

**LIMITATIONS OF THE CURRENT LAND LAWS IN
ADDRESSING THE SQUATTER LAND PROBLEM IN KENYA.**

By

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A thesis submitted in partial fulfillment of the requirements of the
degree of Masters of Laws (LL M) School of Law, University of
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DECLARATION

I **Stephen Chege Njoroge** hereby declare that this is my original work and has not been presented for the award of a degree or any other award in any other university. Where works by other people have been used, references have been provided.

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DEDICATION

This work is dedicated to my dear parents Mr. and Mrs. Njoroge, my wife Pauline and daughter Tania.

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I wish to thank the almighty God for giving me the grace to undertake the LL M programme. He gave me strength when weak, wisdom and all the required resources.

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LIST OF CASES

Attorney General v Akonaay, Judgment of the Court of Appeal of Tanzania (unpublished transcript) of 21st December 1994.

Esiroyo v Esiroyo(1973) EA 338.

Kuria Greens v The Registrar and Another Petition No 107 of 2010 Nairobi (eKLR).

Mwangi Muguthu v Maina Muguthu HCCC No 377 of 1986 (unreported).

Nyali Limited v The Attorney General (1955) All ER 643.

Obiero v Obiero (1972) EA 227.

LIST OF STATUTES

Aboriginal Land Rights Act of 1976 of Australia.

Constitution of Kenya 2010.

Constitution of Kenya 1969 (now repealed).

Constitution of the Republic of South Africa of 1996.

Extension of Security of Tenure Act 1997 of South Africa

Government Land Act Cap 280 Laws of Kenya (now repealed).

Land Act No 6 of 2012.

Land Registration Act No 3 of 2012.

Land Titles Act Cap 282 Laws of Kenya (now repealed).

National Land Commission Act No 5 of 2012.

Proposed New Constitution of Kenya of 2005.

Registration of Documents Act Cap 285 Laws of Kenya.

Registered Land Act Cap 300 Laws of Kenya (now repealed).

Restitution of Land Rights Act 1994 of South Africa

ABSTRACT

The squatter issue has been a problem in Kenya since the advent of colonialism. Successive governments have not been able to adequately deal with the problem. This study explores the limitation of the current legal framework in addressing the squatter problem in Kenya. It shows the extent to which the classification of land in the Constitution is an impediment in dealing with the problem. It also navigates through the National Land Commission which is a constitutional commission and other institutions and their viability in dealing with the problem at hand. It also explores the concept of indefeasible title which has failed to mitigate the problem.

The study draws best practices and concludes by stating that the country should resolve the problem and ensure that there is equitable access to land and security of tenure for peace and development. It recommends changes to the Constitution and the select land laws to address limitations if the current squatter problem is to be effectively dealt with.

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CHAPTER 1

INTRODUCTION AND STATEMENT OF THE PROBLEM

1.0 Introduction

Land is vital to human survival and development. It is the source of livelihood to many people and indeed the source of basic needs such as food and shelter. Access and ownership of land is a central aspect of development and political change. Indeed, most of the development that has taken place in African countries Kenya in particular is related to the use of land.¹ Consequently the need to deal with the squatter problem in Kenya cannot be of any less significance.

The Constitution of Kenya gives a general provision on the right to property.² It provides that every person has the right to own property which includes land either individually or in association with others of any description or in any part of Kenya. Articles 60 to 68 are dedicated to land. In the subsequent chapters in the study, I shall give an in-depth analysis of the said provisions including select provisions in the new land legislation.³

The squatter problem can be traced from the dispossessions that took place when the colonial powers took over the affairs of the country. Land was seized and people uprooted and settled elsewhere. Legal theories used to justify the dispossessions include the doctrine of '*terra nullius*', that is, empty land, which entails land that was not occupied or not rationally exploited,

¹ C. Juma, In Land we Trust: Introduction in C. Juma and J.B Ojwang (eds) *In Land We Trust: Environment. Private Property and Constitutional Change* (ACTS Press, Nairobi 1996) p.1.

² Article 40 (1) of the Constitution of Kenya 2010.

³ The new land legislation include the Land Act, No 6 of 2012, the National Land Commission Act, No 5 of 2012, the Land Registration Act, No 3 of 2012 and the Environment and Land Court Act No. 19 of 2011. It is worth noting that the Land Registration Act repealed the Indian Transfer of Property Act 1882, Government Land Act Cap 280, Registration of Titles Act Cap 281, Land Titles Act Cap 282 and Registered Land Act Cap 300 Laws of Kenya. The Land Act repealed the Land Acquisition Act, Cap 295 and the Wayleaves Act, Cap 292 Laws of Kenya.

could be expropriated. The second method involved the imposition of the notion of private property.⁴The problem in relation to facts and figures will be addressed in detail later in this paper.

Indeed, the issue of private property gave rise to the commoditization of land by man that necessitated land registration.⁵The concept of land registration has been defined as the documentary manifestation of land as a commodity in the world of commerce.⁶ As a consequence, registration plays an overall function of providing information that relate to the quantum of rights in the land and the transferability in the production and exchange process. The rights of the native communities which were communal in nature were neglected by the conception of private rights by settlers.⁷ The express classification of land is an exclusion of the people who do not fall under the categories.

This study will demonstrate how the squatter land problem can be mitigated through legal framework. It will demonstrate how provisions in the current legal framework in the context of land laws do not support the resolution of the squatter problem. This will also be done by drawing some of the best practices that could aid in resolving the problem in Kenya. This project paper therefore seeks to give recommendations which propose a way forward to deal with the

⁴ C. Polsinelli, "Right to Land-Right to House and Adequate Standard of Living" in *Human Rights Litigation and the Domestication of Human Rights Standards in Sub Saharan Africa* AHRAJ Casebook Series Vol 1(International Commission of Jurists Kenyan Section, Nairobi 2007) p.147.

⁵ S.C. Wanjala, Problems of Land Registration and Titling in Kenya: Administrative and Political Pitfalls and Their Possible Solutions in S.C Wanjala (ed) *Essays on Land Law: The Reform Debate in Kenya*, (Faculty of Law, University of Nairobi, Nairobi 2000) p.84.

⁶ *Ibid.*

⁷ P. Kameri-Mbote, *Fallacies of Equality and Inequality: Multiple Exclusions in Law and Legal Discourses*. (University of Nairobi Inaugural Lecture 2013). p.22.

current squatter land problem. The study is premised upon the resolution of the problem by review of the current land laws which are the Constitution of Kenya 2010 and the new land legislation enacted in 2012.

1.2 Background to the Study

The land problem in Kenya and the escalation of the squatter problem can be placed in the context of pre-colonial, colonial and post-colonial administration. Before the coming of the colonialists land was owned communally where everyone had the right of access. Therefore land governance during the three periods has defined the problem as it is today. Smokin Wanjala has documented the fact that alienation of land and exploitation was achieved through application of English law. He has stated that:

...the 1915 Crown Lands Ordinance was the most important piece of legislation passed by the colonial government in terms of its far reaching consequences: it made it possible for the government to not only acquire the territory by disinherit the Africans, but also to grant interests in land to the settlers and had all along been seen as agents of economic development. They were the ones charged with the duty of exploiting the land by engaging in agricultural activity. Earlier pieces of legislation like the Crown Lands Ordinance of 1902 had also concerned themselves with a similar purpose.⁸

Land policies adopted on indigenous tenure systems and land use between 1930 and 1963 resulted in underdevelopment of African peasant economy. This was done by obtaining land and labour resources from African reserves.⁹ Agriculture and tenure arrangements were affected by the reserve system leading to massive landlessness in parts that were within the white highlands.¹⁰

⁸ Wanjala 2000, *supra* note 5, p.86.

⁹ T.O.A Mweseli, The Centrality of Land in Kenya: Historical Background and Legal Perspective in Smokin Wanjala (ed) *Essays on Land Law: The Reform Debate in Kenya*, (Faculty of Law, University of Nairobi, Nairobi 2000) p.17.

¹⁰ *Ibid.*

The Swynnerton Plan in 1954 was a synthesis of various policy strands that had been adopted by the colonial government. The aim was to modernize African agriculture by creating a stable middle class that would be against nationalism.¹¹ Though the Plan was viewed as good as far as agriculture is concerned, it had the effect of causing massive landlessness. Paragraph 12 of the plan provided that African farmers be provided with economic size land holdings.¹² As observed by Syagga:

...the report recommended the consolidation of separated land holdings of each family into one, followed by the adjudication of property rights in that land followed by registration of individuals as absolute owners of land adjudicated as theirs. This marked the beginning of the colonial government's attempt to establish a single market for land. The intention of the system was to end the perceived uncertainty of customary tenure and create stable landed gentry among the Africans.¹³

The Crown Land Ordinance later became the Government Land Act.¹⁴ The other pieces of legislation enacted included the Land Titles Act¹⁵, the Registration of Titles Act¹⁶ and Registration of Documents Act.¹⁷ The Registered Land Act¹⁸ was enacted at independence in 1963 with the aim of making further and better provisions for registration of title to land as well

¹¹ *Ibid.*

¹² *Ibid.*

¹³ P. Syagga, *Public Land, Historical Land Injustices and the New Constitution*; Constitutional Working Paper No 9 (Society for International Development, Nairobi 2010) <www.sidint.net> accessed on 19th October 2012. p.17.

¹⁴ Cap 280 Laws of Kenya (now repealed).

¹⁵ Cap 282 Laws of Kenya (now repealed).

¹⁶ Cap 281 Laws of Kenya (now repealed).

¹⁷ Cap 285 Laws of Kenya.

¹⁸ Cap 300 Laws of Kenya (now repealed).

as regulation of the land so registered.¹⁹ Ideally the Act was supposed to bring all land into one registration statute.

The squatter issue was the root cause of the *Mau Mau* uprising. There was an attempt by the colonial rulers to turn the country into a white settlement area and this had a profound effect on the local African population since they were disinherited and dislocated.²⁰ The rebellion was largely the response of landlessness in the Kenya reserves, the disinherited squatters in the white highlands and the urban proletariats. In settled areas, it was due to agrarian struggles between the squatters and the settlers.²¹

At independence the negotiated Bill of Rights sought to protect property that had already been acquired by the settlers. This clearly shows that there was no intention of resolving the squatter land problem. The crafting of Section 75 was unique by the fact that it sought to meet this requirement. The section gave direct access to the High Court for determination of interests and rights as well as obtaining compensation should property be compulsorily acquired.²² This issue, as will be discussed subsequently in this paper aggravated land problems in Kenya and specifically relating to squatters.

¹⁹ The Preamble to the Registered Land Act Cap 300 Laws of Kenya (now repealed).

²⁰ T. Kanogo, *Squatters and the Roots of Mau Mau 1905-1963* (Heinemann Kenya Limited, Nairobi 1987) p.1.

²¹ *Ibid*, 136.

²² Section 75 of the Constitution of Kenya Revised Edition 2001 (now repealed). The section began by stating that no property of whatever description shall be compulsorily taken unless specified conditions are met. Sub section 2 gave direct access to the High Court.

However, there has been effort by government to resolve land problems in Kenya. In 1999 a Commission of Inquiry into Land Law System of Kenya was formed.²³The Commission was popularly known as the Njonjo Commission.²⁴It was mandated to give recommendations as to the main principles for a land policy framework in Kenya.²⁵ The report recommended that there was need to formulate a National Land Policy and a National Land Commission for better management and administration of land. In 2003, the Commission on Illegal and Irregular Allocation of Land was also formed.²⁶However the recommendations made have remained at the core of the land question in Kenya and largely unimplemented.²⁷

The National Land Policy²⁸ was formulated through a wide consultative process to guide the country towards achievement of efficient, sustainable and equitable use of land. The policy noted that the squatter problem is a challenge for land planning and development and it is caused by absence of security of tenure.²⁹ The current Constitution and legal framework on land are largely informed by the recommendations in the Policy.

²³ Government of Kenya; *Report of the Commission of Inquiry into the Land Law System of Kenya on Principles of a National Land Policy Framework, Constitutional Position on Land and New Institutional Framework for Land Administration*. (Government Printer, Nairobi 2002).

²⁴ This is because it was chaired by the former Attorney General Charles Njonjo.

²⁵ Njonjo Commission Report, *supra* note 23, p. 3.

²⁶ Government of Kenya; *Report of the Commission of Inquiry into Illegal and Irregular Allocated Lands*. (Government Printer, Nairobi 2004).

²⁷ African Centre for Open Governance, *Mission Impossible? Implementing the Ndung'u Report*<www.africog.org> accessed on 19th November 2012.

²⁸ Republic of Kenya *Sessional Paper no 3 of 2009 on National Land Policy* (Government Printer, Nairobi 2009).

²⁹ *Ibid*, p.50.

1.3 Statement of the Research Problem

Resolution of genuine historical and current land injustices regarding squatters is one of the key foundations for land policy reform in Kenya. The squatter land problem began at the onset of colonial rule in Kenya perpetuated by laws and policies that have existed since then. Ineffective land laws have indeed contributed to the escalation of the squatter land problem rather than mitigating it. The concept of indefeasible title remains and constitutional provisions are inefficient in addressing the problem. There has also not been efficient and accountable institutional framework for land ownership and management that has resulted in an increase in squatters.

The new constitutional dispensation was supposed to be a cure to this problem yet it has not done so. Land issues have remained emotive and contentious since the colonial period and have been an obstacle to social cohesion and to some extent economic growth.³⁰ It is therefore imperative that law should at the very least seek to cure the problem.

1.4 Hypothesis

1. The squatter land problem is not adequately addressed by the existing land laws. The tenure and categorization of land under the Constitution is an impediment towards resolution of the squatter land problem in Kenya.
2. The powers given to the National Land Commission are limited and the concept of indefeasible title remains an impediment in resolving the squatter land problem.
3. The lacuna in the existing land laws have to be addressed in order to resolve the squatter land problem in Kenya.

³⁰ Syagga 2010, *supra* note 13, p.10.

1.5 Objectives of the Study

Main objective

1. To determine the extent of the squatter land problem in Kenya and the extent to which categorization of land under the Constitution impedes on resolution to the squatter problem.

Sub Objectives

1. To determine the extent to which the National Land Commission and other select institutions are limited in resolving the issue in question.

2. To review the concept of absolute title in the new land regime and how the concept is also an impediment to resolving the problem.

3. To review the effectiveness of the institutional framework in addressing the squatter land problem in Kenya.

4. To put forth proposals and recommendations of best practice drawn from other jurisdictions on how the squatter land problem can be resolved in Kenya.

1.6 Research Questions

This study seeks to systematically answer the following questions:

Main question

1. What is the extent of the squatter land problem in Kenya and how does the entire tenure system and categorization of land under the Constitution of Kenya 2010 an impediment to resolving the problem?

Sub Questions

2. To what extent are the institutions dealing with land limited in resolving the squatter land problem in Kenya?

3. To what extent is the concept of absolute title an impediment to resolving the squatter land problem in Kenya?
4. What can Kenya learn from other jurisdictions in resolving the squatter land problem?

1.7 Justification of the Study

Despite the fact that there is consensus relating to resolving the myriad of land issues including the squatter land problem in Kenya, the issue has received little attention from the government. Despite having many studies undertaken by many scholars pertaining to the issue of land, not much has been done relating to the specific problem of squatters. This study is significant as it seeks to provide a solution to the problem in Kenya based on best practices and experiences from elsewhere and how they can be relevant and applicable in the Kenyan context. It is believed that this study will assist policy makers and the relevant government departments in coming up with policies that will inform the legal framework to resolve this particular problem.

1.8 Theoretical and Conceptual Framework

This study seeks to rely upon the concepts of ownership and entitlement. These concepts are within the property theory. The reason for advancing these two concepts is to give the basis for the land problems that exist today; the squatter land problem being one of them. Native societies governed themselves according to rules that would have been considered “legal” even if they were different in content from those of the colonial powers.³¹The English property law is underpinned by the idea that a person can acquire secure and exclusive enjoyment of a thing and

³¹ W. C. Whitford, “The Rule of Law: Reflections on an Old Doctrine” (Vol 6 (2) *East African Journal of Peace and Human Rights* 2000) p.157.

be able to transmit it to another.³²The idea has introduced the concept of owner and non-owners of property. It is stated thus:

...the central assumption is that private ownership by individuals is the normal way in which things are held. This concept of ownership is made up of three elements: the right to manage things, the right to enjoy or consume them, and the right to dispose of them during life and upon death. And the use of the term right indicates that at its core, ownership is not a way of conceptualising the relation between people and things but a relation between people that is, owners and non-owners.³³

According to Tom Ojienda,³⁴ ownership of a property depends on the rules that prescribe how ownership can be lost or acquired.³⁵He also states that the aspect of title is a set of facts upon which a legal right and interest is founded. Ownership has been simply conceptualized as the right to a thing. Roman law for example has treated the idea as the right to use and to dispose of property absolutely.³⁶

On the contrary English law treats the issue of ownership as a form of possession. The notion of property has been viewed within the context of existence of ordered relations which entail the existence of norms to regulate human activities.³⁷ The norms of prohibition are the ones that are being referred to in that regard. It is therefore a fundamental principle which imposes a duty upon others not to interfere with the use of property owned by someone.³⁸

³² T. Murphy and Others, *Understanding Property Law* (4thedn Sweet & Maxwell, London 2004) p.60.

³³ *Ibid*, p.52.

³⁴ T. Ojienda, *Conveyancing- Principles and Practice* (Law Africa, Nairobi 2008) p.7.

³⁵ *Ibid*, p.9.

³⁶ *Ibid*.

³⁷ R.S Bhalla, *Concepts of Jurisprudence* (Nairobi University Press, Nairobi 1990) 113.

³⁸ *Ibid*.

The concepts of ownership and title can be questioned in several fronts. Firstly, GJ Donneley³⁹ acknowledges that there are many forms of ownership based on different cultures in the world. In the Kenyan context therefore, there were rules that governed ownership of land. Community members acquired rights to land which they would transmit to their descendants. They would acquire “titles” to land without any procedure of conveyance and documentation.⁴⁰

The first act by the colonial government was to declare all land crown land and enact laws that would facilitate administration of land within the colony. The case of *Nyali Limited v The Attorney General*,⁴¹ the court rightly observed that one cannot transplant an oak tree in Africa and expect it to retain the tough character that it has in England. This case illustrates that the application of English land tenure system in Kenya would not operate the same way as the tenure system in England.

The squatter land problem entails the situation where persons assert land rights or occupy for exploitation land that is not registered in their names or land owned by government or land legally owned by others.⁴² The term squatter is defined as a person who occupies land that is legally owned by another person or institution without the owner’s consent.⁴³ The term can be

³⁹ Intergovernmental Committee on Surveying and Mapping; *Fundamentals of Land Ownership, Land Boundaries and Surveying* < <http://www.icsm.gov.au> > accessed on 20/11/2012.

⁴⁰ A. Mumma, “The Procedures for Issuing Titles to Land in Kenya in Law Society of Kenya”, in *Land Law Reform in Kenya Volume 2* (Law Society of Kenya, Nairobi 2003).

⁴¹ (1955) All ER 643.

⁴² K. Kibwana, “Spontaneous Settlement and Environmental Management in Kenya” in S. Wanjala (ed) *Essays on Land Law: The Reform Debate in Kenya*, (Faculty of Law, University of Nairobi, Nairobi 2000) p.110.

⁴³ See the National Land Policy 2009, *supra* note 28 p.68.

broad in the sense that they can be both rural and urban categories.⁴⁴ This study is therefore specific on squatters who live on private land in the rural areas. Squatters who live in urban centres in what is commonly referred to as slums are out of the scope of this study. As Kibwana asserts, there is a category of squatters who continue to live in large forms that have already been individualized or purchased by state corporations thereby being public land.⁴⁵

Land is classified under Article 61 of the Constitution as public, private and community. The section also provides that all land belongs to the people of Kenya as a nation, as communities and as individuals. The classification of land seems to leave out squatters who live in those particular parcels of land. According to the United Nations Development Programme,⁴⁶ more than 100 million households in developing countries lack ownership or owner-like rights of the land they farm. Squatters and traditional right holders do not hold formal rights to the lands they occupy. The independent state in Kenya widespread poverty hampered the ability of most people to pay the government for the land set aside for settlement schemes after the departure of the colonialists.⁴⁷

The problem of traditional land holders not having formal rights on the land they occupy brings into play their rights in relation to the concept of sanctity of title. The concept has been contested as not absolute. Legislation provides that registration of land makes the registered proprietor the

⁴⁴ Kibwana 2000, *supra* note 42, p.116.

⁴⁵ *Ibid.*

⁴⁶ UNDP, Human Development Report 2003, *Millennium Development Goals: A Compact Among Nations to end Human Poverty* (2001) p.82.

⁴⁷ Wanjala 2000, *supra* note 5, pp.31-33.

indefeasible owner of the land.⁴⁸ Sanctity of title has been described as a mere phrase.⁴⁹ It has been argued as follows:

...legal theorists such as Locke and Rousseau have argued that only rights in the state of nature (natural rights) were absolute, and that in the modern state man can only enjoy civil liberties, which are subject to limitations.⁵⁰

The Ten Mile Coastal Strip is an example where the colonial regime recognized the claims by the Sultan of Zanzibar at the expense of those he had managed to control through economic might and through arms. Land registration was only possible to his subjects whereas original inhabitants were turned landless squatters on the lands they had lived on for generations.⁵¹ The concept of sanctity of such titles cannot be said to be absolute. This study anchors this proposition on the recommendation made by the Commission of Inquiry into the Illegal and Irregular Allocation of Land⁵² which argued that the doctrine of sanctity of title embodied under the Registration of Titles Act and the Registered Land Act (now repealed) and other statutes is a myth and has fuelled illegal and irregular allocations of land in Kenya.

Wade and Megarry⁵³ have supported this assertion by stating that no title is free from danger and that a better right may be established. The text provides for what is referred to as qualified

⁴⁸ The Registered Land Act Cap 300 Laws of Kenya (repealed), Registration of Titles Act Cap 300 Laws of Kenya (repealed) and the Land Registration Act of 2012 that replaced the repealed Acts have that provision. The new Act does not change that.

⁴⁹ See N. Sifuna, "Using Eminent Domain Powers to Acquire Private Lands for Protected Area Wildlife Conservation: A Survey under Kenyan Law" in *Law, Environment and Development Journal* (Vol 2/1 (2006) p.91.

⁵⁰ *Ibid.*

⁵¹ J. Wakhungu and Others, *Land Tenure and Violent Conflicts in Kenya in the Context of Local, National Regional Legal and Policy Frameworks* (ACTS Press, Nairobi 2008) p.11.

⁵² Government of Kenya, *Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Land* (Government Printer, Nairobi 2004).

⁵³ Megarry and Wade, *The Law of Real Property* (7th Edition Sweet and Maxwell, London 2008) pp.228-229.

indefeasibility which could be applicable in this study. It has been shown that even though registration makes one to enjoy predictable property rights, there exist contestations that would make the rights unpredictable. One of the reasons is historical injustices and perceptions of unfairness. Where there are contesting claims, the legal title does not therefore guarantee uninterrupted enjoyment.⁵⁴

Therefore this study is anchored on the proposition that issuance of land in such areas is irregular since it is contrary to Constitutional provision relating to privatization of trust land. Land titles were issued to people who were not residents of the land and this made the people in the said areas technical squatters in the land they owned.⁵⁵ The comprehensive link between the rights of squatters and the concept of sanctity of title is made in the second chapter of this thesis.

1.9 Literature Review

The land problem in Kenya has evoked a lot of comments by academics in their literature. The subject relates to the present squatter land problem, the literature to be reviewed essentially relate to the work that addresses the historical, political and legal events that have failed to address the problem. Contemporary literature includes articles, journals, reports, books and an internet web site relevant to the subject. The review has been divided into three themes:

⁵⁴ P. Kameri-Mbote and M. Akech, "Ownership and Regulation of Land Rights in Kenya: Balancing Entitlements with Public Trust" in *University of Nairobi Law Journal* (Vol 4 Issue 1 2008) p.9.

⁵⁵ Kenya Land Alliance, *The National Land Policy in Kenya: Addressing Historical Injustices Issues Paper No 2 of 2004*.

1.9.1 The Squatter Land Problem and Categorization of Land.

The squatter land problem has its roots in political, economic and legal issues which are traced to the pre-independence period. Land is at the root of the country's uncertain future due to skewed legal, institutional, policy and cultural ideology on land and land tenure system since Kenya attained independence.⁵⁶This problem has been documented by various writers. Tabitha Kanogo⁵⁷ has explored the genesis of the squatter land problem, the escalation and post-independence bargains and the plight of squatters. Resettlement has been done since independence but not supported by the Constitution or legislation. The colonial government and successive governments have created settlement schemes on government land or on purchased land.

Patricia Kameri-Mbote⁵⁸ has addressed the issue of development of private property to land in the context of the historical and legal perspectives. The thrust of her argument is that land tenure reform resulted in the removal of land from the purview of the community to that of the state and the individual. The process of land expropriation began in the colonial period where the acquisition of land rights for the settlers was mainly done through political processes that were followed by legal instruments giving the political acts the force of law.

⁵⁶ P. Kameri-Mbote and K. Kindiki, "Trouble in Eden: How and Why Unresolved Land Issues Landed 'Peace-full Kenya' in Trouble in 2008" in *Forum for Developmental Studies* No 2 of 2008 (International Environmental Law Research Centre) <ielrc.org/content/a0805.pdf> accessed on 29th April 2013. p.169.

⁵⁷ Kanogo 1987, *Supra* note 20.

⁵⁸ P. Kameri-Mbote, *Property Rights and Biodiversity Management in Kenya* (African Centre for Technology Studies Press, Nairobi 2002).

She argues that the tenure reforms introduced in Kenya was not informed by the needs of agricultural production or ecosystem but the need for the colonial authority to entrench themselves firmly and maintain land rights without giving out any to the Kenyan natives. The independence government maintained a commitment to the concept of private property rights to land and the individual as had been perpetuated by the colonial government. Though she addresses the issue of community resource management in relation to colonial and post-colonial laws and policies on land, the chapter illustrates the foundation of the squatter land problem in Kenya. It is from this point that my study illustrates that despite reforms in the land laws, this problem has not been addressed.

With the mention of the issue of squatter land problem, what is likely to come to mind first is the problem at the Coast Province. John M Mwaruvie⁵⁹ has written on the subject of the intricate nature of the land question at the Coast. He discusses the genesis of the land question which began before the British invasion of Kenya. He observes that the international agreements did not recognize the rights of the Africans and have made the problem persist for the last fifty years after independence. He has proposed far reaching measures to address the problem but has not mentioned how it is to be done. My study therefore comes in to complement the paper by proposing a review of the current land laws to address the problem.

⁵⁹ J.M. Mwaruvie, "The Ten Miles Coastal Strip: An Examination of the Intricate Nature of the Land Question at the Coast" in *International Journal of Humanities and Social Science* (Vol 1 No 20 December 2011).

The land question and in particular the squatter land problem has been extensively discussed by Dr. Karuti Kanyinga.⁶⁰ He focuses on the land question at the Coastal region. His paper focuses on the origins of the squatter land problem and traces the origins from the colonial land laws and policies that were developed by the colonial government. He asserts that the problem originated from the Swynnerton Plan of 1954 which was aimed at reforming tenure systems in the Native Reserves and replacing it with a system that entrenched private property rights. He also asserts that individualization of title was a means of containing the widespread *Mau Mau* peasant resistance which according to them would ensure that individualization of title would weaken the ideological base of the movement.

The paper shows how the reforms made by the colonial government was a failure and that the successive governments simply continued with the same policies and laws even though the government recognized that landlessness as a key obstacle to social and economic development. This led to the increase of the squatter land problem as the government neglected the inequalities in land ownership. The fallacies of equality and inequality have been elaborated by Prof Patricia Kameri Mbote.⁶¹ She contends that even though there is a perception that the entire community owns land, access may only be limited to the person who has control over land.

Prof. Kivutha Kibwana⁶² has asserted that the problem of squatters has historical roots and with regards to the Ten-Miles Coastal Strip, the Land Titles Ordinance enabled Arabs and Islamised

⁶⁰ K. Kanyinga, *Redistribution From Above: The Politics of Land Rights and Squatting in Coastal Kenya*. Research Report No 115, Nordiska Afrikainstitutet Uppsala 2000 <www.apsanet.org> accessed on 15th July 2013.

⁶¹ Kameri-Mbote 2012, *supra* note 7.

⁶² Kibwana 2000, *supra* note 42.

Africans to register the land in their names despite land being owned by others. The effect of all this has been explained by Tabitha Kanogo⁶³ who asserts that despite resettlement programmes by the government, the problems of landholding and inadequate land holdings still linger on.

Linking the above studies by the scholars, it is evident that the idea of equality as expressed in the Constitution is fallacious and the problem of individualization of title still contribute to the squatter land problem. Even though the Constitution provides for equitable access to land, the provision remains a platitude. The categorization of land into private, public and community land also poses a problem. In that regard, as studies shown by the scholars, private land was registered in disregard of the aboriginal inhabitants hence the provision for categorization of land under the Constitution is contributes to exclusion of squatters in law.

As shown in the National Land Policy⁶⁴ designation of land in Kenya is public land, community land and private land. The document enumerates several developments that have brought the land question into sharp focus.⁶⁵ Among the impacts identified as contemporary manifestations in the land question are landlessness and the squatter phenomenon. This study shows that the classification and categorization that informed the drafting of the Constitution is inadequate in resolving the squatter land problem in Kenya. The quoted studies address squatter land issues as part of historical land injustices and the policy framework proposes reform which will be imperative in this research.

⁶³ Kanogo 1987, *supra* note 20.

⁶⁴ National Land Policy 2009, *supra* note 28.

⁶⁵ *Ibid*, p.8.

The Report the Commission of Inquiry into the Land Law System of Kenya on Principles of a National Land Policy Framework, Constitutional Position on Land and New Institutional Framework for Land Administration⁶⁶ provided for classification of land by tenure as public, private and land held by the Commons. Regarding land held by the Commons, the Commission proposed that such land should be held in terms of a legal regime based on customary law principles.⁶⁷

It also recommended that the principles should provide equitable land rights security for all holders and use without discrimination. The study of the Report is important since it will seek to draw the missing nexus in the provisions of the Constitution and the relevant land laws in application of the same to deal with the problem at hand. The report is silent as to how specifically the squatter land problem could be resolved in view of such classification or categorization of land.

Prof. Okoth Ogendo⁶⁸ writes that the search for a tenure system enables a particular society to answer the question as to who holds what land and what interest in what land. He explores the process of European settlement in Kenya and how it shaped agrarian law. This work is an illustration of how land problem escalated during and after colonialism. It however does not address the specific issue of the squatter land problem and how the law can resolve it, which is the subject of consideration in this dissertation.

⁶⁶ The Njonjo Commission Report 2002, *supra* note 23.

⁶⁷ *Ibid.*

⁶⁸ H.W.O. Okoth Ogendo, *Tenants of the Crown: Evolution of Agrarian Law and Institutions in Kenya* (ACTS Press, Nairobi 1991).

1.9.2 The Problem of Indefeasibility of Title

Tom Ojienda⁶⁹ has related the problem of landlessness to the process of adjudication that fails to secure the rights of the rightful claimants to land. According to him, the Kenyan property law then did not recognize customary tenure systems and the process of adjudication aims at promoting individual ownership only. He proposed a land law system that recognizes customary tenure as a viable form of land ownership.

He also proposes that that reform would secure the rights of all those who are entitled to land albeit by reference to customary law. The paper was written before the enactment of a new constitution and land legislation. This study will therefore compliment the study in relation to the squatter land problem. The reforms envisaged in the article are inadequate in resolving the problem of landlessness which is addressed in this paper.

In his book *Conveyancing Principles and Practice*,⁷⁰ he addresses the issue of general practice in land law and conveyancing. In the last chapter of the book, he addresses the major developments and reforms concerning land in Kenya. To that extent, this study will rely on his work. The chapter does not recognize the squatter land problem in Kenya as a problem that should be subject of reform of land laws. This study will seek to fill in the gaps left by the writer.

⁶⁹ T. Ojienda, "Customary Land Rights, Land Adjudication and Regime of Beach Plots in Law Society of Kenya," in *Land Law Reform in Kenya Volume 2* (Law Society of Kenya, Nairobi 2003).

⁷⁰ Ojienda 2009, *supra* note 34.

P. L Onalo⁷¹ has mainly addressed the issues of land law and conveyancing. He underscores the fact that the Government of Kenya has made tremendous strides in the individualisation of tenure in the country particularly in the rural areas. He appraises the insufficient effort tenure policies that were inherited at independence in relation to fair distribution of land taking into account communal poverty. This study seeks to provide a nexus between the problem and the limitation in the existing land laws in addressing it.

The recently prepared report on irregular appropriation of public land and the squatter problem in Athi River District⁷² proposed resettlement of squatters in the on-going slum upgrading project by the Ministry of Housing. The report also identifies illegal and irregular allocation of land within different schemes in the area. Since this will be a useful text in this study, it is imperative to point out that it has not identified the legal framework as a panacea to resolving the squatter land problem. This study will therefore seek to provide the missing nexus since the report was prepared under a new constitutional dispensation.

1.9.3 Best Practice in Squatter Problem Resolution

Clara Polsinelli⁷³ addresses the land question in terms of right to land and extends to right to house and adequate standards of living. She analyses the concept of land dispossessions within the African context during and after colonization. Though the article concentrates more on the land issues in terms of international law and human rights, it will assist this study in terms of best

⁷¹ P. Onalo, *Land Law and Conveyancing in Kenya* (Heinemann Kenya Limited, Nairobi 1986).

⁷² Government of Kenya, *Report of the Task Force on Irregular Appropriation of Public Land and the Squatter Problem in Athi River District* (Government Printer, Nairobi 2011).

⁷³ Polsinelli 2007, *supra* note 4.

practice in dealing with the squatter land problem. This study will seek to compliment the article by demonstrating how the Constitution could be used to resolve the problem. It will also seek to compliment with regards to the concept of indefeasible title and that is silent in the article.

Paul Syagga⁷⁴ has recommended in his paper that the primary objective of any reform in land is to restore the entitlement of people to land as well as delivery of efficient outcomes in the ownership and use of land. He proposes that land restitution including land repossession should be clearly defined in law. According to him, the problem could be resolved through a Land Claims Court like the one in South Africa and through a National Land Commission. The resolution of the squatter problem through redistribution and resettlement programmes should be guided by legal framework that is both fair and transparent.

The National Land Commissions as currently established is silent on these issues. My study seeks to compliment the paper in terms of the new development in the formation of a National Land Commission and its inefficiency in dealing with the squatter land problem. The paper does not also envision other problems that hamper resolution of the problem for example, indefeasible title.

1.10 Focus and Scope of the Study

This study concentrates on squatters and their plight in relation to laws and institutional framework. This is within the context of the Constitution of Kenya 2010 and the new land legislation. The reason why they are selected is the general expectation that Kenya would realize land reforms through them and in particular grapple with the squatter issue. The Constitution as

⁷⁴ Syagga 2010, *supra* note 13.

the fundamental law of the state has been selected because on one hand, it has expressly provided for the right to property and secondly has established how land is classified and thirdly has established the National Land Commission as one of the Constitutional Commissions.

The study will address squatters who live on private lands. Private land in this context is land that has been registered under freehold and leasehold tenure. The study focuses on squatters who reside in rural areas who are traditional squatters who continue to live and reside on large scale farms that have been individually owned. The categorization of squatters has been given by Prof. Kivutha Kibwana.⁷⁵ The scope of the term as will be seen in the subsequent chapter is wide and therefore this study will narrow down to those living in private lands in the rural areas and to some extent the squatters along the ten-miles coastal strip. These are squatters who have lived as such and continue to live in large farms that have already been individualized through registration of titles.

1.11 Methodology

1. This study shall mainly be library based with documented facts on land being used. The study will also rely on internet sources as secondary sources. The reason why this study takes this approach is the fact that there are many books, articles, journals and other literature that pertains to the land question.

2. Field Work. Interviews will be done limited to officials working at the Ministry of Lands, Housing and Urban Development. It will mainly focus on settlement officers and land registrars.

⁷⁵ See Kibwana 2000, *supra* note 42, pp.116-117.

The reason for the selection of the two groups is that firstly the settlement officers have the clear understanding of the squatter issues as they are on the ground. Secondly the land registrars have been selected because most of them are advocates and will assist in giving a more analytical view in this study.

1.12 Chapter Breakdown

This study will be divided into five distinct chapters.

Chapter 1

It will provide the context in which the study is set. It provides the basis and the structure of the study by outlining the theoretical and conceptual framework, research questions, hypothesis, literature review, justification and objectives of the study.

Chapter 2

This chapter seeks to address the issues of squatters and how the land problem has escalated over time and the relevant developments that have come up to address the problem. It will give the context and the link between the right of squatters and that of registered owners. It will analyse the tenure systems that have existed and culminate with the classification of land in the current Constitution. It seeks to lay the foundation to tackle the problem statement by showing the rigidity in the provisions that eliminate squatters.

Chapter 3

This chapter constitutes a comprehensive study of the concept of indefeasible title, its history and perpetuation in the new land laws. It will explore its effects in escalating other than mitigating the squatter land problem. The chapter also analyses the National Land Commission and the

powers granted to it by the Constitution and explore the viability in dealing with the problem. It addresses the role of other institutions such as the Ministry of Lands Housing and Urban Development which deals with policy implementation of land issues in Kenya as well as the judiciary and the growth of jurisprudence that have escalated the squatter land problem in Kenya.

Chapter 4

This chapter explores best practice in the context of resolution to the squatter land problem. South Africa and Australia will be considered. The reason for selecting the two jurisdictions is to show the practice in dealing with the problem at hand through their constitutions and legislation, a practice that can be adopted in Kenya.

Chapter 5

It will contain a synopsis of the findings and the conclusions drawn from the study. The chapter will also make recommendations as to how the Constitution and legislation can be reformed to address the squatter land problem.

CHAPTER TWO

THE SQUATTER LAND PROBLEM IN KENYA. CONTEXT AND RELEVANT DEVELOPMENTS

2.0 Introduction.

This chapter shall seek to address the issue of squatters and seek to define who they are and how the land problem has escalated over time. The chapter addresses the context of the squatter problem and seeks to relate the rights of such squatters in view of the doctrine of sanctity of title as provided within legislation. In this chapter, the efforts made by the government to resettle squatters will be highlighted. In that regard therefore, this chapter will dwell on the different tenure systems which shall culminate in the current classification and categorization of land under the Constitution to show how it has failed to resolve the existing problem of squatters. This is because it excludes squatters within legal discourse. It would be prudent to define who squatters are before we delve into the issues of resolving their land problems.

2.1. Definition of Squatters.

Squatters have been defined as people who settle on land or occupy property without title, right or payment of rent. They can also be settled under regulation by the government in order to acquire title.¹ The Oxford Dictionaries define squatters as people who occupy large tracts of land as tenants of the Crown.² The National Land Policy has defined the term as:

...a person who occupies land that legally belongs to another person or institution without the owner's consent.³

¹ See generally *dictionary.reference.com/browse/squatter* accessed on 18th May 2013.

² <*oxforddictionaries.com/definition/english/squatter*> accessed on 18th May 2013.

³ Republic of Kenya *Sessional Paper no 3 of 2009 on National Land Policy* (Government Printer, Nairobi 2009) p. 68.

Squatting has also been related to spontaneous settlement.⁴ It has been used interchangeably to describe situations where inhabitants assert land rights or occupy land that is not registered in their names, land that belong to the government or land that is legally owned by other people. They are found in both rural and urban settings.⁵ Squatters are found on all the categories of land. As such the absence of planning and security of tenure is the essence of squatter settlements. Development and planning are affected by the squatter land problem and informal settlements.⁶

The term has been used in various perspectives. Firstly the squatter land problem as traced from the colonial period when the natives were moved into reserves. Land was thereafter legally owned by a few people creating a large number of people who have been referred to as the landless squatters.⁷ This class of people have been unable to register the land they live on. Squatting has also been caused by population growth that outstrips the available land resource.⁸ An example is the squatters who inhabit Athi River District who are generally casual labourers who work in government institutions and private industries though this category of squatters is out of the scope of this study.⁹

⁴ K. Kibwana, "Spontaneous Settlement and Environmental Management in Kenya" in S. Wanjala (ed) *Essays on Land Law: The Reform Debate in Kenya*, (Faculty of Law, University of Nairobi, Nairobi 2000) pp.105-134.

⁵ *Ibid*, p.110.

⁶ The National Land Policy 2009, *supra* note 3, p.50.

⁷ See the Government of Kenya, *Report of the Task Force on Irregular Appropriation of Public Land and the Squatter Problem in Athi River District* (Government Printer, Nairobi 2011) p.13.

⁸ Kibwana 2000, *supra* note 4, p.117.

⁹ See the Report of the Task Force on Irregular Appropriation of Public Land and the Squatter Problem in Athi River District 2011 *supra* note 7, p.13.

Squatting is not a phenomenon that should be encouraged. This is because there are people who voluntarily squat in a place and especially in urban slum settlements. There are also illegal squatters who encroach and inhabit gazetted forests and other areas that the government has not offered for settlement.¹⁰ An example being the South Western Mau Forest Reserve that the government has already set up a secretariat to help reclaim it. This thesis concentrates on people who were involuntarily made squatters by the laws and policies that have existed since the onset of colonial rule in Kenya.

2.1.2 Context of the Squatter Problem

The previous sections underscored the squatter concept and gave categories of squatters. This study addresses the squatter land problem within of context of squatters who reside on private land in the rural areas. It focuses on squatters who reside in rural areas who are traditional squatters who continue to live and reside on large scale farms that have been individually owned. These are ancestral lands that have been adjudicated and titles issued in the names of individuals at the expense of the original inhabitants of the land. For purposes of this study, the distribution of the squatter problem is largely the coastal region of Kenya. Specifically, Taita Taveta, Kilifi and Kwale Districts are examples where such squatters are found.

The problem is the same within the ten miles coastal strip. The colonial government introduced a system that was governed by the Land Titles Ordinance that later became the Land Titles Act Cap 282 Laws of Kenya. This law governed lands along the Ten Miles Coastal Strip. Coastal

¹⁰ R. Kibugi, *Governing Land Use in Kenya: From Sectoral Fragmentation to Sustainable Integration of Law and Policy*. Thesis submitted to the Faculty of Graduate and Postdoctoral Studies in partial fulfillment for the Doctors of Laws (LL.D) degree, University of Ottawa (2011). Available at <http://www.ruor.ottawa.ca> accessed on 27th June 2013. pp.262-263.

lands were also governed by the now repealed Registration Act and Government Land Acts. Land was registered in the names of people who were mostly of Arab origin and therefore many people became squatters in their ancestral land. In that context therefore this study will show that the laws were limiting and the enactment of the Registered Land Act in 1963 did not resolve the squatter problem.

This position has been rightly indicated by Karuti Kanyinga as follows who alludes to the fact that there was a pre independence agreement between the British government, the Kenyatta administration and the Sultan regarding the control of land in the Coast. The Kenyatta administration conceded to the Sultan's control of private land rights and also committed to adjudicate the land that had not been adjudicated. This was to further negate the rights of the Mijikenda people and the slaves who were the original or indigenous inhabitants who ended up being squatters and tenants of Swahili and Arab land owners.¹¹

The effects of the agreements have been put rightly by the author as follows:

...the agreement, thus, did not resolve the squatter problem but, instead, intensified it by giving full recognition to the freehold titles acquired through the 1908 Land Titles Ordinance. The evolving constitution also protected property and existing land rights irrespective of how they had been acquired and in spite of protest from radical politicians. Both the agreement and independence, thus, concluded the process of creating the squatter phenomenon: they transformed the Mijikenda into squatters or tenants of Arab and Swahili landowners.

Since the law should at the very least address the land problem, this chapter and the entire study shall seek to show that the squatter land problem still persists and the laws have been limited in

¹¹ K. Kanyinga, *Redistribution From Above: The Politics of Land Rights and Squatting in Coastal Kenya*. Research Report No 115, NordiskaAfrikainstitutet Uppsala 2000 <www.apsanet.org> accessed on 15th July 2013. p 51.

addressing that problem. There is need to reconcile the rights of squatters and the doctrine of sanctity of title as entrenched in the law.

2.1.3 Sanctity of Title in Relation to Squatters Rights

This study has categorized squatters and has crystallized on involuntary squatters who were made as such by laws and policies put in place and the context has been previously canvassed. This study opines that such people have a right to restitution to what was originally theirs. Land reform through the law has been an agenda in most countries in the East and Southern Africa.¹² From the context canvassed in the previous section, the Coastal squatters have all along felt that their rights have not been addressed. The people who are of Arab origin possess freehold titles to land that would have been meant for the aboriginal inhabitants.¹³

The problem cannot be resolved by ignoring it but by acknowledging that it exists. There are large parcels that have been kept for speculation purposes and the issue of absentee landlords. This does not preclude the fact that there are individuals who are registered proprietors in the parcels of land. Even though they have indefeasible titles, the concept as canvassed within the conceptual framework in the first chapter of this study is not absolute. The remedy proposed is first and foremost identifying all the land that is owned by absentee landlords. The government should distribute it to deserving squatters who have always worked there and were aboriginal inhabitants.¹⁴

¹² P. McAuslan, *Making Law Work. Restructuring Land Relations in Africa*. www.researchgate.net, accessed on 12th September 2013.

¹³ J. M. Mwaruvie, "The Ten Miles Coastal Strip: An Examination of the Intricate Nature of the Land Question at the Coast" in *International Journal of Humanities and Social Science* (Vol 1 No 20 December 2011) pp181-182.

¹⁴ *Ibid.*

There is also failure by the government to review some of draconian land agreements that do not serve the interests of Kenyans.¹⁵ McAuslan gives the example of Tanzania where land deprivation was made to inhabitants during what was termed as collectivization. Legislation was enacted to support the process but the Court argued that all Tanzanians have a property right to land held through their right of occupancy and therefore the government enacted laws that repealed the laws that had disposed the people of their land.¹⁶ The process had turned people into squatters in their own country.

The situation could be related to Kenya. There is a registration system in the Land Registration Act.¹⁷ The proposition in this study is that it is limited to address the squatter land problem. This has been canvassed within the third chapter. Best practice has been drawn and recommendations made. However, there is still the issue of what would happen if the problem is resolved and the squatters get back their rights and resell the land. There was a suggestion that the land should be parcelled out in four to eight hectares plots issued to families, co-operatives and analogous bodies on the basis of group ownership rather than individual ownership. This would prevent easy resale of land.¹⁸

¹⁵ *Ibid.*

¹⁶ McAuslan, *supra* note 12, p.528. The Court Case is *AG v Akonaay*, Judgment of the Court of Appeal (unpublished transcript) of 21st December 1994.

¹⁷ Act No 6 of 2012.

¹⁸ Government of Kenya, *Report of the Select Committee on the Issue of Land Ownership Along the Ten Mile Coastal Strip of Kenya* (Government Printer, Nairobi 1978) p.18.

2.1.3 The Origin of the Squatter Land Problem in Kenya.

The problem can be traced from the colonial tenure system that made Africans tenants at the will of the crown. That entailed that they only had user rights and not legal rights of the land that they customarily owned.¹⁹ This entailed that Africans could not exercise any right to sale, lease, and enter into any treaty or arrangement for a title they never had. Along the ten mile coastal strip, methods to legitimize compulsory acquisition of land were devised causing landlessness among the inhabitants at the Coast.²⁰ The colonial handling of land therefore was the source of contestation over land and the squatter land problem that exist to date.

It is important to underscore the motive of colonialism in Kenya and Africa at large. The motive for colonialism was the increased demand for raw materials for industrialization in Europe. The colonial government therefore enacted laws that facilitated these agenda and especially making it easy to extract raw materials for industrial development of Europe.²¹ Land as the most important natural resource was therefore at the heart of their activities and therefore enacted laws that made it easy to acquire and maintain it with least resistance.

In that regard the 1902 Crown Land Ordinance was enacted with the aim of enabling settlers to acquire freehold titles and long term leases. Okoth Ogendo has stated it as follows:

¹⁹ *Ibid*, p.12. See also H.W.O Okoth Ogendo *Tenants of the Crown: Evolution of Agrarian Law and Institutions in Kenya* (ACTS Press, Nairobi 1991).

²⁰ T. Ojienda and M. Okoth, "Land and the Environment," in P. L. O. Lumumba *et al* (eds) *The Constitution of Kenya: Contemporary Readings* (LawAfrica Publishing (K) Limited, Nairobi Kampala Dar-es-Salaam 2011) p.159.

²¹ P. Kamari-Mbote and P. Cullet, "Law, Colonialism and Environmental Management in Africa," in *Environmental Management in Africa* (Volume 6 Issue 1 1997) p.23.

...by asserting that the Crown and not the local people had original title to some land, however vaguely defined, protectorate authorities were in a position to solve a more complex and explosive problem than the acquisition of land for public purposes, that is, the tenure aspect of the strategy for exploitation of the country's resources. Having decided that the new acquisition must be made profitable, the immediate issue was how to discover agents that could be trusted with the task.²²

The Ordinance facilitated occupation by European settlers in lands that belonged to and actually inhabited by natives. The natives were grouped into reserves that had been removed from the European and settlers.²³ By 1934, the European Settlers who only comprised of one per-cent of the population controlled all the arable land and the natives were alienated from the control of land which they had held customarily for all the years before colonization.²⁴

Ownership of land in the pre- colonial Kenya was communal and customs generally governed ownership and rights to use of land was not considered absolute. The introduction of private rights to land broke the family and communal ties that existed cementing the aspect of legal title to individuals rather than the community.²⁵ This meant that Africans had been dispossessed their ancestral lands and this situation was to last for a long time as this paper will show that it has not been addressed to date.

The settlers relied on natives for labour thereby developing the settler economy by underdevelopment of the African peasant economy. With time the native reserves became

²² H.W.O. Okoth Ogendo, *Tenants of the Crown: Evolution of Agrarian Law and Institutions in Kenya* (ACTS Press, Nairobi 1991) p.12.

²³ Ojienda and Okoth 2011, *supra* note 20.

²⁴ See the Report of the Task Force on Irregular Appropriation of Public Land and the Squatter Problem in Athi River District 2011 *supra* note 7, p.12.

²⁵ P. Kameri-Mbote, "Land Tenure and Sustainable Environmental Management in Kenya" in C. O.Okidi et al, *Environmental Governance in Kenya: Implementing the Framework Law* (East African Education Publishers, Nairobi Kampala Dar-es-Salaam 2008) pp.264-265.

overcrowded and insecurity thrived.²⁶ Tenure arrangements and African agriculture within the reserves were affected and this was manifested in massive landlessness particularly in the areas of Central and Western Kenya which were within the white highlands. The same problem was also prevalent in the Coast region. The other effects were stagnation in peasant agricultural production since land was limited and population pressure deteriorated land because of soil erosion, overstocking and fragmentation into smaller sizes.²⁷

The squatter phenomenon was created as a result of difficulties in securing labour power for the Africans and the problem of Africans gaining access to arable and grazing land. By the end of the First World War in 1918 therefore, the squatter system had become established in the social and economic aspects of the African livelihoods in the European farms.²⁸ The phenomenon became the root cause of the *Mau Mau* uprising in 1952 because Africans wanted to get back their land. Tabitha Kanogo has stated as follows:

...during the second half of the 1940s, settlers waged an all-out campaign against the squatter peasant option which was seen to undermine capitalist farming. The settlers continued to clamp down on the squatters and to reduce their stock and cultivation and this, in turn fuelled squatter political mobilisation and violence. Political consciousness, bolstered by intensive repression and suffering in both the rural White Highlands and urban Kenya created a taut situation. *Mau Mau* was largely a response of the landless in the Kenya Reserves and the disinherited squatters in the White Highlands.²⁹

²⁶ T.O.A Mweseli, *The Centrality of Land in Kenya: Historical Background and Legal Perspective* in S Wanjala (ed) *Essays on Land Law: The Reform Debate in Kenya*, (Faculty of Law, University of Nairobi, Nairobi 2000) p.15.

²⁷ *Ibid.*

²⁸ T. Kanogo, *Squatters and the Roots of Mau Mau 1905-1963* (Heinemann Kenya Limited, Nairobi 1987) p.8.

²⁹ *Ibid*, p.136.

The uprising culminated into Constitutional amendments that culminated into the attainment of independence. The aims and the objectives of the movement all along were land and freedom.³⁰

2.2 Relevant Land Laws and Other Developments relating to Squatter Land Problem

This part will review land laws and some modern developments that relate to land and affect the squatter land problem in Kenya. Over time there have been both legal and administrative changes that have taken place. Legislation relating to land have been enacted and changed, the 1969 Constitution was repealed and the Constitution of Kenya 2010 promulgated. The Constitution has a Chapter on Land and Environment.³¹ There have also been a number of commissions of inquiries, task forces and committees that have been instrumental in political, social and economic development of Kenya. The land question has not been left out in these initiatives.³²

The 1902 Crown Land Ordinance was enacted in order to facilitate for sale of land and to enable settlers acquire freehold titles. The 1908 Crown Land Ordinance of 1908 amended the 1902 Ordinance to empower the Governor to reserve required for use or support of natives from disposal.³³ The 1915 Crown Land Ordinance redefined Crown lands to include lands that were occupied by natives.³⁴ The Act prohibited alienation of land by Africans even if they had

³⁰ A comprehensive analysis of the *Mau Mau* struggle, see M. Wa Kinyatti, *History of Resistance in Kenya 1884-2002* (Mau Mau Research Centre, Nairobi 2008).

³¹ Chapter 5 which runs from Article 60-72.

³² T. Ojienda, *Conveyancing Principles and Practice* (Law Africa, Nairobi 2008) p.265.

³³ See Ojienda and Okoth 2011, *supra* note 20, pp.159-160.

³⁴ Ojienda 2008, *supra* note 32, p.15.

occupied the said lands or they had been allocated for their use.³⁵ In 1920 Kenya was declared a colony and all natives were rendered tenants at the will of the Crown.³⁶ This entailed that the colonial government had become the sole allocator of land rights. The position remained the same until the attainment of independence.

At the point of independence, it was widely expected that the transfer of power would yield fundamental changes in land management. This did not take place but instead there was continuity of the policies that were established by the colonial authorities. The introduction of the Swynnerton Plan and agriculture legislation in the 1950s was a scheme of incorporating African elite into the principles of colonial agriculture with the aim of protecting their own interests.³⁷ The independent Bill of Rights was negotiated on the basis that the power transfer arrangement would therefore not dismantle or destabilize the settler economy.³⁸ The right of

³⁵ *Ibid.*

³⁶ For comprehensive analysis of the happenings of that period, see H.W.O Okoth Ogendo's *Tenants of the Crown Evolution of Agrarian Law and Institutions in Kenya* (ACTS Press, Nairobi 1991). The book provides a detailed account of the origin of agrarian law in Kenya. It also explores the institutions that impacted on property systems during the pre-colonial, colonial and post-colonial periods.

³⁷ Government of Kenya; *Report of the Commission of Inquiry into the Land Law System of Kenya on Principles of a National Land Policy Framework, Constitutional Position on Land and New Institutional Framework for Land Administration*. (Government Printer, Nairobi 2002) pp. 30-31.

³⁸ That could be seen through the drafting of the 1969 Constitution. Section 75 provided that "No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied.

- (a) The taking of possession or acquisition is necessary for the interest of defence, public safety, public order, public morality, public health, town and council planning or development or utilization of property to promote public benefit and
- (b) The necessity therefore is such as to afford reasonable justification for the causing of hardship that may result to any person having an interest in or right over property and
- (c) Provision is made by a law applicable to that taking of possession or acquisition for the prompt payment and full compensation.

direct access to the High Court was expressly provided for any infringement of the right to property.³⁹

The measures taken by the new administration after independence were inadequate in resolving the issue of landlessness. The issue of landlessness was a thorny one for the administration and therefore the only measures taken to deal with it was appeasing vocal Africans who demanded return of land that had been alienated. In that regard, no clear measures were taken to address the squatter land problem at independence.⁴⁰

Land continued to be governed under policies, statutes and laws and structures that were colonial in nature. An analysis of their failure to resolve the squatter land problem will be addressed in the subsequent chapter. This part though will review the recommendations of the Commission of Inquiry into the Land Law System in Kenya commonly referred to as the Njonjo Commission, the National Land Policy of 2009, the constitution making process and the provisions of the Constitution of Kenya 2010.

2.2.1 Commission of Inquiry into the Land Law System in Kenya a.k.a the Njonjo Commission

This was the Commission of Inquiry into the Land Law System on Principles of a National Land Policy Framework, Constitutional Position on Land and New Institutional Framework for Land Administration. It is popularly known as the Njonjo Commission since it was chaired by Charles

³⁹ Section 75 (2) of the Kenyan 1969 Constitution.

⁴⁰ National Land Policy 2009, *supra* note 3, p.7.

Njonjo. The mandate of the Commission was to undertake a broad review of the land issues in Kenya and to come up with a policy framework that would reform land tenure and land use system.⁴¹

The Commission recommended the formulation of a land policy and gave specific objectives for such a policy. One of the policy principles would be to ensure that land is held, used and managed efficiently and sustainably. Secondly, a land system that is economically efficient, socially equitable, environmentally sustainable and operationally sustainable should be put in place.⁴²

Some of the specific objectives of the land policy given included equitable distribution and access to land and other resources. It also recommended the putting into place of efficient, transparent and participatory land management and administration systems.⁴³ The Commission also recommended that land rights security regardless of tenure should be guaranteed. Further to that, it recommended that consideration should be given to a general enfranchisement of all occupiers on land registered under the Land Titles Act Cap 282 Laws of Kenya (now repealed) in the former Ten-Mile Coastal Strip.⁴⁴

Land delivery functions were to be centralised in a proposed National Land Authority. In that regard, the Authority would be charged with taking an inventory of genuine squatters and the

⁴¹ The mandate of the Commission is found in Gazette Notices number 6593 and 6594 of November 1999.

⁴² The Njonjo Commission Report 2002, *supra* note 37, p.37.

⁴³ *Ibid.*

⁴⁴ *Ibid*, p.57.

landless to ensure that they are all settled. The Commission made a bold recommendation that there should be an amendment to the Constitution and relevant land laws to ensure that land belonging to absentee landlords is taken over and the same given to squatters.⁴⁵ The Commission noted that the squatter land problem at the Coast was by default because the residents did not make claim under the Land Titles Act⁴⁶ and therefore land was deemed Government land.⁴⁷

It was recommended that the government should enact legislation to divest itself of ownership of land under Section 17 of the LTA. The alternative given would have been to issue freehold titles without having to go through the process of adjudication of claims.⁴⁸ These were bold recommendations that were aimed at resolving the squatter land problem especially at the Coastal Province of Kenya.

2.2.2 The National Land Policy

The National Land Policy recognizes that landlessness and the squatter phenomenon is one of the contemporary manifestation and impact in the land question in Kenya. Gross disparities in ownership of land, multiplicity of legal regimes and failure of the law to establish an efficient and equitable framework for land ownership, management and management are causes for

⁴⁵ *Ibid*, pp. 71-72.

⁴⁶ Section 17 (1) of the Act provided that “All land situated in any district, area or place to which this Act has been applied concerning which no claim or claims for a certificate of ownership have been made in the manner and in the period provided, or if, such claim or claims having been made, none have been allowed, shall at the expiration of that period be deemed to be Government land, and the land and all things attached to it or permanently fastened to anything attached to it shall be subject only to a right or interest in any person other than the Government as may be evidenced by a certificate of title granted under this Act or which may thereafter be granted by or on behalf of the Government.” The Act has been repealed by the Land Registration Act of 2012.

⁴⁷ The Njonjo Commission Report 2002, *supra* note 37, p.51.

⁴⁸ *Ibid*, pp.54-55.

among other issues, mass disinheritance of communities and individuals from their land. The aim of the policy was to guide the country towards efficient, sustainable and equitable use of land for prosperity and posterity. The Sessional paper was formulated to address critical issues of land administration including restitution of historical injustices.⁴⁹

The policy followed the recommendations done by the Commission of Inquiry into the Land Law System in Kenya in 2004. One of the principles that guide the Policy is equitable access of land for subsistence, commercial, productivity and settlement of people.⁵⁰ In that regard the Policy was instrumental in trying to provide a solution to the squatter land problem in Kenya. The Policy acknowledged that there was need to undertake land reforms in the country due to failure in the constitutional framework at that time.

The need for reform was mainly due to failure of the 1969 Constitution to establish an efficient, accountable and equitable institutional framework for administration of land, management and ownership. The result of this was among other things disinheritance of communities and individuals in their land and ineffective regulation of private property rights resulting to unplanned settlements.⁵¹ The limitations in the Constitution and legislation resulted to escalation of the squatter land problem as has been acknowledged in the Land Policy.

⁴⁹ The National Land Policy 2009, *supra* note 3, Part IX. The Policy makes provisions for the need of reforms that are supposed to resolve the squatter land problem in Kenya. See also pp. 8, 9 and 12.

⁵⁰ *Ibid*, p.2.

⁵¹ *Ibid*, p.12.

Some of the recommended reforms were that the Constitution should ensure among other things equitable access to land in the interest of social justice, resolution of genuine historical and current land injustices and regulation of the use of all the categories of land for public interest.⁵² The establishment of the National land Commission was also proposed. The Commission is currently in place having been established under the Constitution of Kenya 2010 and the National Land Commission Act of 2012.

On the aspect of regulation of property rights, the Policy recommended for classification of land just like the provisions in the Njonjo Commission report. It provided that:

...the radical title (ultimate ownership) shall be vested in the people of Kenya collectively as a nation, as communities and as individuals. Tenure rights shall be derived from that radical title under specific laws.⁵³

The policy therefore designated all land in Kenya as public land, community land and private land. Since policy precedes legislation, the provisions were codified in the Constitution and the new legislation. The thrust of this paper is that the proposed reforms are limited in resolving the squatter land problem in Kenya. It is imperative to consider the constitution making process and the provisions of the constitution relating to the land question.

2.2.3 The Constitution making Process

The issue of land in Kenya was a major issue in the constitutional review process. There was a feeling that the land question had to be dealt with by the Constitution. As Tom Ojienda writes in his book that was published before the enactment of the Constitution in 2010:

⁵² *Ibid*, p.13.

⁵³ *Ibid*.

...it cannot be gainsaid that the question of land has been a major issue in the constitutional review. The general feeling among the Kenyan populace has been that the current constitution (the 1969 Constitution) inherited from the colonial regime, does not recognize the uniqueness of land and lumps it together with other forms of property. Accordingly, there have been calls to define issues of land in the Constitution.⁵⁴

Indeed the Proposed New Constitution of Kenya of 2005⁵⁵ made provisions on land and property in Chapter 5 and environment and natural resources in Chapter 8. Majority of Kenyans voted against it in the referendum and therefore was not adopted. The Draft provided that Parliament would enact legislation to settle the landless including squatters as well as rehabilitation of spontaneous settlement in urban and rural areas.⁵⁶ It had mandated Parliament to establish a fund to enable citizens gain access to land on an equitable basis. The two provisions were left out in the Constitution of Kenya 2010.

The provisions in the Draft were specific to resolution of the squatter land problem in Kenya. However, most of the other provisions relating to land were retained as they were except that land and environment were compressed in one chapter. It is imperative to review the chapter on land and establish the extent to which it addresses the squatter land problem in Kenya.

2.2.4 The Constitution and Land Classification/ Categorization

The provisions on land and environment are found in Articles 60 to 68. The principles of land policy have been outlined and it is provided that land shall be held in a manner that is equitable, efficient, productive and sustainable and in accordance with the principles of equitable access

⁵⁴ Ojienda 2008, *supra* note 32, p.273.

⁵⁵ Published under Kenya Gazette Supplement No. 63 of 22nd August 2005.

⁵⁶ Article 86 (1) (h) of the Proposed New Constitution of Kenya of 2005.

and security of land rights among others.⁵⁷ Land has been classified as private, public and community land.⁵⁸

Tenure regimes have existed since the independence Constitution. In 1969 Constitution, land was designated as government land, trust land and private land. Land tenure has been defined as the conditions that land and land rights are acquired, retained, used, disposed of or transmitted. According to Kivutha Kibwana, land tenure refers to the physical and proprietary relationship between individuals or groups to land rights.⁵⁹ Land administration by the colonial and post-colonial regimes undermined the traditional management systems. The result was uncertainty in access, control of land and land based resources.⁶⁰

With creation of the tenure system, the control of government land was vested in the President. The powers were exercised through the Commissioner of Lands. The president had exclusive powers to dispose of any rights in unalienated government land.⁶¹ This kind of tenure known as public tenure has been defined to entail land that has been held by the government as a private owner.⁶² The powers have been misused in many respects resulting in illegal and irregular

⁵⁷ The Constitution of Kenya 2010. See generally Article 60 where other principles of land policy have been enumerated. The most important in this research are what has been enumerated in (a) and (b), that is security in land rights and equitable access to land.

⁵⁸ *Ibid*, Article 61.

⁵⁹ K. Kibwana, "Spontaneous Settlement and Environmental Management in Kenya" in S. Wanjala (ed) *Essays on Land Law: The Reform Debate in Kenya*, (Faculty of Law, University of Nairobi, Nairobi 2000) p.109.

⁶⁰ The National Land Policy 2009, *supra* note 3, p.15. See paragraph 3.3 on Land Tenure Issues.

⁶¹ Section 3 of the Government Land Act Cap 280 Laws of Kenya (repealed).

⁶² B. D. Ogolla and J. Mugabe, "Land Tenure Systems and Natural Resources Management" in C. Juma and J.B. Ojwang (eds) *In Land We Trust: Environment, Private Property and Constitutional Change* (ACTS Press, Nairobi 1996) p.104.

allocation of land. The findings of the Commission on Illegal and Irregular Allocation of Public Land of 2003 cannot be gainsaid.

Private land has been defined as land registered under freehold or leasehold tenure and any other land that is declared as such by an Act of Parliament.⁶³The tenure emphasizes on indefeasibility of title except in cases of fraud where the proprietor is a party.⁶⁴With the alienation of land from natives and registering them in individual proprietors, the Constitution is not keen on the people who were left as squatters. The new Constitutional dispensation has perpetuated the status quo and limiting in addressing the squatter land problem.

The law as it is perpetuates the English proprietary principles that were used to expropriate the African commons.⁶⁵As Okoth Ogendo states:

...British colonial authorities promptly declared their colonies without settled forms of government as having no sovereign to hold title to land. This was followed in rapid succession by a series of laws which completely appropriated the African commons to the imperial power and made them available for allocation to colonial settlers in terms of English proprietary principles.⁶⁶

The new constitutional dispensation would at the very least seek to rectify the problem and acknowledge that there has been a problem but it has not. The subsequent Chapter will delve into legislations that were enacted in 2012 and also show that they have limitations in resolving the squatter land problem in Kenya.

⁶³ Article 64 of the Constitution of Kenya 2010. The Acts of Parliament include Government Land Act Cap 280, Registration of Titles Act Cap 281, Land Titles Act Cap 282 and Registered Land Act Cap 300 Laws of Kenya. They have been repealed by the Land Act of 2012.

⁶⁴ Ojienda and Okoth 2011, *supra* note 20, p.170.

⁶⁵ H W O Okoth Ogendo, "The Tragic African Commons: A Century of Expropriation, Suppression and Subversion" in *Land Reforms and Agrarian Change in Southern Africa* (Programme for Land and Agrarian Studies, School of Government, University of the Western Cape 2002) p.6.

⁶⁶ *Ibid.*

2.3 Conclusion

This chapter has defined squatters and explored the origin of the squatter land problem in Kenya. It has navigated through some relevant developments in the aspects of land. The most important developments are the recommendations of the Commission of Inquiry into the Land Law System in Kenya and the National Land Policy that have been instrumental in shaping the current legal framework on land. It has also reviewed the Draft Constitution of 2005 and highlighted the omission made in the Constitution of Kenya 2010 as far as provisions relating to squatters are concerned. This chapter has shown that the provisions in the Constitution are limited in resolving the squatter land problem in Kenya.

CHAPTER THREE

EFFICACY OF THE LAWS IN ADDRESSING SQUATTER LAND PROBLEM

3.0 Introduction

This chapter reviews the concept of indefeasible title, its history and perpetuation in the new land laws. This will be done by a study of the repealed land laws and the new ones. The chapter will also review the institutional framework and this will include the National Land Commission as well as the Ministry of Lands, Housing and Urban Development. These are the State institutions that deal with land in Kenya. The chapter will explore their viability in dealing with the squatter land problem in Kenya. The previous chapter has indeed proved that the problem exists. This chapter therefore explores the viability of the legislation and institutional framework in dealing with the squatter land problem in Kenya.

As seen in the previous chapters, laws were used to perpetuate dispossessions of land and were a facilitator to landlessness. This chapter therefore explores the issue whether the situation is different since there is a new legal framework on land. The framework includes the Constitution of 2010, the land laws of 2012 both substantial and institutional framework created under them. The system that is present for land registration is limited in addressing the problem.

3.1 Review of Laws

3.1.1 The Registration of Titles Act and Government Land Act (now repealed)

This part will address the concept of titling in Kenya and then explore the concept of indefeasible title. The incursion of the colonial authorities was the result to land registration and this was

done by the laws that were put in place at that particular time.¹ The Crown Land Ordinance of 1915 allowed the Commissioner of Lands to cause subdivision of land within townships and the leases issued were 99 as well as 999 years. The Government Land Ordinance established two registers for registration of land, one in Mombasa and one in Nairobi. The provision of that law was that all leases for more than a year and agreements to lease or sell could be registered.²

The law that operated for a long time after the said Ordinance was the Government Land Act.³

The Registration of Titles Act had its registries in Nairobi and Mombasa. The registries are still there after the enactment of the Land Registration Act of 2012 and still operate under the RTA. There is a delay in devolving the titles to the counties due to failure by Cabinet Secretary in charge of Lands, Housing and Urban Development to issue guidelines for the same as required by the law. There is therefore not anything substantial that has changed, one year since the enactment of the new laws.⁴

However, the Act provided that a certificate of title issued by the registrar was conclusive evidence to be taken by a court of law that the owner was the absolute and indefeasible owner of the land. The title would not be subject to challenge except on ground of fraud or misrepresentation where he was proved to be party.⁵ Under the Act, leases for periods exceeding

¹ S.C. Wanjala, "Problems of Land Registration and Titling in Kenya: Administrative and Political Pitfalls and Their Possible Solutions" in S.C. Wanjala (ed) *Essays on Land Law: The Reform Debate in Kenya*, (Faculty of Law, University of Nairobi, Nairobi 2000) p.86.

² *Ibid*, p.87.

³ Cap 280 Laws of Kenya repealed by the Land Registration Act of 2012.

⁴ Interview with Sarah Chelimo Chief Land Registration Officer, Ministry of Lands Nairobi on 10th July 2013.

⁵ The provisions are found in Section 23 of the Act.

12 months or for less but contains a right to purchase the reversion must be effected by a registered instrument. ⁶The Act covers a very large area of the country though many areas have now been converted to the regime or the repealed Land Registered Act that was enacted in 1963. ⁷

3.1.2 The Registered Land Act

The Registered Land Act was enacted with the aim of bringing all the parcels registered under the previous statutes under it. It was enacted to confer absolute and indefeasible title to the registered land owner. Registration of land under this is first preceded by adjudication, and then consolidation. The registrar was supposed to register the persons in the adjudication register as the owners of the land. ⁸Since there were few districts that had completed the process of adjudication by the time of the enactment of the Act, the country therefore had to do with different registration systems operating concurrently. The Act did not therefore immediately replace all the other registration statutes as it was meant to do.

The rights conferred on registered proprietors were intended to transform the legal status from multiple customary claims to individual customary ownership that would secure credit for purposes of development. That position was upheld by De Soto who states that formal property rights hold the key to poverty reduction by unlocking the property held informally by the poor. According to him, it is better for land to be formalised to the extent of enabling one to acquire

⁶ Sections 40 and 41 of the Act.

⁷ Cap 300 Laws of Kenya (repealed).

⁸ *Ibid*, Section 11.

credit from banks so that if he does not bother to get it those who can, can proceed and invest to boost the economy as a whole.⁹

A contrary view has been held by an African scholar who rightly puts it that formalization of title without contextual understanding of the multiple interests in land could actually be a source of insecurity of title.¹⁰ She alludes to that fact as follows:

...a market in land does exist in the absence of formal title, and informal transactions in land do take place in spite of formal title. This market in land is regulated primarily by informal social structures and only marginally, if at all, by formal official structures that are supposed to regulate land transactions.¹¹

There has also been the issue of confusion and insecurity of tenure with respect to families who entrusted one member to be registered as a proprietor in trust for the rest. The registered proprietor had secured absolute title to the land and this caused confusion and insecurity in many parts especially in the rural areas with respect to customary rights of the family members.¹² The RLA has a key provision that the issuance of title to private individuals vests absolute title upon them.

⁹ H. De Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (Basic Books, New York 2000).

¹⁰ C. N. Musembi, "Breathing Life into Dead Theories about Property Rights: De Soto and Land Relations in Rural Africa," Vol.28 (8) *Third World Quarterly* (Institute of Development Studies, University of Sussex 2006).

¹¹ *Ibid*, p.18.

¹² A. Mumma, "The Procedures for Issuing Titles to Land in Kenya in Law Society of Kenya," in *Land Law Reform in Kenya Volume 2* (Law Society of Kenya, Nairobi 2003) p.48.

The registration of a person as the proprietor of a lease vests unto the person the absolute right that cannot be defeated and are to be held free from all other interests and claims.¹³In that regard therefore, the title was to be subject to encumbrances shown on the register but no subject to rights of people claiming as beneficiaries of land held in trust.

The enactment of the Act brought about exclusivity thereby extinguishing multiple rights in land. This study alludes that the squatter land problem was not mitigated by the enactment of that law since it eroded the principle of multiple rights in land and absolute title enforced exclusivity. From the foregoing, it is evident that the laws that have always existed were exclusive in favour of registered proprietors and therefore were not favourable in addressing the squatter land problem. The next part addresses the concept of absolute title and the judicial attitudes that hampered any resolution of the problem since in most cases the courts would rule in favour of the registered proprietor in exclusion of any other interest in the land.

3.2 Absolute Title and Customary land Rights

This part will address the concept of absolute title and the effects on the customary land rights and provide a nexus between the concepts and the escalation of the squatter land problem in Kenya. In that regard, the positivist approach and the trust view approach will be considered in the right of the concept of indefeasible title and how the courts have not been able to address the issue. The subject has had a number of interpretations in the Kenyan courts.

¹³ Section 28 of Registered Land Act Cap 300 Laws of Kenya.

Customary land rights are not recognized as overriding interests in the Act.¹⁴ There have been difficulties in the interpretation of the effects of registration on customary property rights and interests.¹⁵ Section 28 of the repealed RLA is important in this respect. It provides that:

...the rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register.

Upon registration of land therefore, the registered proprietor became the absolute owner of the land together with all rights and privileges belonging or appurtenant thereto and not liable to be defeated except as provided for in Section 30 of the Act. The positivist approach takes the view that the law should be applied as it is and no extraneous factors should be considered or imported into the legal provisions irrespective of the consequences. On the other hand the trust view approach takes the view that despite the rigours of the provisions of the RLA customary law concepts can be applied on the face of it.¹⁶

The High Court has therefore held in some cases that customary claims are not extinguished by registration of land. In the case of *Mwangi Muguthu v Maina Muguthu*¹⁷ it was held that first registration of land was not a bar to creation of a trust. On the contrary, the cases of *Esiroyo v*

¹⁴ See Section 30 of the RLA.

¹⁵ Mumma 2003, *supra* note 12.

¹⁶ T. Ojienda, *Conveyancing- Principles and Practice* (Law Africa, Nairobi 2008) pp. 117-125.

¹⁷ HCCC No 377 of 1986 (unreported).

*Esiroyo*¹⁸ and *Obiero v Obiero*¹⁹ held that first registration of land extinguishes customary claims, trust and rights. The Court of Appeal has done very little to reconcile the two interpretations. What the Court advanced is that both customary property law and customary rights are ousted by registration, statute and Common Law.

However, despite this scholars have argued that customary law remains resilient despite emphasis of private land within adjudicated areas. This is because of guaranteed rights of access to land and other natural resources by virtue of their membership in some social unit of production or political community.²⁰ Land use practices in many societies are based on the diversity of soil types and the related crop diversity. Under such conditions, communities have continued to use customary rules of access to multiple sites instead of relying solely on registered parcels.²¹

First registration remained a contentious issue in the sense that the RLA provided that the rights of a registered proprietor remained sanctified despite the fact that the registration could have been obtained by fraud or mistake perpetuated by the proprietor.²² The provisions of the law therefore did not therefore mitigate the squatter land problem. Tom Ojienda²³ analyses the

¹⁸ (1973) EA 338.

¹⁹ (1972) EA 227.

²⁰ B. D. Ogolla and J. Mugabe, "Land Tenure Systems and Natural Resources Management" in C. Juma and J.B` Ojwang (eds) *In Land We Trust: Environment, Private Property and Constitutional Change* (ACTS Press, Nairobi 1996) p.97.

²¹ *Ibid*, p.103.

²² Section 143 of the Act.

²³ Ojienda 2008, *supra* note 16, pp.114-115.

problems brought about by the law in terms of family disputes and wrangles in the courts. This study seeks to show that the squatter land problem was escalated by the injustice that was occasioned to people who had genuine customary claims. The review of the Land Act 2012 has been discussed subsequently in this chapter.

The previous chapter gives the chronology of events that led to the position of the squatter land problem today. This part shows that all the laws that were enacted did not solve the problem and the subsequent part will show that not much has changed and the problem still persists. It is now imperative to consider the provisions of the Commission on Illegal and Irregular and the recommendation on the issue of indefeasible title.

3.2.1 The Commission of Inquiry into the Illegal and Irregular Allocation of Land

The Commission was appointed under Gazette Notice number 4559 of July 2003. The Commission was appointed with the mandate of inquiring into allocation of public land and land meant for public purposes and to recommend legal and administrative measures to restore the lands to their proper purpose. The Commission made recommendations that land that has been illegally or irregularly acquired should be repossessed by the government and recommended for the creation of a Land Titles Tribunal to oversee the process.²⁴

The Commission argued that the doctrine of sanctity of title embodied under the RLA and RTA is not absolute. The concept of indefeasible title therefore depends on its legality and not otherwise. In that regard the commission challenged the concept of first registration in the light

²⁴ Government of Kenya, *Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Land* (Government Printer, Nairobi 2004) p.67.

that no title is completely out of danger and even where the titles were allocated to *bona fide* purchasers for value without notice illegally and irregularly, they could still be revoked.²⁵ It was recommended that Section 75 of the 1969 Constitution should not be a bar to revoke illegal and irregular titles. There was no concrete action taken after the release of the report until the formulation of the National Land Policy and by extension the enactment of the Constitution of Kenya 2010 and the new land legislation of 2012.

The previous chapter of this study alluded to the fact that the section was used to protect property that had been taken by the colonialists and therefore there was no intention of resolving the squatter land problem in Kenya. The recommendations by this report are progressive in terms of resolving land injustices and by extension the squatter land problem in Kenya. The subsequent part will therefore review the limitations in the current land laws in resolving the problem.

3.3 Review of the Current Legislation Relating to Land

3.3.1 The Land Registration Act

The Act was enacted in 2012 with the aim of revising, consolidating and rationalizing the registration of title to land and to give effect to the principles of devolution.²⁶ It provides registration of a person shall vest in him/her the absolute ownership together with all the rights

²⁵ *Ibid*, p.59. See also African Centre for Open Governance, *Mission Impossible? Implementing the Ndung'u Report*<www.africog.org> accessed on 19th November 2012. pp. 18-19.

²⁶ The Preamble to the Land Registration Act No 3 of 2012.

and privileges belonging thereto.²⁷The registration of a person as a lessee shall vest in that person all the leasehold interest together with all the rights and interests described in the lease.²⁸

The rights of a proprietor whether acquired through first registration shall be indefeasible.²⁹ The certificate of ownership is to be held as conclusive evidence of ownership. The registered owner is the absolute and indefeasible owner but is subject to encumbrances contained in the title. The only exception is on the grounds of fraud or misrepresentation or where the title is acquired illegally.³⁰ Customary trusts have however been provided for as overriding interests.³¹

The Act repealed the previous registration statutes. It was able to bring registration under one Act of Parliament but the provisions relating to indefeasible title, first registration and the absolute nature of sanctity of title provided under the repealed RTA and RLA are not different. This is a limitation as far as resolving the squatter land problem is concerned. The reason is that the policies and laws that had made people squatters have not changed despite the Constitution of Kenya 2010 and the LRA. Even though the Commission of Inquiry into the Illegal and Irregular Allocation of Land recommended that the said provisions should not be taken as absolute, the statute did not consider that but rather upheld the position that has always existed.

²⁷ *Ibid*, Section 24 (a).

²⁸ *Ibid*, Section 24 (b).

²⁹ *Ibid*, Section 25.

³⁰ *Ibid*, Section 26.

³¹ *Ibid*, Section 30 (b).

3.3.2 The Land Act

The Act is aimed at giving effect to the provisions of Article 68 of the Constitution and to revise and rationalize land laws. It was also aimed at provision for sustainable administration of land and land based resources and for connected purposes.³² The Act defines public purpose to entail settlement of squatters, the poor and the internally displaced persons. It also defines a squatter as a person who occupies land that legally belongs to another person.³³

The Act makes provisions for settlement programmes to be administered by the National Land Commission. In that regard, the settlement programmes shall be used to make land accessible to squatters.³⁴ A land settlement Fund is also established to be managed by the Commission. The fund is to be used for among other purposes, the provision of access to land to squatters and to purchase private land for settlement programmes.³⁵

The Act gives the National Land Commission or the Cabinet Secretary power to make rules where applicable to ensure the better carrying out of the Act.³⁶ With regards to squatters it provides that they have powers to:

- ... (1) to facilitate negotiation between private owners and squatters in cases of squatter settlements found on private land and
- (2) to transfer unutilized land and land belonging to absentee land owners to squatters.³⁷

³² The Preamble to the Land Act No 6 of 2012.

³³ *Ibid*, Section 2.

³⁴ *Ibid*, Section 134.

³⁵ *Ibid*, Section 135.

³⁶ *Ibid*, Section 160.

³⁷ *Ibid*, Section 160 (e) (ii) and (iii).

The challenge with the provisions is that the LRA makes it easy for land to be registered in the names of private individuals. The repealed land laws made provisions protecting first registration which is to the effect that a title deed makes one an indefeasible owner despite historical injustices. There is however need to reconcile the provisions of the LRA and the Land Act. Whereas it is possible for people to be made squatters by registration of land in the names of few private individuals, the Land Act provides for making of rules to transfer unutilized land to squatters. The issue that would arise is the possibility of transferring land that is already registered. In most cases, the government would be made to buy the land for settlement programmes mostly in high prices as provided that negotiations can be made with private owners where squatter settlements are found on private land.

The Land Act makes provisions for the role of the National land Commission to implement settlement programmes to provide access to land for shelter and livelihood. This is to be done on behalf of the national and county governments. The settlement programmes are supposed to provide access to land for squatters among other things. In the context of this study, the provisions limit the right of squatters who would have otherwise deserved restitution other than resettlement through schemes.

The case of *Kuria Greens v The Registrar and Another*³⁸ best illustrates the position. In that case the Registrar of Titles published a notice in the Kenya Gazette revoking 14 titles in Limuru. The land had been reserved for Agricultural Research Institute and the titles had been allocated to private developers. In his judgment, Justice Daniel Musinga ruled that the Registrar of Titles had

³⁸ Petition No 107 of 2010 Nairobi (eKLR).

acted *ultra vires* in revoking the said titles. The court stated that cancellation can only be done by the court where it was obtained, made or omitted through fraud or mistake only where it is not a first registration.

The court referred to Section 23 of the RTA (now repealed) and stated as follows:

...section 23(1) of the Act gives an absolute and indefeasible title to the owner of the property. The title of such owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of titles and the entire system in relation to ownership of property in Kenya will be placed in jeopardy.

The judge also said that the revocation of the titles was a breach of the constitutional right under Section 40 of the Constitution of Kenya 2010. He said that the revocations were unconstitutional, null and void. In that regard therefore, dealing with land problems and the squatter land problems in Kenya will not be easy considering the legal hurdles.³⁹The case relied on the repealed RTA and it is possible that such cases will arise and be decided the same way since the new LRA is not different from the previous ones. In that instance therefore, they are limited as far as resolving the squatter land problem is concerned in Kenya.

3.4 The Institutions

This part will address the institutions that deal with land and the nexus with addressing the squatter land problem in Kenya. It will seek to answer the question as to their effectiveness in dealing with the problem. It will review the National Land Commission, the Ministry of Land and the Judiciary. This is in the wake of the new land laws, one the Constitution that has

³⁹ See commentary by P. Mwaure, *Title Deed Makes one Indefeasible Owner of Land despite Historical Injustices* Daily Nation 2nd February 2013. p.14.

established the National Land Commission, the National Land Commission Act⁴⁰ that provides for the operations of the Commission and the Land and Environment Court Act⁴¹ that has established the Land and Environment Court.

3.4.1 The National Land Commission

The National Land Commission is a constitutional commission given a wide mandate under the Constitution of Kenya 2010. The Commission of Inquiry into the Land Law System recommended that a National Land Authority should be formed in order to vest the basic title to government land on it. On the other hand, the Commission recommended the formation of a District Land Authority in order to manage trust land.⁴² The aim of establishing a new institutional framework was to ensure that there is community participation in land administration, transparency and accountability and efficiency that had been lacking.⁴³

The Commission was provided for in the Proposed New Constitution of 2005 and the Constitution of Kenya 2010 under Article 67.⁴⁴ The Commission is given the mandate to initiate

⁴⁰ Act No 5 of 2012.

⁴¹ Act No 19 of 2011.

⁴² Government of Kenya; *Report of the Commission of Inquiry into the Land Law System of Kenya on Principles of a National Land Policy Framework, Constitutional Position on Land and New Institutional Framework for Land Administration*. (Government Printer, Nairobi 2002) p.108.

⁴³ *Ibid.*

⁴⁴ The National Land Commission is given the mandate to:

- (a) Manage public land on behalf of the national and county governments.
- (b) Recommend a national land policy to the national government.
- (c) Advise the national government on a comprehensive programme for the registration of title in land throughout Kenya.
- (d) Conduct research related to land and the use of natural resources, and make recommendations to appropriate authorities.
- (e) Initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress.

investigations on its own motion on historical land injustices and make recommendations for appropriate redress. The body to which the recommendation is to be made is not clear but could be the national government. The Commission is supposed to recommend a national land policy to the national government and also advise it on a programme for registration of title in land throughout Kenya.

The difference in provision with the Proposed New Constitution of 2005 is that the Commission was mandated to address the problem and not merely recommend for redress. The provision made was as follows:

...initiate investigations on its own or upon a complaint from any person or institution on land injustices both present and historical and ensure appropriate redress.⁴⁵

In that regard, the provision had expressly mandated the Commission to ensure redress and not merely make recommendations. This provision changed in the Constitution. The mandate of the Commission is also spelt out in the National Land Commission Act.⁴⁶ The powers of the Commission given in the Act are the same as the ones provided for in the Constitution. However in addition to that the Commission is given the mandate of alienation of public land on behalf of or with the consent of national and county governments. It is also supposed to monitor the

-
- (f) Encourage the application of traditional dispute resolution mechanisms in land conflicts.
 - (g) Assess tax on land and premiums on immovable property in any area designated by law.
 - (h) Monitor and have oversight responsibilities over land use planning throughout the country.

⁴⁵Article 85 (2) (g) of the Proposed New Constitution of Kenya of 2005.

⁴⁶ Act No 5 of 2012.

registration of rights and interests in land and manage all unregistered trust land and unregistered community land on behalf of the county governments.⁴⁷

However, the Commission is mandated to ensure that land that is unregistered in Kenya is registered within ten years since the commencement of the Act.⁴⁸ The Constitution mandates the Commission to advise the national government on a comprehensive programme for registration of title throughout the country. In that regard therefore, the issue is whether registration of all land in Kenya will help resolve the squatter land problem or will continue to escalate it. In instances where large parcels of land are registered in names of individuals, the issue would be whether the problem is resolved through tenure system in Kenya that gives rights to one and excludes all the others.

The Commission has the power to review all grants and establish their legality and propriety. In that regard, the Commission is supposed to make the review within a period of five years on its own motion or at the request of the national and county governments, an individual to establish their propriety. The restriction has only been made to public land and not to private or community land.⁴⁹ Revocation of title is to be done by the registrar upon direction of the Commission where there is impropriety or illegality of title.⁵⁰

⁴⁷ *Ibid*, Section 5 (2).

⁴⁸ *Ibid*, Section 5(3).

⁴⁹ *Ibid*, Section 14(1).

⁵⁰ *Ibid*, Section 14(5).

The Commission's mandate under the Constitution and the law has got limitations. The Commission is a constitutional body that is independent and its mandate provided for in the law. The Commission has to work hand in hand with the Ministry of Land since not all functions relating to land have been transferred to it. The relationship between the commission and the ministry will be addressed in the findings of empirical research in the subsequent factor. The bottom line is that though the Constitution empowers the Commission to carry out a wide range of reforms in land that would address problems including the squatter land problem, there are still many gaps and limitations in the constitution and the enabling law.

The National Land Commission Act provides for the recommendation to parliament for an appropriate legislation for the investigation and adjudication of claims arising out of historical injustices.⁵¹The issue with such a provision is what would happen if Parliament ignores recommendations by the Commission. This study is of the view that the Commission should proceed with the mandate provided for in the Constitution whether the enabling law is there or not. The next part shall briefly look into the role of the Ministry and the judiciary.

3.4.2 The Ministry of Lands, Housing and Urban Development

The Ministry of Lands developed the National Land Policy and is in charge of policy formulation within the land sector. The National Land Policy proposed that the role of the ministry should be administration and management functions in the devolved system of government in liaison with the National Land Commission, District Land Boards and

⁵¹ *Ibid*, Section 15.

Community Land Boards.⁵²The functions of the ministry as proposed in the land policy include giving policy direction to the National Land Commission, giving policy direction, mobilising resources for the land sector and facilitating the implementation of land policy reforms.⁵³

Within the ministry, there have been initiatives that have been aimed at dealing with the squatter land problem in Kenya. There is a department that deals with settlement which includes settling squatters.⁵⁴ Though the initiatives are good, they are not backed by any legal framework and therefore they are not as effective as they should be. In that regard, though the programmes to settle squatters have always been carried out by the settlement department of the ministry, the problem still persist partly due to lack of legislative structure of the way it should effectively carried out.

3.4.3 The Judiciary

The Constitution has expressly anchored itself in the judicial branch in Kenya and the courts are not supposed to resort to limiting technicalities in the administration of justice. This has opened the door for creativity and a broad based judicial approach to all issues.⁵⁵Despite this there are potential factors that will remain uncertain in the mind of judicial officers. According to J B Ojwang, there is need for creative interpretation of the Constitution in the new dispensation especially on issues regarding environmental categories that have already been invoked by

⁵² See Republic of Kenya *Sessional Paper no 3 of 2009 on National Land Policy* (Government Printer, Nairobi 2009) p.60.

⁵³ *Ibid*, 60-61.

⁵⁴ www.lands.go.ke accessed on 15th July 2013.

⁵⁵ J.B.Ojwang, *Ascendant Judiciary in East Africa: Reconfiguring the Balance of Power in a Democratizing Constitutional Order* (Strathmore University Press, Nairobi 2013) p.28.

squatters to dispute the rights of private land owners. There is also an anticipation that land title holders will demand for their property rights even where the titles were obtained irregularly.⁵⁶

The National Land Policy proposed that a Land Court Division and District Land Tribunals be set up for dispute resolution.⁵⁷ The Constitution provides that courts shall be established to hear and determine disputes related to the occupation and title land.⁵⁸ Indeed, the Land and Environment Court Act⁵⁹ has already been enacted. The jurisdiction of the court is both original and appellate over disputes relating to land and environment.⁶⁰

Though the Act provides that the court shall hear varied disputes relating to land and environment, the Constitution provides that the main dispute is title to land.⁶¹ In that regard, squatter land problems fall within the issues that the court can determine and address. The court is given powers to issue orders of specific performance, restitution, compensation, declaration and costs.⁶² Therefore the rights of squatters can be handled by the court according to the provision of the statute. However, the other land laws that are to be relied by the court are limited in resolving the squatter land problem as elaborated in this chapter. Therefore, despite having a

⁵⁶ *Ibid*, pp. 90-91.

⁵⁷ National Land Policy 2009, *supra* note 52.

⁵⁸ Section 162 of the Constitution of Kenya 2010.

⁵⁹ Act No 19 of 2011.

⁶⁰ *Ibid*, Section 13 (1).

⁶¹ Section 13(2) of the Act provides that the court determines matters relating to environment planning and protection as well as other aspects in land including climate issues, title, tenure, compulsory acquisition and issues relating to public, private and community land.

⁶² *Ibid*, Section 13 (7).

progressive procedural law, the substantive laws remain limited and therefore the problem at hand cannot be adequately addressed.

3.5 Conclusion

This chapter has interrogated the limitations of the current land statutes in resolving the squatter land problem in Kenya. It has shown that despite a change in the law and minimizing of the registration regimes, the principles that hamper the resolution of the problem still persists. Though the courts are given powers to address the problem through the Constitution and the enabling statute, other substantive laws are limited and this would make the judiciary ineffective in dealing with the squatter land problem. The chapter has also addressed the limitations in addressing the squatter land problem from an institutional perspective.

With the enactment of the new land laws, much has not changed with regards to the concept of indefeasible title. The new land laws contain the concepts of indefeasible title and the protection of first registration even if done through fraud. Even though the judiciary is empowered to address the problem, it may not effectively do so considering the provisions of the other legislation as alluded earlier in this chapter. The Land Act 2012 has provisions relating to squatters but limiting the rights of involuntary squatters who are the concern of this study.

CHAPTER 4

BEST PRACTICE AND REFORM TO RESOLVE THE SQUATTER LAND PROBLEM

4.0 Introduction

The earlier sections of this thesis have addressed the squatter land problem and the limitation in the current land laws in dealing with the problem. This chapter will therefore explore best practice in the context of resolution to the squatter land problem in Kenya. For best practice in resolving the squatter land problem, the jurisdictions to be considered are South Africa and Australia. The reason for selecting the two jurisdictions is to show the practice in dealing with the problem at hand through their constitutions and legislation, a practice that can be adopted in Kenya.

This chapter addresses the concern about reform in the land sector in Kenya and how inefficient it has been in addressing the squatter land problem in Kenya. Best practice is chosen to act as a benchmark or a denominator to measure the success in dealing with the problem in other jurisdictions. The jurisdictions that have been selected succeeded in addressing the issues of land dispossessions and restitution was effectively done as shown in this chapter.

4.1 Reforms in the Land Sector

There have been efforts to reform the land in order to address the problem of landlessness. The government started settlement schemes after Kenya attained independence. It established Settlement Fund Trust and the poor people were encouraged to pull resources together to acquire

land and this led to the establishment of co-operatives and land buying companies.¹ In essence the initiatives were meant to assist the squatters get land but they failed to meet the objective. Indeed, the conditions were stringent in a way that the poor would not be able to comply with payment of the land loans for land that had been vested in the Settlement Fund Trust.² The real issue is how are we able to confront dispossessions and ensure that the reforms are sustainable and the same does not happen in the future.

The Ministry of Lands Housing and Urban Development has a settlement and adjudication department that has been tasked with formulation of policy for land management and administration, ascertainment of customary rights over trust lands, acquisition of land for poor landless Kenyans and provision of basic infrastructures needed for settlement schemes.³ Accordingly, the role of allocation of government land and trust land for various functions, approval for extension of leases change of user and subdivision schemes have been taken up by the National Land Commission. However, land registration has been left as a function of the Ministry of Lands Housing and Urban Development.⁴

With the function of registration left under the Ministry of Lands, Housing and Urban Development, it would not be easy for the Commission to accomplish the mandate of reviewing grants because it can only make recommendations to the Registrar. In the event the Registrar

¹ W. Odhiambo and H. Nyangito, *Land Laws and Land Use in Kenya: Implications for Agricultural Development*, (Kenya Institute for Public Policy Research and Analysis Discussion Paper No. 15, Nairobi 2002) www.kippra.org accessed on 15th June 2013. p.11.

² *Ibid.*

³ See www.lands.go.ke accessed on 15th July 2013.

⁴ Interview with Peter Nganga, Land Registration Officer Ministry of Lands on 20th July 2013.

does not do anything regarding what is recommended by the Commission, then resolution of squatter land problems and other land related issues may not be effectively addressed. Indeed the Land Registration Act of 2012 provides that officers within the land registration section shall be appointed by the Public Service Commission and not the National Land Commission.⁵This by extension entails that the officers within the land registration section are not supposed to be under the direction of the land commission.

However the Act empowers the Commission to establish land registration units in consultation with the national and the county governments. In that regard, it is supposed to gazette a constituted area as a registration unit and may vary the limits of such units from time to time.⁶The powers to establish registration units have been given with one hand but the powers of control and appointment of staff within the section has been taken away with the other hand. In that regard therefore, the Commission would have been more effective if it was able to have control on registration of land.

4.1.1 The Constitution of Kenya 2010

For the first time, the Constitution has made provisions relating to land and the environment. It provides that land shall be held, used and managed in an equitable, efficient and productive

⁵ Section 12 of the Act.

⁶ *Ibid*, Section 6.

manner.⁷The two principles of equitable access to land and security of land rights are emphasized and they are to be achieved through a national land policy and through legislation.⁸

Chapter 2 has reviewed the Constitutional making process in Kenya and some provisions that had been made in the Proposed New Constitution of 2005 and then omitted in the final document that was passed in 2010.

In that regard therefore, it is imperative to review the Harmonised Draft Constitution and some of the provisions it made relating to land and property.⁹ The draft recognized that land is the primary resource for livelihood of the people of Kenya and mandated the national government to define and keep under review the national land policy. In doing so it was supposed to ensure security of land rights for all land holders, users and occupiers in good faith.¹⁰The provision would have been imperative in the squatter land problem since dispossessions would make people users of land and/or occupiers in good faith.

There was also provision that legislation was supposed to be made to ensure that settlement of the landless and the squatters and ensure rehabilitation of spontaneous settlements in both urban and rural areas is done. It also made provisions for establishment of a land fund to enable Kenyans own and use land in an equitable basis.¹¹These were important and progressive

⁷ Article 60 (1) of the Constitution of Kenya 2010. The provisions on land and environment are found in Articles 60 to 72.

⁸ *Ibid*, Article 60 (1) (a) and (b) and Sub Section 2.

⁹ *The Harmonised Draft Constitution of Kenya* as Published on 17th November 2009 by the Committee of Experts on Constitutional Review pursuant to Section 32 (1) of the Constitution of Kenya Review Act 2008. Found in the *Daily Nation* 18th November 2009.

¹⁰ *Ibid*, Article 77 (1) (d).

¹¹ *Ibid*, Article 85 (1) (i) and (j).

provisions that were omitted in the Constitution. Therefore the resolution of the squatter land problem cannot be effectively addressed with the limitations in the Constitution. Even though equitable access of land is provided for, there is no clear framework for effectuating the provisions and therefore limited in resolving the squatter land problem in Kenya.

In reviewing the Constitution, two scholars¹² have hailed the Constitution as having adequate provisions for resolving the squatter land problems especially at the Coast. They have stated it as follows:

...the squatters among the Mijikenda community who for generations have been denied land rights at the Coast have their land question addressed under Article 63 (2) of the Constitution which defines Community land to include ancestral land. Furthermore, limitation of landholding by non-citizens under Article 65 of the Constitution to 99 years is critical in reducing the near infinite 999 years leasehold interest by non-citizens to some determinable periods.

They make a general view that the squatter land problem is to be addressed by the National Land Commission and suggest that this is a reprieve for persons whose land has been illegally and irregularly acquired.¹³ The Commission is supposed to investigate and recommend mechanisms for redressing historical land injustices. Recommendation is not sufficient in addressing a problem especially when there is no recourse in instances where they are not acted upon by the relevant institutions or where there is no will to effectuate them.

Regarding community land rights as alluded by the two authors, there is a challenge in defining the term 'community'. The other challenge is the anticipation by Article 63 of the Constitution that it shall vest in and be held by communities on the basis of culture, ethnicity or community

¹² T. O. Ojienda and M. Okoth, "Land and the Environment" in P L O Lumumba *et al* (eds) *The Constitution of Kenya: Contemporary Readings* (LawAfrica Publishing (K) Limited, Nairobi Kampala Dar-es-Salaam 2011) p.177.

¹³ *Ibid*, p.178.

interests. It is not clear what amounts to community of interests.¹⁴ There is however unpredictability of rights since formal law has made individual land holding predictable at the expense of community rights. Private rights are created without consultation with the communities who live in the trust lands.¹⁵

The problem with the provisions of Article 63 of the Constitution is that over time communities have migrated to live among others that dominate a particular area. It would therefore not suffice to claim that the Mijikenda of the Coast can exclude other inhabitants who are of a different community living among them. It has been stated that this could be possible to the extent that:

...there are historical injustices that have lingered for a long time and perceptions of unfairness and wrongs in the creation of land rights nuancing any claims to individual land rights. The possession of legal title to property in these circumstances has not guaranteed uninterrupted enjoyment of property precisely because the legal title is laced with contesting claims. Land as a social relationship depends principally on the acceptance of one's neighbours of the legitimacy of their claims and it is this acceptance that makes people keep off. Where people perceive some inalienable rights in the res that is claimed as property by another, the cost of protecting the property rise exponentially.¹⁶

However, despite the claim that could be made by the communities who have been rendered squatters, there is still high deficiency within the legal framework as observed earlier in this thesis.

The Constitution also provides for protection of the right to property.¹⁷ Everyone is given the right to own property either individually or in association with others in any part of the country. It prohibits Parliament to enact laws that would limit the enjoyment or deprive a person the

¹⁴ P. Kameri-Mbote and others, *Ours by Right, Law, Politics and Realities of Community Property in Kenya* (Strathmore University Press, Nairobi 2013) pp.28-29.

¹⁵ *Ibid*, 37.

¹⁶ *Ibid*, 36.

¹⁷ Article 40 of the Constitution of Kenya 2010.

enjoyment of a right arbitrarily.¹⁸ The right to property does not extend to properties that were illegally acquired.¹⁹ With regards to the squatter land problem in Kenya, this section does not help address the problem since the laws were enacted and followed and therefore dispossessions were done legally. At this stage it is imperative to consider other jurisdictions and how they were able to handle the problem.

4.2 South Africa

South Africa embarked on a post-apartheid transformation after attainment of independence in 1994. The system of apartheid had established laws and systems that were discriminatory and this extended to land dispossessions. The Constitution of South Africa recognizes in the preamble that there was need to heal the divisions of the past and establish a society based on democratic values and human rights and social justice.²⁰ It provides that deprivation of property shall not be done except in law of general application and that no law shall arbitrarily deprive a person of the right to property. The State is mandated to take legislative measures to ensure conditions that will enhance equitable access of land.²¹

It also provides that if a community or an individual was dispossessed as a result of discriminatory practices and laws, then there is an entitlement to restitution of that property or to

¹⁸ *Ibid*, Sub Article 2.

¹⁹ *Ibid*, Sub Article 6.

²⁰ The Preamble to the Constitution of the Republic of South Africa of 1996 <www.info.gov.za> accessed on 15th July 2013.

²¹ *Ibid*, Article 25 (1).

equitable redress. This was to be done through an Act of Parliament.²² The land department of South Africa undertook measures to redistribute, reform tenure arrangements and resolve the issue of dispossessions by ensuring that disposed people get back their lands. The difference between South Africa and other countries is that while she enacted laws that ensured redress of land alienations and dispossessions, others took over the land and held it in trust for the public whereas in others, the *status quo* remained.²³

The Constitution also provided that a person or a community whose tenure is insecure as a result of discriminatory laws is entitled to redress or to tenure that is secure.²⁴ The land reform programme firstly entailed restitution. Restitution is the act of making good or giving monetary value to a loss incurred. It refers to restoration of the original right to property in the instance where it was wrongfully taken from a person.²⁵

Confronting dispossession of land has not been without challenges especially where rights have passed to other parties yet the dispossession is not acknowledged. Many countries have therefore not been able to implement the concept of restitution. The concept is to be understood from a justice point of view where the terms must be agreed upon by the parties concerned.²⁶ For it to be

²² *Ibid*, Article 25 (7).

²³ C. Polsinelli, "Right to Land-Right to House and Adequate Standard of Living," in *Human Rights Litigation and the Domestication of Human Rights Standards in Sub Saharan Africa* AHRAJ Casebook Series Vol 1 (International Commission of Jurists Kenyan Section, Nairobi 2007) p.154.

²⁴ Article 25 (6) of the Constitution of the Republic of South Africa of 1996.

²⁵ P.Syagga *Public Land, Historical Land Injustices and the New Constitution*; Constitutional Working Paper No 9 (Society for International Development, Nairobi 2010) <www.sidint.net> accessed on 19th October 2012.

²⁶ P. Kameri-Mbote, "Righting Wrongs, Confronting Land Dispossession in Post- Colonial Contexts", in *East African Law Review* (Vols 35-40 December 2009).

successful it must go to the root of unjust expropriation that led to the extinction of rights of persons.²⁷ In that regard therefore, squatter land problem in Kenya began with expropriation of land that was unjust and the rights transmitted to other persons.

The South African problem was resolved through the Restitution of Land Rights Act 1994.²⁸ The Act established the Commission on Restitution of Land Rights and a Lands Claims Court. It provided for restitution to persons or communities that were affected by the colonial laws and sought to restore full enjoyment of their land.²⁹ The Act further defined right to land to include any right in land whether registered or unregistered which include among other interests customary interest and the person should have lived for a period of more than ten years by the time of dispossession.³⁰

Under the Act, the restitution would take the form of getting back the land and where that was not possible, a claimant was entitled to land owned by the State or benefit from programmes that were supported by the State.³¹ The statute had provided that claims would only be done for a period of ten years. In 1998, only four per cent of the claims had not been finalized. The process faced the challenge of delays in producing relevant documents and budgetary constraints. However the process was largely successful since thousands of landless people benefitted from

²⁷ *Ibid*, p.107.

²⁸ Act No 22 of 1994 <www.info.gov.za> accessed on 15th July 2013.

²⁹ See the Preamble to the Act.

³⁰ Article 1 of the Act.

³¹ See Section 35 of the Act.

the process.³² According to Paul Syagga, Kenya needs to learn from this law and process if the provisions of the Constitution of Kenya 2010 and the National Land Policy are to be realized.³³

To protect vulnerable groups including squatters, the Prevention of Illegal Eviction from Unlawful Occupation of Land Act³⁴ was enacted following the South African Land Policy in 1997.³⁵ The Act made a difference between owner of land and illegal occupier. The owner was defined as the registered owner whereas an illegal occupier was defined as a person who has not been given express consent without any right to occupy the land.³⁶

Despite having a number of people who were squatters protected from illegal eviction by the Act, others were protected by the Extension of Security of Tenure Act of 1997 and Interim Protection of Informal Land Rights Act of 1996 and therefore excluded from form the Prevention of Illegal Eviction from Unlawful Occupation of Land Act.³⁷ The Community Land Rights Act was also important since it was enacted to rectify the position where the apartheid regime in South Africa had failed to give recognition and protection to community rights.³⁸

³² Syagga 2010, *supra* note 25, p.20.

³³ *Ibid.*

³⁴ Act No 19 of 1998 <westerncapeantieviction.files.wordpress.com> accessed on 8th August 2013.

³⁵ Polsinelli 2007, *supra* note 23, p.155.

³⁶ Section 1 of the Prevention of Illegal Eviction from Unlawful Occupation of Land Act of 1998.

³⁷ *Ibid.*

³⁸ Kameri-Mbote *et al* 2013, *supra* note 14, p.124.

South Africa is one of the few jurisdictions that successfully dealt with the issue of land dispossessions. Indeed the guiding document was the White Paper on South African Land Policy of 1997.³⁹The policy recognized that settlement issues cannot be addressed without first addressing historical injustices. The responsibility was placed upon the Commission, the Lands Claim Court, the land owners, all levels of government and the claimants. In that regard therefore, the systems and procedures for claims were simplified to ensure success of the processes.⁴⁰

The process of restitution similar to the one in South Africa has been recognized in Kenya in the National Land Policy.⁴¹It underscores that the issues that require special intervention include historical injustices and the Coastal land issues. One of the mechanisms for resolving the land issues is restitution. It provides thus:

...the purpose of land restitution is to restore land rights to those that have unjustly been deprived of such rights. It underscores the need to address circumstances which give rise to such lack of access, including historical injustices. The Government shall develop a legal and institutional framework for handling land restitution.⁴²

Despite the Policy giving the mechanism for land restitution, the law has not made this possible. It would have been proper to have the Constitution and the new land laws address the squatter land problem through this mechanism as had been envisioned by the Policy. This thesis underscores the limitations that the laws have in addressing the problem. Since the policy was

³⁹ <www.polity.org.za/polity/govdocs/white_papers/landwp.html> accessed on 9th August 2013.

⁴⁰ *Ibid*, Article 3.17.

⁴¹ Republic of Kenya *Sessional Paper no 3 of 2009 on National Land Policy* (Government Printer, Nairobi 2009) p.42.

⁴² *Ibid*, p.43.

formulated before the legislation, it would have been imperative to address all the issues within the Constitution and legislation.

4.3 Australia

Land in Australia was declared Crown lands and the Aboriginal communities lost their land and their rights ignored.⁴³The government recognized the rights that they had on their original lands before colonization. The procedure for returning of the northern territory of the Aboriginal land was done through the Aboriginal Land Rights Act of 1976.⁴⁴ The Act applied to the Crown lands that were vested in the Northern Territory.⁴⁵The Act generally recognized the Aboriginal rights to land and was a way forward in dealing with historical land problems in Australia.

The legal framework in Australia would offer best practice as far as historical land injustices are concerned. This would help resolve land issues that are peculiar to the Coast region. There are still policy issues that remain unresolved. Though they have been recognized as peculiar by the National Land Policy, nothing much has been done to address the question. The Coast region has the greatest number of people living as squatters. The processes of adjudication and registration under the Land Titles Act leaving most of the indigenous communities deprived of their land.⁴⁶ The Aborigines experience in Australia can be used to help resolve squatter land problem in Kenya.

⁴³ See Polsinelli 2007, *supra* note 23, p.156.

⁴⁴ See Kameri-Mbote *et al* 2013, *supra* note 14, p.122. The Act can be found in www.austlii.edu.au accessed on 10th August 2013.

⁴⁵ Section 3A of the Aboriginal Land Rights (Northern Territory) Act.

⁴⁶ The National Land Policy 2009, *supra* note 41, p.45.

4.4 Policy Issues Relating to Squatter Land Problem

Resolution of the squatter land problem in Kenya remains a fundamental issue. Colonial practices and laws that formed the genesis of mass landlessness were perpetuated after independence. It is the argument sustained by this thesis that the position is not different as far as the squatter land problem is concerned and as such it still persists after enactment of new land laws. The National Land Policy recognized that the successive governments after attainment of independence have not committed themselves to addressing the problem.⁴⁷

Indeed the land question has had the feature of exclusions where the state has led a mode of social economic domination. This has in essence led to a group of powerful individuals who own land and a group of squatters who always demand a resolution of the land question for their own benefit.⁴⁸ The State had for a long time dominated the regulation of access to land and this had led to escalation of the squatter problem since the practice of individualization of public land due to political considerations created more people who did not have claims on land and a few who owned large tracts.⁴⁹

However this problem seems to be addressed through the formation of the National Land Commission. The Commission is mandated to regulate public land but as this thesis has alluded to earlier, the laws establishing the Commission are limited in terms of addressing historical injustices that relate to squatters. The policy issues on resolution of historical land injustices are

⁴⁷ *Ibid*, p.44.

⁴⁸ K. Kanyinga, *Redistribution From Above: The Politics of Land Rights and Squatting in Coastal Kenya*. Research Report No 115, NordiskaAfrikainstitutet Uppsala 2000 <www.apsanet.org> accessed on 15th July 2013. p.122.

⁴⁹ *Ibid*.

well spelt out within the land policy of 2009. The government commits to establish mechanisms for resolving historical claims arising in 1895 and after by putting in place legal and administrative framework for investigation and documentation of the claims.⁵⁰

Review of policies and laws that have enhanced the increase of injustices are a main point of concern and a policy issue that the government committed to achieving. The policy also provides that the government shall establish suitable mechanisms for restitution and specify the periods for doing the same.⁵¹ As part of best practice, the process of resolving injustices and addressing the rights of the people who had been dispossessed was carried out in this manner in South Africa.

Though Kenya proposed the same in the policy, it was not effectuated through the law. Even though the Constitution of Kenya 2010 makes provision for the National Land Commission and gives it mandate to resolve historical land injustices, there are limitations to achieving the same as observed earlier in this paper. The powers given to the Commission in the Land Act are still not adequate as discussed in the third chapter of this paper.

Karuti Kanyinga has proposed that tenure reforms should not only focus on agricultural productivity but should go beyond and address social restructuring, polarisation and exclusions.⁵² The classification of land under the Constitution of Kenya 2010 does not create tenure reforms that are envisioned by the writer. This thesis opines that the laws are inadequate

⁵⁰ The National Land Policy 2009, *supra* note 41, p. 45.

⁵¹ *Ibid.*

⁵² Kanyinga 2000, *supra* note 48, p.123.

in addressing the squatter land problem and would need to be reformed in order to address the same.

4.5 Concluding Remarks

This chapter has addressed the issue of best practice and what Kenya can learn from other jurisdictions to be able to resolve the squatter land problem in Kenya. It has also addressed the reforms within the land sector and pending policy issues that need to be addressed by the government. With regards to the limitations identified, this study proposes that the Constitution of Kenya should be amended to remove the classification of land which excludes squatters in favour of private owners whose ownership is registered.

The National Land Commission should be given more robust powers to be able to address the squatter land issue. It has been shown earlier that the provisions in the Proposed New Constitution⁵³ had given the Commission powers to investigate on its own motion and ensure redress. The Constitution of Kenya 2010 gives it power to recommend redress. The issue with such a provision is that the national government which is supposed to get the recommendations may be unwilling or unable to ensure redress.

The land legislation should be amended to remove the concepts of absolute title and the issue of protection of first registration. Chapter 3 of this study has shown how the concepts are impediments to resolution of the squatter land problem. This study has argued that the concept of sanctity of title under land legislation is not absolute and a better title can be established. Kenya should learn from South Africa and Australia and enact robust legislation that will address the

⁵³ The 2005 Draft Constitution.

issue of restitution for involuntary squatters who are the subject of this study. As shown earlier in this chapter, the National Land Policy adopts the same measures within the South African legal framework to ensure restitution. In that regard, this study proposes that what is in policy should reflect in legislation.

The next chapter addresses the findings, give a summary of the findings, conclude and recommend on the way forward regarding the resolution of the problem.

CHAPTER 5

FINDINGS, CONCLUSION AND RECOMMENDATIONS

5.0 Introduction

This chapter will delve into the findings, make conclusions and recommend the way forward regarding the resolution of the squatter land problem in Kenya. The work has given a case for limitation of the land laws in resolving the squatter land problem. In that regard, the study has asserted that classification and categorization of land under the constitution, the concept of indefeasible title and the institutional framework hamper the resolution of the problem under the new constitutional and legal dispensation.

In that regard therefore, the hypotheses have been proven. The squatter land problem has not been adequately addressed by the Constitution and land legislation. The powers given to the National Land Commission are inadequate in addressing the problem. There is therefore a lacuna in the law that have to be addressed if the squatter land problem is to be effectively resolved.

5.1 Synopsis of the Findings

The research has established that there is a deficiency in the land laws that relate to land as far as resolution of the squatter land problem is concerned. There is also a deficiency with the institutions and are limited and therefore not able to resolve the squatter land problem. In my interaction with the officers at the lands office, the position is that the National Land Commission has assumed office but there are some constrains that they are facing making them unable to fulfil their mandate.

The earlier part of this thesis looked at the legal deficiencies facing the Commission. There exist administrative problems that are also facing it. In that regard, the allocation of money that has been given to it since the gazettelement has been minimal and this is not sufficient to enable it fully perform its duties. Another finding is that though the Commission is in place, the Office of the former Commissioner of Land has been turned to the Office of the Secretary to the Land Commission under the transitional clauses of the Land Act 2012 and the progress of land reform is moving at a slow pace.¹

The study did not only review the land laws but also delved into the problem of squatters and how it started and escalated over time. The study concentrated on squatters who were involuntarily made so by the legal and policy framework. It concentrated on squatters who live in private lands within rural areas in select places within the Coast of Kenya. It observed that voluntary and illegal squatting is not to be encouraged. On the institutional framework, the study reviewed the role of the Ministry of land in addressing the squatter land problem. It observed that the initiatives made by the settlement department within the Ministry are not adequate since they are not backed by legal requirements.²

¹ Interview with Benson Kemboi, Land Administration Officer, Ministry of Lands on 26th July 2013. The argument being made is that there has to be a transition period before the Commission can fully assume office and perform their mandate. This seems to be taking longer than anticipated or expected.

² By the time of writing this paper the Ministry was in the process of issuing 60,000 titles to people in Taita Taveta and Lamu Counties. This according to the Minister is to try and address the squatter problem at the Coast. Though this is a commendable step, there is still need to review the land laws in order to ensure efficiency in resolving the squatter land problem especially at the Coast. The Cabinet approved the issuance of the titles. See Cabinet Approves Release of 60,000 Title Deeds in Coast in *The Daily Nation*, 14th August 2013. 4. This study proposed that the law should anchor such initiatives in order so that they are not under the discretion of the government of the day.

The study also found out that the judiciary seems to have the necessary powers to address the squatter land problems through the Constitution and the enabling Acts of Parliament, the provisions of other land laws make it unable to resolve the problem. The Constitution has classified land into private, public and community. This classification is limiting in resolving the squatter land problem since the Constitution recognizes lands that were made private legally despite historical injustices. The Constitution has also created the National Land Commission with powers that are not sufficient in addressing the problem.

The concept of indefeasible title has not changed even after the enactment of the new land laws. The Land Registration Act that has repealed the previous registration statutes is not different from the previous ones and almost all the provisions have been replicated in the new Act albeit for the issue of devolution and the provisions relating to the National Land Commission which are established by the Constitution of Kenya 2010. The provisions relating to indefeasible title and protection of first registration remain the same. In canvassing the concepts, this study is of the view that they remain an impediment in resolving the squatter land problem especially when the issues become subject of determination by the court.

The study also delved into the efforts that have been made by the country in trying to resolve the issue. Key in that were the reports by the Njonjo Commissions and the report by the Commission on Illegal and Irregular Allocation of Public Land. The recommendations were relevant in resolving the problem. The Njonjo report recommended on what ought to be done to resolve the problem and the Ndungu Commission provided that the concept of indefeasible title is not absolute.

The report argued that the doctrine of sanctity of title has fuelled illegal and irregular allocation of land. Therefore the Commission was of the view that the concept of indefeasibility and sanctity of title depend on the circumstances that surround the issuance of that title and therefore not absolute. It also argued that no title is completely free of danger and that a better right can be established. The concept of first registration was also challenged as not absolute. This research argued that based on the provisions in the report, the land laws could be reformed to address the squatter land problem.

The problem is that with the new land laws, not much has been reflected in terms of resolution of the squatter land problem. The concepts that have always existed still persist. That brings us to best practice that Kenya can adopt. In that regard, this study considered the legislations that were put in place by South Africa and Australia. Indeed resolution of dispossessions was expressly anchored in the Constitutions and there were timelines that guided the completion of the processes intended by the law. The processes have been hailed as successful and would provide useful lessons as on how the problem of squatters would be addressed.

The study addressed the policy questions that are related to the right of squatters. The National Land Policy is useful in this respect. The policy recognized that the squatter land problem exists and gave recommendations as to resolution. Despite classifications of land which is anchored in the Constitution and is to the extent of this thesis an impediment in resolving the squatter land problem, the other provisions are relevant but not reflected in the new land laws. The study also

reflected on the constitution review process and some of the omissions that were made by the drafters that would have had far reaching effects on the squatter land problems in Kenya.

5.3 Conclusion

Land is a crucial resource in the life of every Kenyan. The importance of resolving the squatter land problem in Kenya cannot therefore be gainsaid. The study has made a case for resolving the problem through review of the limitations within the land laws. The squatter issue has been a problem in Kenya since the advent of colonialism. Successive governments have not been able to adequately deal with the problem. The study did not only address the laws in exclusion of the squatters. It established the origins, perpetuation of the problem and the efforts made to resolve it.

The main objective of the study was to determine the extent of the squatter land problem and how the categorization of land under the Constitution impedes on resolution. The other objectives were to determine the extent to which the concept of indefeasible title is an impediment and to review the effectiveness of the institutional framework in addressing the problem. The study also sought to put forth recommendations based on best practice from other jurisdictions on how the squatter land problem can be resolved in Kenya.

The assumptions in the study were that the current land laws are inefficient in addressing the problem. The second assumption was that the powers given to the National Land Commission are limited and the concept of indefeasible title remains an impediment in resolving the squatter land problem and that there are gaps within the land legislation that need to be filled if the

problem is to be adequately addressed. The study has proved these assumptions and has made recommendations to that effect.

The recommendations are to the effect that the Constitution and the select land legislative framework have limitations which need to be addressed if the current squatter problem is to be effectively dealt with. The study draws best practices and concludes by stating that the country should resolve the problem and ensure that there is equitable access to land and security of tenure for livelihood security, peace and development.

5.4 Recommendations

This study recommends the following in view of the foregoing discussions.

5.4.1 Reforms to the Constitution of Kenya 2010.

The Constitution should be amended to ensure that the National Land Commission is given adequate powers to address the problem of injustices and have the capacity to address the squatter land problem. Article 60 of the Constitution provides that the land in Kenya shall be managed in an equitable manner within the principles of equitable access. The prevailing circumstances relating to squatters in Kenya and the escalation of the problem as advanced by this thesis therefore recommends that classification of land under Articles 61 to 64 should have been silent.

Since the Constitution provides for equitable access of land, that cannot be achieved considering injustices that have made many people squatters. It recognizes private land as land registered by

any person under freehold tenure and leasehold tenure. Laws and policies that have been in place have catalysed the squatter land problem. By giving classifications, the Constitution excludes squatters who otherwise are entitled to the land dispossessed from them through the laws and policies. There is a currently inequality in land distribution escalating the squatter land problem and leaving a few with large tracts that almost lie idle.³ The Constitution should at the very least be able to resolve this.

5.4.2 The Concept of absolute/indefeasible title.

Land laws should be amended to delete the concepts of sanctity of title and indefeasible title. The law should make it clear that the concepts are relative and not absolute. The institutions should be strengthened through the Constitution and legal framework. In that regard, the National Land Commission should be empowered to address the problem. What is provided currently is that the Commission should not only recommend redress of historical injustices but should be given capacity to handle the problem.

South Africa established a Commission and a Land Claims Court that had been given adequate powers to handle historical dispossessions. The process which took few years has been hailed by scholars as by and large successful.⁴ Kenya could be able to learn from that. The Constitution put in place mechanisms for restitution of land as well as tenure reforms that do not only focus on agricultural productivity but address exclusions and social restructuring. The enabling laws of

³ P. Syagga, *Land Ownership and Use in Kenya: Policy Prescriptions from an Inequality Perspective* <www.marsgroupkenya.org> accessed on 28th November 2012. p.292.

⁴ An example is P. Syagga *Public Land, Historical Land Injustices and the New Constitution*; Constitutional Working Paper No 9 (Society for International Development, Nairobi 2010) <www.sidint.net> accessed on 19th October 2012.

the Land Commission should give it clear guidelines as to how the redress of the squatter land problem ought to be addressed. By doing this, redress of the squatter problem will not be left at the whims of the executive of the government of the day.

5.4.3 Documentation of Genuine Squatters

The law should establish mechanisms of identifying genuine landless people. The legal and administrative framework should be put in place to document, investigate and determine all historical land dispossessions and ensure that they are resolved. Therefore the laws in place currently should be reviewed to be in tandem with the National Land Policy that has given a clear guideline as to how the problem should be resolved.

The law should also provide for mechanisms to repossess and redistribute idle land that is kept for speculative purposes and given to squatters.⁵ There is also need to ensure that there is sustainability in legal and policy framework to ensure that the problem is resolved and does not keep recurring again. Vesting rights through the law will not be enough and therefore there is need for proper education for the people and sensitization on the implications in order to avoid conflict in the processes and in resolution of the problem.

⁵ See J. Mwaruvie, "The Ten Miles Coastal Strip: An Examination of the Intricate Nature of the Land Question at the Coast," in *International Journal of Humanities and Social Science* (Vol 1 No 20 December 2011). The author of the paper proposes that it should be given to people who are willing to develop for the sake of the general wellbeing of Kenyans. The problem with that is that land could be taken by private developers whose aim is profit at the expense of the right of squatters.

BIBLIOGRAPHY

1. Books

Bhalla, R.S., *Concepts of Jurisprudence* (Nairobi University Press, Nairobi 1990).

De Soto, H., *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (Basic Books, New York 2000).

Kameri-Mbote, P., *Property Rights and Biodiversity Management in Kenya* (African Centre for Technology Studies Press, Nairobi 2002).

Kameri-Mbote, P., *et al, Ours by Right, Law, Politics and Realities of Community Property in Kenya* (Strathmore University Press, Nairobi 2013).

Kanogo, T., *Squatters and the Roots of Mau Mau 1905-1963* (Heinemann Kenya Limited, Nairobi 1987)

Megarry and Wade, *The Law of Real Property* (7th Edition Sweet and Maxwell, London 2008).

Murphy, T. et.al, *Understanding Property Law* (4th edn Sweet & Maxwell, London 2004).

Ojwang, J.B., *Ascendant Judiciary in East Africa: Reconfiguring the Balance of Power in a Democratizing Constitutional Order* (Strathmore University Press, Nairobi 2013).

Ojienda, T., *Conveyancing- Principles and Practice* (Law Africa, Nairobi 2008).

Okoth Ogendo, H.W.O., *Tenants of the Crown: Evolution of Agrarian Law and Institutions in Kenya* (ACTS Press, Nairobi 1991).

Onalo, P., *Land Law and Conveyancing in Kenya* (Heinemann Kenya Limited, Nairobi 1986).

Wa Kinyatti, M., *History of Resistance in Kenya 1884-2002* (Mau Mau Research Centre, Nairobi 2008).

Wakhungu, J *et.al, Land Tenure and Violent Conflicts in Kenya in the Context of Local, National Regional Legal and Policy Frameworks* (ACTS Press, Nairobi 2008).

2. Articles

Juma, C., "In Land we Trust" in C. Juma and J.B Ojwang (eds) *In Land We Trust: Environment. Private Property and Constitutional Change* (ACTS Press, Nairobi 1996).

Kameri-Mbote, P., *Fallacies of Equality and Inequality: Multiple Exclusions in Law and Legal Discourses* (University of Nairobi Inaugural Lecture 2013).

Kameri-Mbote, P., “Land Tenure and Sustainable Environmental Management in Kenya,” in C. O Okidi et al, *Environmental Governance in Kenya: Implementing the Framework Law* (East African Education Publishers, Nairobi Kampala Dar-es-Salaam 2008).

Kameri-Mbote, P., and Cullet, P., “Law, Colonialism and Environmental Management in Africa,” in *Environmental Management in Africa* (Volume 6 Issue 1 1997).

Kameri-Mbote, P., “Righting Wrongs, Confronting Land Disposessions in Post- Colonial Contexts,” in *East African Law Review* (Vols 35-40 December 2009).

Kameri-Mbote, P., and Akech, M., “Ownership and Regulation of Land Rights in Kenya: Balancing Entitlements with Public Trust,” in *University of Nairobi Law Journal* (Vol 4 Issue 1 2008).

Kenya Land Alliance, *The National Land Policy in Kenya: Addressing Historical Injustices Issues* Paper No 2 of 2004.

Kibwana, K., “Spontaneous Settlement and Environmental Management” in S. Wanjala (ed) *Essays on Land Law: The Reform Debate in Kenya*, (Faculty of Law, University of Nairobi, Nairobi 2000).

Mumma, A., “The Procedures for Issuing Titles to Land in Kenya in Law Society of Kenya,” *Land Law Reform in Kenya Volume 2* (Law Society of Kenya, Nairobi 2003).

Musembi, C.N., “Breathing Life into Dead Theories about Property Rights: De Soto and Land Relations in Rural Africa,” Vol.28 (8) *Third World Quarterly* (Institute of Development Studies, University of Sussex 2006).

Mwaruvie, J.M., “The Ten Miles Coastal Strip: An Examination of the Intricate Nature of the Land Question at the Coast,” in *International Journal of Humanities and Social Science* (Vol 1 No 20 December 2011).

Mweseli, T.O.A., “The Centrality of Land in Kenya: Historical Background and Legal Perspective,” in S. Wanjala (ed) *Essays on Land Law: The Reform Debate in Kenya*, (Faculty of Law, University of Nairobi, Nairobi 2000).

Ogolla, B.D. and Mugabe, J. (1996) “Land Tenure Systems and Natural Resource Management” in Juma, C. and Ojwang J.B. (eds) *In Land we Trust: Environment, Private Property and Constitutional Change* (ACTS Press, Nairobi 1996)

Ojienda, T.O., “Customary Land Rights, Land Adjudication and Regime of Beach Plots in Law Society of Kenya”, *Land Law Reform in Kenya Volume 2* (Law Society of Kenya, Nairobi 2003).

Ojienda, T.O., and Okoth, M., “Land and the Environment” in P L O Lumumba *et al* (eds) *The Constitution of Kenya: Contemporary Readings* (LawAfrica Publishing (K) Limited, Nairobi Kampala Dar-es-Salaam 2011).

Okoth Ogendo, H.W.O., “The Tragic African Commons: A Century of Expropriation, Suppression and Subversion” in *Land Reforms and Agrarian Change in Southern Africa* (Programme for Land and Agrarian Studies, School of Government, University of the Western Cape 2002).

Polsinelli, C., “ Right to Land-Right to House and Adequate Standard of Living” in *Human Rights Litigation and the Domestication of Human Rights Standards in Sub Saharan Africa* AHRAJ Casebook Series Vol 1(International Commission of Jurists Kenyan Section, Nairobi 2007).

Sifuna, N., “Using Eminent Domain Powers to Acquire Private Lands for Protected Area Wildlife Conservation: A Survey under Kenyan Law,” in *Law, Environment and Development Journal* Vol 2/1 (2006).

Wanjala, S.C., “Problems of Land Registration and Titling in Kenya: Administrative and Political Pitfalls and Their Possible Solutions,” in S.Wanjala (ed) *Essays on Land Law: The Reform Debate in Kenya*, (Faculty of Law, University of Nairobi, Nairobi 2000).

3. Reports

Government of Kenya; *Report of the Commission of Inquiry into the Land Law System of Kenya on Principles of a National Land Policy Framework, Constitutional Position on Land and New Institutional Framework for Land Administration.* (Government Printer, Nairobi 2002).

Government of Kenya, *Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Land* (Government Printer, Nairobi 2004).

Government of Kenya, *Report of the Task Force on Irregular Appropriation of Public Land and the Squatter Problem in Athi River District* ((Government Printer, Nairobi 2011).

Government of Kenya, *Report of the Select Committee on the Issue of Land Ownership Along the Ten Mile Coastal Strip of Kenya* (Government Printer, Nairobi 1978).

Republic of Kenya *Sessional Paper no 3 of 2009 on National Land Policy* August 2009.

UNDP, Human Development Report 2003, *Millennium Development Goals: A Compact among Nations to end Human Poverty* (2001).

4. Internet sources

African Centre for Open Governance, *Mission Impossible? Implementing the Ndung'u Report* <www.africog.org> accessed on 19th November 2012.

Intergovernmental Committee on Surveying and Mapping; *Fundamentals of Land Ownership, Land Boundaries and Surveying* <<http://www.icsm.gov.au>> accessed on 20/11/2012.

Kanyinga, K., *Redistribution Form Above: The Politics of Land Rights and Squatting in Coastal Kenya*. Research Report No 115, Nordiska Afrikainstitutet Uppsala 2000 <www.apsanet.org> accessed on 15th July 2013.

Kameri-Mbote, P., and Kindiki, K., "Trouble in Eden: How and Why Unresolved Land Issues Landed 'Peace-full Kenya' in Trouble in 2008," in *Forum for Developmental Studies* No 2 of 2008 (International Environmental Law Research Centre) <ielrc.org/content/a0805.pdf> accessed on 29th April 2013.

McAuslan, P., *Making Law Work. Restructuring Land Relations in Africa*. www.researchgate.net accessed on 12th September 2013.

Odhiambo, W., and Nyangito, H., *Land Laws and Land Use in Kenya: Implications for Agricultural Development*, (Kenya Institute for Public Policy Research and Analysis Discussion Paper No. 15, Nairobi 2002) www.kippra.org accessed on 15th June 2013.

Syagga, P., *Land Ownership and Use in Kenya: Policy Prescriptions from an Inequality Perspective* <www.marsgroupkenya.org> accessed on 28th November 2012.

Syagga, P., *Public Land, Historical Land Injustices and the New Constitution*; Constitutional Working Paper No 9 (Society for International Development, Nairobi 2010) <www.sidint.net> accessed on 19th October 2012.

5. Dissertation

Kibugi, R., *Governing Land Use in Kenya: From Sectoral Fragmentation to Sustainable Integration of Law and Policy*. Thesis submitted to the Faculty of Graduate and Postdoctoral Studies in partial fulfillment for the Doctors of Laws (LL.D) degree, University of Ottawa (2011)

6. Newspaper Articles

Cabinet Approves Release of 60,000 Title Deeds in Coast in *The Daily Nation*, 14th August 2013.

Mwaura, P., *Title Deed Makes one Indefeasible Owner of Land despite Historical Injustices* Daily Nation 2nd February 2013.

The Harmonised Draft Constitution of Kenya as Published on 17th November 2009 by the Committee of Experts on Constitutional Review pursuant to Section 32 (1) of the Constitution of Kenya Review Act 2008. Found in the Daily Nation 18th November 2009.