iricolson London 1964
84. See Footnote 20.
85. J.W. Harbeson Land Reform Supra
86. Garry Wasserman. The Independence bargain, Kenya Europeans and the land 1960-62 Journal of commonwealth Political studies 1973 Columbia University.
87. Oginga Odinga Not yet Uhuru Heinman 1967 Dchapter 12
88. LN 245 of 1963 S. 193.
(a) Cap. 300 Laws of Kenya
89. See Njeru's Dissertation Supra chapter 4
90. G.K. Kuria supra p. 47
91. Cap. 300 s. 163
92. This information is based on personal observation and information by some elders.
93. Interview with some elders.
94. A good example in Ngenda Location is a piece of land near Kimunyu where the current owner was forced to occupy it and abandon his previous land. The land turns into a small take whenever it rains heavily.
95. This information was supplied by my father
96. 1921 9 E.A. LR 102
97. See Footnote 42
98. This is based on personal observation
99. See Footnote 5.
100. Agunda Akinola T. The role of the judge with special reference to civil liberties Vol. 10 E.A. LJ. 147
101. See (a) Akilagpa sawyer. Customary Law in the highcourt of Tanzania 6 E.A. LJ. 265.
(b) Vol 46 ML.R.
102. East Africa Royal Commission Report Supra Chapter 23.
103. 1972 E.A. 227
104. 1971 K.H.C.D. No. 16
105. See Footnote 13 and 14.

106. This information was supplied by Mr. Mburu the head of the police force investigation branch in Kiambu.

107. Report of the working party supra pp. 29 -37 paras. 69 - 90

108. This information was supplied by members of the land control Board in Gatundu.

109. Okubasu - The Resident magistrate at Kiambu is a good example.

110. See chapter two the role of the Muramati.

111. See (i) Republic of Kenya Report of the mission on land consolidation and Registration 1965 - 1966 Government Printer Chapter 16.

E.A.L.R. East Africa Law Reports 1957

K.H.C.D. (ii) Wilson R. Land Control in Kenya Small Holder Farming areas.

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4. Report of the Conference on land tenure in East and Central Africa
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5. APPENDIX of the Kenya land commission 1952 (Government Printer, Nairobi)

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