

UNIVERSITY OF NAIROBI

School of Law Parklands Campus

**The Principle of Sanctity of Title as a Challenge in Repossession of Illegally Acquired
Public Land: A Case for Review**

By

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requirements for the award of the degree of Master of Laws (LL.M) of the University of
Nairobi**

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DECLARATION

I, Wilkister Nyangito, hereby declare that this project paper is my original work. This work has never been submitted to any University, College or other institution of learning for any academic or other award. Other works cited or referred to are accordingly acknowledged.

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SUPERVISOR’S APPROVAL

This dissertation has been submitted for examination with my approval as University supervisor.

Signed:.....

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DEDICATION

I dedicate this thesis to:

My loving and supportive husband

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and

My Children- Lincks, Ashley and Jason

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Land Registration Act, No.3 of 2012
National Land Commission Act, No. 5 of 2012
Registered Lands Act, Cap 300 (RLA) (Repealed)
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ABBREVIATIONS AND ACCRONYMS

AG	Attorney General
EMCA	Environmental Management and Coordination Act
GLA	Government Lands Act
ITPA	Indian Transfer of Property Act
KFS	Kenya Forest Service
LTA	Land Titles Act
NGO	Non-Governmental Organization
NLC	National Land Commission
NLCA	National Land Commission Act
PPDA	Public Procurement and Disposal Act
RLA	Registered Lands Act
RTA	Registration of Titles Act

CHAPTER ONE: INTRODUCTION

1.1 BACKGROUND

Kenya is an agriculture based economy and therefore relies on land. 85% of the population relies on agriculture as their primary livelihood source.¹ However, 88.4% of the population has access to less than three hectares of land.² The shrinking pieces of land coupled with increasing population make land an emotive issue, with tensions over land simmering.³

In the pre-colonial times, land was communally owned, through customary tenure arrangements, and was accessible to all. At the height of colonialism, the colonial powers, through an amendment to the Crown Lands Ordinance Act of 1902, vested all land in the Crown in 1915, renaming the Act to Government Lands Act. It was to be appropriated and managed on behalf of the British Monarchy by the Governor of the colony. The Act created the office of Commissioner of Lands, to whom the Governor could delegate some powers of allocation. After Independence, the colonial framework was altered through amendments to the Government Lands Act in 1984, with public land now being vested in the government of Kenya. The position of Commissioner of Lands was retained, as the custodian of public land. The National Government of Kenya, through the Commissioner of Lands continued to be the custodians of all public land; both government and trust land. However, through the Constitution of Kenya, 2010 and the Land Act, 2012, the ownership of all land in Kenya is vested on the government; both National and County depending on its classification,⁴ with custodianship and administration being vested in the National Land Commission (NLC).⁵

Public land includes unalienated government land; land lawfully held, used or occupied by any State organ excluding leased private land; land transferred to the State by way of sale, reversion or surrender, land in respect of which no individual or community ownership can be established by any legal process; land in respect of which no heir can be identified by any legal process; all

¹ Erin O'Brien (2011), *Irregular and Illegal Land Acquisition by Kenya's Elites: Trends, Processes, and Impacts of Kenya's Land-Grabbing Phenomenon*, International Land Coalition, p. 9, available at: www.landcoalition.org/sites/default/files/publication/906/ERIN-KLA_Elites_web_14.03.11.pdf (last accessed 1st August, 2013).

² *ibid.*

³ *ibid.*

⁴ Articles 62(2) and (3), Constitution of Kenya, 2010.

⁵ Article 67(2)(a) Constitution of Kenya, 2010 and Section 8 Lands Act, 2012

minerals and mineral oils as defined by law; government forests, government game reserves, water catchment areas, national parks, government animal sanctuaries, and specially protected areas; all roads and thoroughfares; all rivers, lakes and other water bodies; the territorial sea, the exclusive economic zone and the seabed; the continental shelf; all land between the high and low water marks and any land not classified as private or community land.⁶

From Independence in 1963 till now, there has been massive disappearance of large tracts of public land in the above categories.⁷ The disappearance has been executed through illegal allocations and acquisitions. Illegal allocation of public land occurs when public officers in the Lands department allocate public land without following due process in law.⁸ Such allocations skip processes such as public participation and competitive bidding. It also occurs when public land is allocated to undeserving beneficiaries.⁹ Illegal acquisition on the other hand occurs when individuals acquire public land set aside for other purposes, for instance agriculture, forestry and roads, without following due process.¹⁰ They then use executive orders and influence to get valid allotment letters for the land.¹¹

The beneficiaries of these illegal allocations have title deeds which they use to claim valid land ownership,¹² thereby invoking the principle of sanctity of title to protect such ownership. The question that arises then is whether such illegally acquired titles can be valid in the first place. Sanctity of title refers to the ultimate importance granted title deeds to the extent of being sacred.¹³ This is closely linked to indefeasibility and inviolability of title. Indefeasibility of title means that the register is the definitive record of all land interests, and thus, the registered

⁶ Article 62, Constitution of Kenya, 2010.

⁷ GoK (2004), Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land, Government Printer, Nairobi, 2004, p. 2 (Ndung'u Report).

⁸ *ibid.*, p. 9

⁹ *ibid.*

¹⁰ *ibid.*, p. 10.

¹¹ *ibid.*

¹² Gakuu Mathenge (2005), *Kenyan Ministers' in Row Over 'Grabbed' Forest Land Deepens Divisions in Narc*, Nation Newspaper, Monday, April 4, 2005. available on <http://www.nationmedia.com/estafrican/current/Regional/Regional7.html>, (last accessed on 28th December, 2013).

¹³ Patrick McAuslan (2013), *Land Law Reform in East Africa: Traditional or Transformative?* (Routledge: New York), p. 21.

proprietor is immune to claims contrary to the register.¹⁴ The registered proprietor's interest cannot be annulled, voided, cancelled or revoked on basis of unregistered interests.¹⁵ It grants the registered title immunity from attack by adverse claims.¹⁶ Inviolability of title on the other hand means that the title cannot be invaded, transgressed, dishonoured, or broken.¹⁷ The above are linked to state guarantee of title. The state by issuing a title deed gives a written assurance and certainty that it shall honour the land rights of the registered proprietor.¹⁸ The government grants indemnity in cases of fraud or mistakes or omissions by the Land Registry which lead to loss.¹⁹

The guarantee by the government is based on the details appearing in the register thus granting indefeasibility. Indefeasibility denotes inviolability which then grants ultimate importance to the title, to the point of being considered sacred. The concepts of sanctity, indefeasibility, inviolability and state guarantee of title therefore work together to impede cancellation of title deeds issued to persons who illegally acquired public land. The question that remains, however, is whether such illegally acquired titles can be declared to be valid in the first place.

Kenya runs a system of registration of title not registration of deeds. In a deed registration system, there is maintenance of a public register in which documents affecting interests in a particular registered land are copied.²⁰ Such a deed is merely evidentially of the recorded transaction and is by no means proof of title. Registration as owner does not confer title, but such title is derived from the deeds.²¹ Registered interests take priority over others which are not registered or are registered at a later date. Some unregistered interests however remain enforceable against subsequent owners.²² Title is not guaranteed by the government and

¹⁴ Kelvin F K Low (2009), *The Nature of Torrens Indefeasibility: Understanding the Limits of Personal Equities*, Melbourne University Law Review, p. 3, available at: www.mulr.com.au/issues/33_1/33_1_7.pdf (last accessed 23rd October, 2013).

¹⁵ *ibid.*

¹⁶ *supra*, note 10, p. 4.

¹⁷ Mugambwa, J.T. (2001), *Judicial Assault on the Citadel of Indefeasibility of Title under the Papua New Guinean Torrens System of Conveyance*, Journal of South Pacific Law, 5, p. 2, available at: <http://www.paclii.org/journals/FJSPL/vol05/2.shtml> (last accessed 24th October, 2013).

¹⁸ P.L Onalo (1986), *Land Law and Conveyancing in Kenya*, (Heinemann Kenya: Nairobi), p. 9.

¹⁹ *ibid.*

²⁰ Parliament of Wales (2008), *Comparison of Deeds Registration and Title Registration*, p. 3, available at: <http://www.legco.gov.hk/yr02-03/english/bc/bc03/papers/bc030408cb1-1357-2e.pdf>, (last accessed 23rd October, 2013).

²¹ *ibid.*, p. 5.

²² *ibid.*, p. 6.

therefore there is no certainty of title.²³ However, in system of registration of titles, Registration as owner confers title to the land. The Register is conclusive evidence of title in law.²⁴ Unregistered interests are unenforceable against subsequent purchasers who obtained the property for value.²⁵ Title is conferred by law and evidenced by the Title Register. Title is certain and guaranteed by Government, with indemnity being provided in cases of fraud or mistakes or omissions by the Land Registry which lead to loss.²⁶ This system of registration of title makes it hard for the government to cancel title deeds for illegally acquired public land. Once its officers have illegally issued the title, it amounts to a breach of the government's guarantee for it to renege on the indefeasibility status acquired by the titles as per the Register.

In order to remedy the situation, the government has been playing an active role in reclaiming illegally acquired public land. The Ndung'u Land Report,²⁷ Report of the Task Force on the Rehabilitation of Mau Forests²⁸ and the Report of the Truth Justice and Reconciliation Commission²⁹ all recommended for cancellation of title deeds of the alleged owners of titles. Indeed, the Minister of Lands, through the Registrar of Titles, Commissioner of Lands and the various District Lands Registrars, in an attempt to implement the recommendations of the above reports has proceeded to cancel various title deeds that were alleged to have been illegally allocated. The revocation of title deeds has been met with a lot of resistance. Several cases have been filed in court seeking for Judicial Orders of Certiorari in order to quash such revocation decisions on the grounds of lack of powers to revoke titles and the legal protection of sanctity of title.

²³ *ibid.*

²⁴ *ibid.*, p. 3.

²⁵ *ibid.*, p. 5.

²⁶ *ibid.*, p. 6.

²⁷ GoK (2004), *Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land*, Government Printer, Nairobi, 2004, p. 1 (Ndung'u Report).

²⁸ In 2008 the Government established a 30 member Task Force (reporting to the Prime Minister) whose responsibility was to study and make recommendations to it on the immediate, short- and long-term options for restoring the entire Mau Forests Complex. The Task Force completed its work and submitted recommendations to the Government in March 2009.

²⁹ TJRC (2013), *Final Report of The Truth Justice and Reconciliation Commission of Kenya*, available at: http://www.tjrkenya.org/index.php?option=com_content&view=article&id=573&Itemid=238, (LAST ACCESSED 2ND August, 2008).

In the case of *Kuria Greens Limited v. Registrar of Titles & another*,³⁰ the Court observed that:

I have carefully searched the Land Titles Act, the Registration of Titles Act, the Indian Transfer of Property Act, the Government Lands Act, the Registered Lands Act and the Land Control Act and I did not come across any provision that grants power to a Registrar of Titles or the Commissioner of Lands to arbitrarily revoke a valid land title.

The ruling has been a major setback to the government's efforts in recovering the grabbed public lands through cancellation of titles.

Further, the old Land statutes, now repealed, complicated the recovery of illegally acquired public land. For example, the Registered Land Act³¹ provided for absolute protection to the first registration of land, even if such registration may have been fraudulently obtained.³² The Registration of Titles Act³³ provided that a Certificate of Title issued by the Registrar to any purchaser of land is to be taken by all courts as conclusive evidence that the person named therein as the proprietor of land is the absolute and indefeasible owner thereof.³⁴ Courts have in fact supported and upheld the view of absolute proprietorship especially under the first registration including those fraudulently acquired.³⁵

However, the Constitution of Kenya 2010 and the new land laws enacted pursuant to it seem to have significantly altered the position. Article 40(3) of the Constitution provides that:

The State shall not deprive a person of property of any description or any interest in, or right over, property of any description unless the deprivation;

- a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land in accordance with Chapter Five; or
- b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that-
 - i) requires prompt payment in full, of just compensation to the person; and
 - ii) allows any person who has an interest in, right over that property a right of access to a court of law .

³⁰ (2011) e KLR, 5.

³¹ Chapter 300 of the Laws of Kenya.

³² Section 27(a) of the Registered Land Act, Chapter 300 of the Laws of Kenya.

³³ Chapter 281 of the Laws of Kenya.

³⁴ Section 23.

³⁵ *Samuel Murimi Karanja & 2 others v. Republic HCCC Criminal Application No. 412 of 2003, Joseph Arap Ngok v. Justice Moiwo Ole Keiwa, NAI Civil Application No. 60 of 1997.* and *Mugogo v Sihowa (KLR) 1988*. The Court of Appeal, in the 1986 decision, held that "even if fraud had been established, inasmuch as the respondent's title was acquired by first registration, it can, in no circumstances be defeated".

The Land Registration Act,³⁶ enacted pursuant to the Constitution of Kenya, 2010, provides that certificate of title shall be held as conclusive evidence of proprietorship except on the ground of fraud or misrepresentation to which the person is proved to be a party; or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.³⁷

There is thus need to re-examine the concept of sanctity of title vis-a-viz the recovery of illegally acquired land in Kenya.

1.2 STATEMENT OF THE PROBLEM

Illegal acquisition of public land is a reality in Kenya. Numerous reports have called for repossession of this illegally acquired land. Most of these reports suggest cancellation of titles to be an avenue for such repossession. Attempts by the government to cancel title deeds have been met with much resistance. The recipients of the illegal acquisitions have challenged the cancellations in court with a high degree of success.

When faced with such cases, the Kenyan courts have relied on the concept of sanctity of title. The sanctity of title is a concept that upholds inviolability of a title deed. It grants certainty to a title deed and makes it indefeasible. Sanctity of title, therefore, poses a unique challenge to the recovery of and revocation of titles to illegally acquired public land.

Due to sanctity of title, the courts have been consistent that the Registrar of Titles or even the Minister for Lands has no power to cancel title deeds. They have held that it is only the court that can cancel or amend a title where the court is of the view that the registration has been obtained, made or omitted through fraud or mistake. The Minister or Registrar has two options: initiate the process of compulsory acquisition of the suit land and thus pay full and prompt compensation to the petitioner or file a suit in the High Court challenging the petitioner's title and await its determination, one way or the other. Due to backlog of cases in the High Court, coupled with the period it takes to conclude a case, sanctity of title has, thus been a major hindrance to repossession of illegally acquired public land.

³⁶ Act No.3 of 2012.

³⁷ Section 26 of the Land Registration Act, Act No. 3 of 2012.

Moreover, there exists a legal dichotomy. Despite persons who have illegally acquired of public land successfully raising the principle of sanctity of title to defend their titles, it remains doubtful whether such titles should be deemed valid in the first place to warrant such protection.

In addition, the courts have generated conflicting jurisprudence on indefeasibility of a first registration. Whereas some courts have upheld indefeasibility of a first registration by holding that even the courts cannot interfere where the registration is a first registration, others have held that this title can be interfered with as a result of fraud or mistake. There is, thus, need to also examine the conflicting jurisprudence from the courts, with a view to ascertaining the correct approach.

Uganda has appointed a presidential commission to audit allocations of public land and revoke titles to illegally acquired public land. Further, Andhra Pradesh State in India has criminalized illegal acquisition of public land, subjecting such acquirers to imprisonment of up to five years and hefty fines. It has also set up Special Tribunals to address all matters of illegal acquisition of land, with powers to order for cancellation of titles and compensation.

This study explores how the government could repossess illegally acquired land, without being unnecessarily hindered by the alleged sanctity of title.

1.3 OBJECTIVES OF THE STUDY

The main objective of this study was to assess the legal challenges that have faced revocation of title deeds as an approach towards repossession of illegally acquired land in forest as water catchment areas in Kenya.

This objective was broken down to more specific objectives including:

1. To evaluate the extent to which the constitution and land laws facilitate revocation of title deeds as a method of repossessing illegally acquired public land in Kenya.
2. To examine the conflict in emerging jurisprudence from the courts on sanctity of title deeds for illegally acquired land in Kenya.

3. To evaluate whether the principle of sanctity of title should be used to protect titles to illegally acquired land.
4. To compare the Kenyan approach to repossession of illegally acquired land with that of Uganda and the Andhra Pradesh State in India.
5. To propose necessary reforms to the existing legal framework so as to streamline revocation of title deeds as a means of repossessing illegally acquired public land in Kenya.

1.4 RESEARCH QUESTIONS

The study has its main research question as:

What are the legal challenges that have faced revocation of title deeds as an approach towards repossession of illegally acquired public land in Kenya?

This research question was broken down to four specific questions as follows:

1. To what extent do the Constitution and land laws facilitate revocation of title deeds for illegally acquired land in Kenya?
2. What is the emerging jurisprudence from courts on sanctity of title deeds for illegally acquired land in Kenya?
3. To what extent can titles to illegally acquired public land be protected by the principle of sanctity of title?
4. What is the approach in Uganda and the Andhra Pradesh State in India to repossession of illegally acquired land in Kenya?
5. What reforms are necessary to the existing legal framework so as to streamline revocation of title deeds as a means of repossessing illegally acquired public land in Kenya?

1.5 HYPOTHESES

The study tests the following hypotheses:

1. A restrictive legal framework and conflicting jurisprudence from the courts on sanctity of title over illegally acquired land are the major hindrances towards repossession of all illegally acquired land in Kenya.

2. Fast-tracking of the National Land Commission's powers to investigate all land allocations and revoke titles to illegally acquired public lands is the key to repossession of illegally acquired public land in Kenya.

1.6 JUSTIFICATION FOR THE STUDY

The study is justified in that it shall seek to explore a legally sustainable approach to repossession of illegally acquired public land in Kenya. Various investigative reports, taskforces and Commissions of inquiry have recommended among other things the cancellation of the title deeds and the eviction of any form of human settlement in illegally acquired public land.

This study proposes a legally sustainable approach to repossession of illegally acquired land, supported by law. The study is, thus, a reference piece for policy makers within the Executive including the relevant ministries and the officers at the Attorney General's office tasked with the implementation of these reports.

Finally, the study informs the implementation of the various land laws required to operationalize the new Constitution under the rights to property ownership. The topic is therefore an integral component of wider government policy cycles and planning processes.

1.7 LITERATURE REVIEW

The results of the literature review conducted for this thesis are presented throughout the thesis by citation of relevant work in appropriate places. There is a rich tapestry of academic and professional writing relevant to the topic of study. The literature discussed below will be reviewed in preparation for this study:-

Ndung'u has analyzed land related corruption in Kenya.³⁸ His paper notes that some 200,000 illegal titles were created between 1962 and 2002. Close to 98% of these were issued between 1986 and 2002.³⁹ It elaborates that the categories of public land affected included forests,

³⁸ Paul N Ndung'u (2010), *Tackling Land Related Corruption in Kenya*, available at: http://siteresources.worldbank.org/RPDLPROGRAM/Resources/459596-1161903702549/S2_Ndungu.pdf, (last accessed 2nd August, 2013).

³⁹*ibid*, p. 4

settlement schemes established for the poor, national parks and game reserves, government civil service houses, government offices, roads and road reserves, wetlands, research farms, state corporations' lands and trust lands.⁴⁰ Further, these illegal allocations were done on the orders of the President, other senior public officials and well connected politicians or businessmen. Beneficiaries of grabbed land included ministers, senior civil servants, politicians, politically connected businessmen, and even churches and mosques.⁴¹

On acquiring titles, most grabbers would very quickly sell the land to state corporations at hugely inflated values. For instance, the National Social Security Fund, spent about KShs.30 billion between 1990 and 1995 purchasing illegally acquired properties.⁴²

The paper recommends that the illegal title deeds be revoked by a competent authority, within the confines of the Rule of law. Given the very large number of titles involved and the slow, expensive, complicated and bureaucratic processes of the conventional Courts, the paper recommends there be put in place a simple, cheap and accessible forum to deal with these problems. It recommends establishment of a Land Titles Tribunal, with a simplified system of processing cases, such that it is possible to dispose of a case in a matter of one or two days.⁴³ Finally, it recommends prosecution of public officials who, by processing illegal titles, had actually committed criminal offences under Kenyan laws.⁴⁴

Ndung'us paper is useful to this study for it presents the problem that is illegal allocations of public land in Kenya. Its recommendation on revocation of title deeds is also useful to this study. However, it was written before the enactment of the new Constitution and also the new land laws. Further, it does not investigate the position of the courts on cancellation of title deeds. This study goes further to investigate the position in our laws and also the jurisprudence from the courts on revocation of title deeds. It proposes additional reforms in our land laws in addressing cancellation of title deeds for illegally acquired public land in Kenya.

⁴⁰*ibid.*

⁴¹*ibid.*

⁴²*ibid*, p. 5.

⁴³*ibid*, p. 6.

⁴⁴*ibid*, p. 7.

Southall, quoting the Ndung'u land report, analyses the numerous methods were used to grab public land.⁴⁵ His paper notes that the illegal transactions were facilitated by the extensive complicity of professionals: lawyers, surveyors, valuers, physical planners, engineers, architects, land registrars, estate agents and bankers.⁴⁶ It notes that most high profile allocations of public land were made to companies incorporated specifically for that purpose, largely to shield the directors and shareholders of such entities from easy public view.⁴⁷ Further, most illegal allocations of public land took place before or soon after the multiparty general elections of 1992, 1997 and 2002', reinforcing its view that public land was allocated 'as political reward or patronage'.⁴⁸

For urban lands, the paper notes that here was widespread abuse of presidential discretion leading to making of grants of land to individuals without any consideration to the public interest, for political reasons, and without proper pursuit of legal procedures.⁴⁹ Further former presidents allocated alienated land, which they did not have legal power to allocate. Commissioners of Lands had made direct grants of government land without any authority from the President. Forged letters and documents were used to allocate land in numerous instances, with many records at the Ministry of Lands and Settlements having been deliberately destroyed.⁵⁰

Often, land was sold by grantees without any adherence to the conditions laid down by letters of allotment, and many illegal titles to public land were transferred to third parties, often State Corporations, for massive sums of money. Land compulsorily acquired, like that for the proposed Nairobi by-pass, was illegally allocated to individuals and companies, and then often sold on to third parties, whilst land reserved for public purposes such as schools, playgrounds,

⁴⁵ Roger Southall (2005), *The Ndungu Report: Land & Graft in Kenya*, Review of African Political Economy, 103 pp.142-51, available at: [http://www.mokoro.co.uk/files/13/file/lria/ndungu_report_land_and_graft_in_kenya\(1\).pdf](http://www.mokoro.co.uk/files/13/file/lria/ndungu_report_land_and_graft_in_kenya(1).pdf), (last accessed 26th July, 2013).

⁴⁶*ibid.*, p. 3.

⁴⁷*ibid.*

⁴⁸*ibid.*, p. 4.

⁴⁹*ibid.*

⁵⁰*ibid.*

and hospitals had been sold off in blatant disregard of the law by both the Commissioner of Lands and numerous local authorities.⁵¹

For settlement scheme, the paper notes that land purchased by government with international loans from European settlers for settlement by African smallholders or carved out of Trust land.⁵² After the early years of independence, the establishment of settlement schemes and their subsequent allocation extensively deviated from the original objectives, with much land having been allocated for purposes other than settlement and agricultural production.⁵³ The interests of the landless were ignored in favour of District officials, their relatives, members of parliament, councilors and prominent politicians from the area, Ministry of Lands and Settlement officials, other civil servants and other ‘politically correct’ individuals. Whilst the majority of deserving allottees received smaller plots, the undeserving often received large ones.⁵⁴ Meanwhile farms belonging to the Agricultural Development Corporation, designed to provide an the needs of the agricultural industry by developing high quality seeds or livestock or undertaking research etc, have been illegally established as settlement schemes and subsequently illegally allocated to individuals and companies, often as political reward or patronage.⁵⁵ In addition, extensive tracts of Trust Land have been illegally allocated, with county councilors having been the main beneficiaries.⁵⁶

Forest land was grabbed through illegal and irregular excisions, usually made without any reference to scientific considerations or under the guise of settlement schemes.⁵⁷ The beneficiaries of such excisions include (often private) schools, government institutions, and religious bodies as well as private individuals and companies.⁵⁸

Southall’s is useful to this study for it inform on the various means used to illegally acquire public land. However, despite chronicling illegal acquisition of public land, it does not make any

⁵¹*ibid.*

⁵²*ibid.*

⁵³*ibid*, p. 5.

⁵⁴*ibid.*

⁵⁵*ibid.*

⁵⁶*ibid.*

⁵⁷*ibid*, p. 6

⁵⁸*ibid.*

recommendations on how to repossess the same. This study shall improve on the literature by exploring revocation of title deeds as an avenue of repossession of illegally acquired public land.

Korven has critiqued the concept of sanctity of title as it is applied in Saskatchewan, Canada.⁵⁹ His thesis traces the origin of indefeasibility of title from an Australian Statute, Real Property Act, sponsored by Torrens, a Member of Parliament. The new system of land registration proposed in the Act came to be known as Torrens System of land registration, and was adopted in English law, consequently being ‘exported’ to majority of British colonies, including Kenya. The thesis notes that Saskatchewan province does not uphold indefeasibility of titles when they are tainted with fraud, mistake or misrepresentation. Innocent purchasers for value are further not protected against cancellation of their titles.⁶⁰ The innocent purchasers would recover damages from the vendor, and it is only in instances where the vendor was impecunious or had absconded from the province that they would claim their loss from an assurance fund set up by the government.⁶¹

The thesis notes that Saskatchewan courts have held that indefeasibility is an incident of registration. Once registered, an instrument is no longer the source of title of the transferee but is replaced by the certificate of title.⁶² The courts have further held that indefeasibility protects the transferee of title to land, in that the new owner takes that title free and clear of all encumbrances except those registered against the title at the time of transfer.⁶³ The courts concur that indefeasibility is subject only to statutory exceptions or the effects of fraudulent activities.⁶⁴ The thesis concludes that Saskatchewan legislation does not protect indefeasibility of title, but upholds lesser protection under the principle of ‘conclusiveness of ownership’. It notes that the courts have been consistent in denying total indefeasibility of any title deed.

⁵⁹ Kim Sonja Korven (2012), *The Emperor’s New Clothes: The Myth of Indefeasibility of Title in Saskatchewan*, available at: <http://ecommons.usask.ca/handle/10388/ETD-2012-10-522>, (last accessed 2nd August, 2013).

⁶⁰*ibid*, p. 36.

⁶¹*ibid*.

⁶²*ibid*, p. 64.

⁶³*ibid*.

⁶⁴*ibid*, p. 65.

Korven's paper is useful to this study. It traces the origin and characteristics of indefeasibility, informing the researcher. It however focuses on Saskatchewan legislation. This study shall contextualize the Saskatchewan position into Kenya's unique legal regime. It shall further propose reforms which circumvent indefeasibility for repossession of illegally acquired public land.

Professor Paul Maurice Syagga⁶⁵ in his study examines the genesis of public land ownership and its disposition in the post-colonial era, how this has disadvantaged some sections of society and given rise to claims of historical land injustices. The study makes proposals on how best to redress historical land injustices and disputed land allocations, as well as the institution of an effective National Land Commission as envisaged by the Constitution. The study makes four significant recommendations: First, the study contends that the public must be sensitized through civic education on the benefits of land reform that aims to achieve three objectives: equity in terms of opportunities for land access and ownership; efficiency in terms of improved land use; and development of the national economy.⁶⁶ Second, the National Land Commission should be sufficiently funded, be accessible to the public, and be empowered to impose significant penalties on non-compliance with the law on land management and administration. In this regard there must be mechanisms in place for monitoring the activities of the professionals, ensuring that errant professionals are penalized and providing opportunities for the public to report any errant professionals.⁶⁷ Third, the study recommends the establishment of a Land Claims Tribunal to handle land restitution claims, including land repossession, in a clearly defined process.⁶⁸ Finally, the study recommends that redistribution and resettlement programmes must be guided by a legal framework to ensure fairness and transparency.⁶⁹

⁶⁵ Paul Syagga (2012), *Public Land, Historical Land Injustices and the New Constitution*, Society for International Development (SID) Constitution Working Paper No. 9, available at: <http://www.sidint.net>, (last accessed on 24th July, 2013).

⁶⁶ *ibid.*, p. 5

⁶⁷ *ibid.*, p. 6.

⁶⁸ *ibid.*

⁶⁹ *ibid.*

The study is important to this research by providing the factual position of the state of public lands that forms the basis of this study. Its recommendation shall be actualized and conceptualized in a practical way in this study.

In summary, most of the pieces of literature reviewed were written before the enactment of the new Constitution and also the new land laws. Further, they do not investigate the position of the courts on cancellation of title deeds. In addition, they only chronicle the extent of the problem of illegal land acquisition without offering workable solutions on repossession. The foreign literature also needs to be contextualized into the unique Kenyan situation on illegally acquired public land.

This study shall therefore address the above gaps in the literature, offering solutions to the problem of illegal land acquisitions in Kenya.

1.8 THEORETICAL FRAMEWORK

This study was underpinned by two theories. First is theory of indefeasibility of titles. Padilla in propounding this theory stipulates that under the Torrens System, indefeasibility of title can only be claimed if a previous valid title to the same parcel of land does not exist.⁷⁰ This position has been used by Kenyan courts to justify indefeasibility of first registration. The theory adds that where issuance of the title was attended by fraud, the same cannot vest in the titled owner any valid legal title to the land covered by it; and the person in whose name the title was issued cannot transmit the same, for he has no true title thereto.⁷¹ This position shall be used in the study to advance the argument that beneficiaries of illegally acquired land cannot pass good title even to innocent purchasers for value and without notice. This position would thus remove the protection for innocent purchasers for value, allowing repossession of land from them.

The theory of indefeasibility circumvents the principle of sanctity of title for illegally acquired land, by allowing revocation of titles to such land upon being established in a fair inquiry that the

⁷⁰ Padilla, J. in *C. N. Hodges V Dy Buncio & Co., Inc. & The Court Of Appeals*, G.R. No. L-16096, October 30, 1962, available at: http://www.lawphil.net/judjuris/juri1962/oct1962/gr_1-16096_1962.html, (last accessed 2nd August, 2013).

⁷¹ *ibid.*

land was acquired or allocated illegally. It thus opens a window for such titles to be defeated and violated.

Second is the theory of deferred indefeasibility. This theory postpones the quality of indefeasibility to a proprietor or transferee who subsequently acquires the title or interest, and not the first transferee.⁷² Ross Judge in explaining the theory holds that there are three classes of parties: “the original owner; the intermediate owner, who is the person who dealt with the party responsible for the fraud; and, the deferred owner, a bona fide purchaser or encumbrancer for value without notice of the fraud, who takes from the intermediate owner.”⁷³ The theory stipulates that only a deferred owner would defeat the original owner’s title. This is because the intermediate owner, as the party who acquired an interest in title from the fraudster, had an opportunity to investigate the transaction and avoid the fraud whereas the deferred owner did not.⁷⁴ The theory further states that registration of a void instrument does not cure its defect, thus neither the instrument nor its registration gives good title. However, good title can be obtained by a deferred owner from an intermediate owner.⁷⁵ The above theory⁷⁶ has informed the practice of illegal land grabbers quickly disposing off their parcels of land to innocent purchasers, for value, with notice. This study shall seek to circumvent their actions by advancing arguments for repossession even from the deferred owners.

The theory of deferred indefeasibility negates sanctity of title to the deferred owners, while upholding the same for innocent third party purchasers, that is intermediate owners. This study shall rely on strict application of the principle of *nemo dat quod non habet* in holding that sanctity of title should not be upheld even for intermediate owners, since the persons who sold the land to them did not have good title. It shall therefore advocate for defeat and violation of

⁷² Keang Sood Teo (2010), *Deferred Indefeasibility Reinstated in the Malaysian Torrens System: The End of an Unfortunate Saga*, p. 3, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1802664, (last accessed 8th June, 2013).

⁷³ Ross Judge (2007), *Real Property, Fraud and the Land Titles Act*, available at: <http://www.weilers.ca/article/real-property-fraud-and-the-land-titles-act-221.asp>, (last accessed 6th June, 2013).

⁷⁴ *ibid.*

⁷⁵ *ibid.*

⁷⁶ For detailed discussion on the theory, see R. J. Smith (1985), *Forgeries and Land Registration*, 101 Law Q. Rev. 79, p. 88-89, Robin Edwards & Jennifer O’Reilly (1999), *The Duel between Immediate and Deferred Indefeasibility*, Sing. J.L.S. 82, pp. 98- 111 and Pamela O’Connor (2009), *Deferred and Immediate Indefeasibility: Bijural Ambiguity in Registered Land Title Systems*, 13 Ed. L. Rev. 194, p. 15 (all last accessed 6th June, 2013).

titles for illegally acquired public land, even in instances where that land is in the hands of innocent third party purchasers.

1.9 RESEARCH METHODOLOGY

The study required data on legal framework concerning revocation of title deeds, decided cases on revocation of title deeds, past attempts to revoke titles for illegally acquired land by government and comparative approaches to repossession of land by Uganda and South Africa.

The above data was available from both primary and secondary sources. The primary sources consulted include the Constitution of Kenya, 2010, various Acts of Parliament, Reports of various Taskforces and Commissions of Inquiry on illegally acquired land, and also data from interviewees. Secondary sources included books, journal articles, periodicals, other theses and newspaper articles.

The study employed various approaches to collect the data. Data from the Constitution of Kenya, 2010, various Acts of Parliament, Reports of various taskforces and Commissions of inquiry on illegally acquired land was collected through desk research on these sources. Desk research was also used to collect data from the secondary sources.

Data from interviewees was collected through in depth-interviews. In depth interviews were conducted with five officials from the ministry of lands, five officials from the National Lands Commission and five advocates knowledgeable on land matters. The interviewees were selected using purposive sampling method, which enabled identification of only the interviewees with most information. The determining factor of choice was experience in dealing with public land repossession matters, including cancellation of title.

Data analysis was mainly qualitative, bringing out personal views of individuals, gathered from the interviews.

1.10 CHAPTER BREAKDOWN

Chapter one gives an introduction to the topic of study in the thesis. The chapter includes the statement of the problem, the research objectives, questions and hypothesis, literature review, justification of the study and research methodology. It largely introduces the framework and scope of the study.

Chapter two explores the legal framework covering revocation of title deeds. It explores the legal provisions upholding sanctity of title deeds. It also examines legal provisions that allow for cancellation of title deeds, as an exemption to sanctity of titles. It evaluates the legal provisions, before enactment of the revised land laws in 2012, and also after the revision. It also examines the effect of the Constitution of Kenya, 2010 on revocation of title deeds for illegally acquired land.

Chapter three reviews the jurisprudence that has emerged from courts on the issue of sanctity of title, especially when faced with disputes about executive action to revoke title deeds in effort to repossess illegally acquired land. It explores the legal arguments for and against the revocations so as to establish a coherent argument for this action. It also draws from similar decided cases in other jurisdictions, and theoretical perspectives from law so as to critique the approach by Kenyan courts.

Chapter four engages in a comparative analysis with Uganda, a fellow East African country, on how they have handled the issue of repossession of illegally acquired land.

Chapter five summarizes the major conclusions of the study. It sums up the findings in the preceding chapters. The chapter then makes recommendations on the reforms necessary so as to strengthen the use of revocation of title deeds as a tool in repossession of illegally acquired land in Kenya. The recommendations are drawn from the analysis of law, jurisprudence from the courts and comparative angles from other jurisdictions. It offers a clear and understandable jurisprudence on the way forward.

CHAPTER TWO: LEGAL FRAMEWORK ON REPOSSESSION OF ILLEGALLY ACQUIRED LAND IN KENYA

2.1 INTRODUCTION

Chapter two explores the legal framework covering revocation of title deeds. It explores the legal provisions upholding sanctity of title deeds. It also examines legal provisions that allow for cancellation of title deeds, as an exemption to sanctity of titles. It evaluates the legal provisions, before enactment of the revised land laws in 2012, and also after the revision. It also examines the effect of the Constitution of Kenya, 2010 on revocation of title deeds over illegally acquired land.

2.2 STATUTORY FRAMEWORK BEFORE ENACTMENT OF CONSTITUTION OF KENYA, 2010

The statutory framework before the enactment of the new Constitution is relevant to this study. This is because the old land statutes continue to be in force in respect of rights, interests, titles, powers or obligations they confer, vide the saving provision under the new Land Registration Act.⁷⁷ The provision states that:

Unless the contrary is specifically provided for in the Act, any right, interest, title, power, or obligation acquired, accrued, established, coming into force of exercisable before the commencement of the Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act.

Further, the process of implementing the new land laws is too slow, with some categories of land still being registered under the old land laws as of August, 2013.⁷⁸ In addition, no litigation on indefeasibility of title has been referred to court under the new land laws. To this extent, the old land laws are still relevant to this study

2.2.1 Forests Act, Cap 385 (Repealed)

This Act empowered the minister through a notice in the Gazette to declare any unalienated Government land to be a forest area, declare the boundaries of a forest and from time to time alter those boundaries and declare that a forest area shall cease to be a forest area.⁷⁹ The only safeguard was a

⁷⁷ s.107(1).

⁷⁸ Information given by RL 1, a Registrar of Lands, during an interview on 1st August, 2013.

⁷⁹ Section 4(1) of the Act.

requirement for the Minister to publish twenty-eight days' notice of the intention to make the declaration in the Gazette.⁸⁰

This provision was used by ministers to alter forest boundaries and subsequently without justification allocate forest land to individuals with no form of public interest considerations, making such allocations illegal. This Act, having commenced on 1st March 1942 was only repealed in 2005.

2.2.2 Forests Act, No. 7 of 2005

This Act commenced on 1st February 2007. The Act requires that any notice intended to vary the boundaries of a State or a local authority forest; or declare that a forest shall cease to be a State or local authority forest, should only be published where the proposal is recommended by the Kenya Forest Service (KFS) and is subsequently approved by resolution of Parliament.⁸¹

KFS is required not to make such a recommendation unless:

- (a) it has been approved by the forest conservation committee for the area in which the forest is situated;
- (b) it is satisfied that such variation of boundary or cessation of forest proposed by the notice—
 - (i) shall not endanger any rare, threatened or endangered species;
 - (ii) does not adversely affect its value as a water catchment area; and
 - (iii) does not prejudice biodiversity conservation, cultural site protection of the forest or its use for educational, recreational, health or research purposes.
- (c) the proposal has been subjected to an independent Environmental Impact Assessment; and
- (d) public consultation in accordance with the Third Schedule has been undertaken and completed in relation to the proposal.⁸²

The above proposals guard public land, especially forests, from grabbing. The placing of the powers on KFS rather than the Minister and the requirement of parliamentary approval makes such a decision collective and subject to scrutiny. It therefore guards against illegal acquisition of forest land by private individuals.

⁸⁰ Section 4(2) of the Act.

⁸¹ Section 28(1) of the Act.

⁸² Section 28(2) of the Act.

2.2.3 Government Lands Act, 1915 (GLA) (Repealed)

This Act was enacted in 1915, as a replacement of the Crown land Ordinance, to regulate the leasing and other disposal of Government lands. Its main purpose was to govern freehold or leasehold land granted by the government prior to 1920, with the exception of leaseholds converted to 99 or 999 year leaseholds or freeholds under the Registration of Titles Act. It introduced a more systematic approach to registration and provided for Deed Plans for all parcels of land to be registered. The title under the G.L.A was usually the last indenture of Conveyance for freeholds or Assignments for Leaseholds.

This Act empowered the President of Kenya to grant and dispose any estates, interests or rights in unalienated government land.⁸³ The President was further empowered to order the Commissioner of Lands to execute any transaction relating to public land on his behalf.⁸⁴ Moreover, the President had power to order for establishment of farms for unalienated public land, suitable for agricultural purposes.⁸⁵ The above provisions granted the President powers to unilaterally allocate public land, without any restrictions or qualifications for the possible beneficiaries of such lands.

The only safeguard was the requirement that such allocations be done through competitive bidding, with the highest bidders being beneficiaries. However, the same Act empowered the president to exempt certain allocations from having to be done competitively thus:

12. Leases of town plots shall, unless the President otherwise orders in any particular case or cases, be sold by auction.

20. Leases of farms shall, unless the President otherwise orders in any particular case or cases, be sold by auction.

The above powers created a loophole, allowing the president allocate public land to his friends and cronies, at the expense of the public. This has been abused to varying degrees in past regimes to dish out parcels of public land to undeserving individuals for political reasons.

⁸³ Section 3 of the Act.

⁸⁴ Section 7

⁸⁵ Section 19.

The powers of the President to allocate public land could not be delegated to the Commissioner of Lands.⁸⁶ However, the Commissioner has on several instances allocated public land without an express allocation letter by the president, amounting to illegal allocation of public land. In addition, the Commissioner of Lands was also empowered to dispose public land thus;

9. The Commissioner may cause any portion of a township which is not required for public purposes to be divided into plots suitable for the erection of buildings for business or residential purposes, and such plots may from time to time be disposed of in the prescribed manner. Though such dispositions were to be done through auction, the president could again order otherwise. No public auction has been held since independence for disposal of public land, despite the lack of an authorization from the President excepting such allocations from auction. As such, the dispositions by the Commissioner, not subjected to auction have been illegal. Further, the provision was used by prominent individuals to acquire plots in major towns, against public interest. Even those plots required for public purposes, for instance road reserves, markets, playgrounds, social halls and other public amenities were sub-divided and issued to prominent individuals without being subjected to auctions.

The Act further guaranteed sanctity to leases, licenses and conveyances issued under the Act. It provided that, ‘a copy of any conveyance, lease or licence from the Government registered in the registry, certified to be a true copy under the hand of a registrar, shall be admissible in evidence of its contents in all courts.’⁸⁷ Further, it provided that, ‘every certified copy of any entry in the register, purporting to be signed by a registrar, shall be receivable in evidence in any case without further or other proof thereof, unless it is alleged to be a forgery.’⁸⁸

The registrar was barred from arbitrarily cancelling such allocations. The registrar could only, ‘correct errors and supply omissions in the register or in any entry therein.’⁸⁹ Further he could only cancel, ‘any document or entry which he is satisfied has determined or ceased or been discharged, or for any other reason no longer affects or relates to land registered.’⁹⁰ He could therefore not cancel existing, valid documents.

⁸⁶ Section 7.

⁸⁷ Section 124.

⁸⁸ Section 125.

⁸⁹ Section 120 of the Act.

⁹⁰ Section 121(1).

For persons illegally in possession of public land, the Act gave the Commissioner the sole option of filing a suit in court to recover the possession thus;

130. (1) When any person without right, title or licence, or whose right, title or licence has expired or been forfeited or cancelled, is in occupation of unalienated Government land, the Commissioner or some person appointed by him in writing may enter a suit in any court of competent jurisdiction to recover possession thereof.

The Act thus created the infrastructure and avenues for irregular allocations of public land, but gave court action as the sole option for repossession of the same.

2.2.4 Registered Lands-Act, Cap 300 (RLA) (Repealed)

This Act was enacted in 1963. Its aim was to enable land owned by Africans to be registered under the law so that all land that was consolidated and adjudicated in the African reserves and then offered to the Africans for settlement be registered under it. It also aimed at providing for a better registration of title to land as well as simplification of conveyancing and facilitation of a cheaper mode of transfer of interest in land.

Registration under this Act gave the proprietor absolute ownership of that land together with all rights and privileges.⁹¹ The rights of a registered proprietor were free from all other interests or claims whatsoever, only subject to any registered encumbrances or overriding interests.⁹² The Act guaranteed sanctity to titles issued under it, stipulating that the register was a final and conclusive evidence of title which is guaranteed by the state.⁹³

The Registrar of Lands was not allowed to cancel entries to the register. He was only allowed to make rectifications in certain instances: in formal matters and in the case of errors or omissions not materially affecting the interests of any proprietor, when there is consent by all persons interested, when upon resurvey, a dimension or area shown in the register is found to be incorrect and upon proof of the change of the name or address of any proprietor.⁹⁴ The registrar attempted

⁹¹ Section 27(a).

⁹² Section 28.

⁹³ Section 37.

⁹⁴ Section 142

on many occasions to rely on the rectification powers to cancel title deeds,⁹⁵ but the Courts were consistent in holding the Registrars actions illegal.

Only the courts were allowed to cancel titles issued under the Act. The powers of cancellation were given to the courts thus;

143. (1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.

The above section only allowed cancellation of subsequent registrations. The courts were stopped from interfering with first registrations even when procured through fraud or mistake. This granted indefeasibility status to first registration. Further, cancellation of subsequent registrations was only allowed if the current proprietor had knowledge of, caused or substantially contributed to the omission, fraud or mistake. The burden of proof for knowledge, negligence and default is difficult to discharge, making it hard for courts to order such cancellations.

However, the Act subjected transactions and registrations under the Act to common law and equity.⁹⁶ The subjection to equity was significant, for Kenyan courts heavily relied on equity to order cancellation of registration for illegally acquired public lands, registered under this Act. Moreover, the common law doctrine of *nemo dat quod non habet* was applied through this section to invalidate subsequent registrations. However, in other instances, courts have relied on section 143(1) to uphold total indefeasibility of a first registration.

2.2.5 Registration of Titles Act, Cap 281 (RTA) (Repealed)

This statute was enacted in 1920 and it introduced the system of registration of titles as opposed to the registration of deeds. The Act related to land granted by the Government, or the subject of the certificate of ownership or of mortgage or of interest issued by the recorder of titles under the Land Titles Act (LTA) and to all leaseholds which had been converted from terms of 99 years to

⁹⁵ Interview with Orioki, an official at Ministry of Lands. The Registrar's opinion was that rectification included cancelling titles wrongfully issued.

⁹⁶ Section 163.

999 years or to freeholds, and titles converted on a voluntary basis, from GLA or LTA registration to RTA titles. There were various title documents under the RTA: Grants, Certificate of Title, or a Lease. The substantive statute governing transactions under this Act was the Indian Transfer of Property Act, 1882 (ITPA).

The Act assured indefeasibility of title in *rem* to buyer thus:

23. (1) The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.

(2) A certified copy of any registered instrument, signed by the registrar and sealed with his seal of office, shall be received in evidence in the same manner as the original.

The above provisions made all registrations indefeasible, except on the ground of fraud or misrepresentation to which the title holder is proved to be a party. The Act stipulated that every registration under the Act was to be deemed to be a fresh grant thereby extinguishing all past titles and interest, which should then have been cancelled thus;⁹⁷

(2) When a certificate of title is issued under subsection (1), all previous certificates of title shall be delivered up to the registrar and cancelled by him.

(3) The title of the proprietor under each fresh certificate of title shall be as valid and effectual in every respect as if he had been the original grantee in the grant of the land contained in the certificate.

By deeming all registrations to be first registrations, in addition to requiring proof that the title holder was a party to any fraud or misrepresentation for any successful challenge on the title, the Act made it almost impossible to repossess any illegally registered lands.

The Act guaranteed title by registration, protecting the buyer from being concerned about the past record. The buyer was not obliged to go behind the certificate of title or what appears on the face of register records of land registry so as to ascertain if certificate of title or transfer is valid or not. It was the sole responsibility of registrar to scrutinize each instrument before registering it to ensure it complies with the provisions of the Act.⁹⁸

2.2.6 Land Acquisition Act, Cap 295 (Repealed)

⁹⁷ Section 22(2) and (3)

⁹⁸ Sections 32 and 37 of RTA

This Act allowed the State or Government to take over land without private negotiations, without the full consent of the owner but with a just compensation. The Act set out a detailed process for the compulsory acquisition. The Minister of Land, on realizing the need for land, would authorize the Commissioner of Lands to issue a preliminary notice of acquisition.⁹⁹ The preliminary notice would allow entry to the land by the Commissioner's agents for purposes of preliminary surveys and determination as to whether the land is suitable for the purpose for which it may be required.¹⁰⁰

The Minister needed to be satisfied of several facts: that the land was suitable; was required for purposes of a public body; that the acquisition was necessary in the Interest of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization would promote the public benefit;¹⁰¹ and the necessity afforded reasonable justification for the causing of hardship that resulted to persons interested in the land.¹⁰² Once satisfied, he/she would authorize the commissioner in writing to publish the notice of intention to acquire the land.¹⁰³ The Commissioner would then within thirty days and not later than twelve months after the publication of the notice of intention to acquire, hold an inquiry for the hearing of claims to compensation by persons interested in the land.¹⁰⁴ On conclusion of the inquiry, the Commissioner would prepare a written award, making a separate award of compensation to each person whom he has determined to be interested in the land, and facilitate the payments to such persons.¹⁰⁵ It is only after the making of the award of the compensation that the government would take possession of the land.¹⁰⁶

The Act was significant for it provided an avenue to repossess illegally acquired land from individuals, but only on paying them full compensation. It would be absurd to use compulsory

⁹⁹ Section 3.

¹⁰⁰ Section 4.

¹⁰¹ Section 6(1)(a).

¹⁰² Section 6(1)(b).

¹⁰³ Section 6(2).

¹⁰⁴ Section 9.

¹⁰⁵ Section 10.

¹⁰⁶ Section 19.

acquisition to repossess illegally acquired public land as this would amount to validating the illegal allocation.¹⁰⁷

2.2.7 Land Titles Act, Cap 282 (Repealed)

During the advent of colonialism in Kenya, an administrative arrangement was signed between the Sultanate of Zanzibar and the colonial authorities, in which part of the sultans dominion was ceded to the British under a concession agreement, the so called 10 mile coastal strip. Under the agreement, the British were to administer the area but subject to the rights of the inhabitants which included property rights such as the inhabitants may be having. This is what made it necessary for the Act to be introduced in 1908, with a view to creating a registration system that would be applicable only to the coastal region.¹⁰⁸

The registration regime created under this Act was meant to give recognition to those long established claims of ownership and adjudicate them so that claimants would get recognition under the Act. It provided for a registration system in favour of individual title claimants within the coastal region provided that they could prove their claims to the properties they owned and so an adjudication process became necessary and one was created and a compulsory registration system was put in place.¹⁰⁹

Property owners were obligated to present their claims and so they were supposed to lodge their claims to the land registration court that was created under the Act. This court was presided over by a recorder of titles and a deputy who was expected to deal with such claims as may be lodged. Claimants were required to prove furnish evidence of ownership upon successfully proving such claims they were issued with various documents of title depending on the nature of their ownership or certificates of ownership were issued in respect of freehold property so any successful claimant who could prove the nature of their holding would obtain a certificate of

¹⁰⁷ View given by Kimani Njogu, an advocate knowledgeable on land matters, during an interview on 3rd July, 2013.

¹⁰⁸ Mona Doshi (2012), *The Land Laws of Kenya: A Summary of the Changes*, available at: <http://www.africalegalnetwork.com/wp-content/uploads/2012/10/Summary-of-the-Land-Laws-Anjarwalla-Khanna-October-2012.pdf.pdf>, (last accessed 22nd October, 2013).

¹⁰⁹ *ibid.*

ownership or certificate of mortgages would be issued in respect of mortgage of immoveable property whereas a certificate of interest would issue to those who could demonstrate the existence of other rights of whatever kind in the land subject matter.

What it set in motion was a process of not conferring as it were any rights or interests but merely ascertaining and endorsing the same through extending recognition to such rights through of issuance of various documents of title. Registration of such interest in the register created under the Act would in effect bring to an end any rival claims that could evolve over such land. Title documents would issue with a short description of a document proving such ownership being noted in the register thereafter all subsequent documents or transactions relating to the same land would consecutively be entered in the register in the order in which they were presented and the effect of creating the register with all the entries was that it would be conclusive as to the question of ownership so that a certificate of title would make the owner of the holder thereof have a title that was good against the whole world. Similarly certificate of ownership would make the holder thereof as the undisputed owner of all the property, trees buildings standing on the land as at the date of that certificate unless or a memorandum noting or having entries to the contrary was produced to contradict that position. Once the adjudication process was complete the resulting position was that all unclaimed land or such land as was not subjected to successful claims would be designated Crown Land and became freehold property which could be dealt with by the government or the Crown in the normal manner including being subject to the exercise of powers of alienation or disposition.

Many persons took advantage of the lengthy adjudication process at the Coast to register themselves as owners of the land, creating the problem of absentee landlords and dispossessing the local population, especially indigenous communities of their land. Further, the land that remained unclaimed, supposed to be public land, was also subdivided by prominent politicians and titles procured illegally.

2.2.8 Conclusion on Legal Framework before Enactment of Constitution of Kenya, 2010

The laws before enactment of Constitution of Kenya 2010 had loopholes, which were exploited to illegally allocate public land to private individuals. Upon registration of such allocations through the various regimes, the registration laws granted indefeasible title to first registrations

and also made it difficult to invalidate subsequent registrations. There were only two legal options left to the government: institute legal proceedings to recover such lands or use compulsory acquisition to repossess the same. The next section evaluates whether there were changes with the enactment of Constitution of Kenya, 2010 and also the new land laws to give effect to the letter and the spirit of constitutional provisions on land.

2.3 CONSTITUTION OF KENYA, 2010

The Constitution has several provisions that entrench the sanctity of title deeds. It grants the right to every person either individually or in association with others, to acquire and own property of any description; and in any part of Kenya¹¹⁰

It further bars parliament from enacting any law that permits the State or any person to arbitrarily deprive a person of any property of any description or of any interest in, or right over, any property of any description or limit in any way the enjoyment of any right to own property on the basis of on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.¹¹¹ The Constitution therefore, bars arbitrary deprivation of the right to own land, thus guaranteeing sanctity of title.

However, the protection is not absolute. The Constitution grants a lee-way to recovery of illegally acquired land thus:¹¹²

The State shall not deprive a person of property of any description of any interest in, or right over, property of any description unless the deprivation; results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land in accordance with Chapter Five; or is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that-

- a) requires prompt payment in full, of just compensation to the person; and
- b) allows any person who has an interest in, right over that property a right of access to a court of law .”

The above provision prohibits the government from depriving persons of their land unless by compulsory acquisition, or other avenue provided for in chapter five.

¹¹⁰ Article 40(1).

¹¹¹ Article 40(2).

¹¹² Article 40(3).

However, the Constitution is categorical that the protection from arbitrary deprivation does not extend to any property that has been found to have been unlawfully acquired. This expressly removes the protection and requirement for compensation from holders of titles for illegally acquired public lands.

Chapter five of the Constitution, in recognition of the magnitude of illegal acquisition of public land, authorizes Parliament to enact a law to enable the review of all grants or dispositions of public land to establish their propriety or legality.¹¹³ Though the Constitution is silent on actions subsequent to the review, it implies that those grants or dispositions that are illegal should be cancelled and the land repossessed by the government.¹¹⁴ The Constitution therefore guarantees sanctity of title, but provides a framework for repossession of illegally acquired public land, leaving Parliament to expound on the specifics.

In order to operationalise these provisions of the Constitution, 2010, parliament is mandated to enact legislations on land and environment within a specified time frame. Parliament is required to enact the legislation contemplated under Article 63, 66 and 71 of the Constitution¹¹⁵ within Five Years and that under Article 72 within four years.¹¹⁶ The legislation concerning Land under Article 68 of the Constitution is already enacted through the various land laws including the Land Act, the Land Registration Act and the National Land Commission Act, that are discussed below.

2.4 STATUTORY FRAMEWORK AFTER ENACTMENT OF THE CONSTITUTION OF KENYA, 2010

2.4.1 Land Act, No. 6 of 2012¹¹⁷

It is an Act of parliament to give effect to Article 68 of the Constitution, to revise, consolidate and rationalize land laws; to provide for the sustainable administration and management of land

¹¹³ Article 68(c)(v).

¹¹⁴ View stated by Njoka, an official at the National Land Commission, during an interview on 7th July, 2013 at Nairobi.

¹¹⁵ Article 261(1) of the Constitution.

¹¹⁶ Schedule Five of the Constitution, 2010.

¹¹⁷ Act No. 6 of 2012.

and land based resources, and for connected purposes.¹¹⁸The Act defines Land in terms of the Constitutional definition under Article 260 which includes public, private and community land.¹¹⁹

The Act provides the necessary legal apparatus to repossess illegally acquired land. On sanctity of title, the Act provides that all grants of public land, issuances of a certificate of ownership of land or dispositions obtained or induced by corruption, on the part of any government official, county government official or employee of the NLC are illegal from their inception and are void and of no legal effect.¹²⁰It requires persons occupying such lands forfeit it back to the government without any entitlement to any compensation.¹²¹ Here, The Act does not differentiate first and subsequent registrations, giving right to invalidate all transactions tainted by corruption. It, thus, goes against indefeasibility of first registration as provided for in the previous land laws. By holding the transactions void, it allows for cancellation of the titles. It further denies any form of compensation, without protecting an innocent purchaser for value and without notice.

It also improves on previous laws by empowering the National Land Commission (NLC) to issue a notice to person or entity it suspects to be in illegal occupation of public land to vacate. Failure to comply with the terms of the notice empowers NLC to move to court to validate the notice and thereafter obtain appropriate orders for vacation.¹²²The Act further makes the fraudulent and corrupt land transactions a criminal offence liable on conviction to a fine not exceeding ten million shillings or imprisonment for a term not exceeding ten years or both.¹²³

The Act further provides for compulsory acquisition. It provides that whenever the National or County government is satisfied that it may be necessary to acquire some particular land for public use, the respective Cabinet Secretary or the County Executive Committee Member shall submit a request for acquisition of public land to the Commission to acquire the land on its behalf.¹²⁴ The Commission is empowered however, to reject a request of an acquiring authority,

¹¹⁸ Preamble to the Act.

¹¹⁹ Section 3 of the Act.

¹²⁰ Section 158(1) and (2).

¹²¹ Section 158(4).

¹²² Section 155.

¹²³ Section 157(1).

¹²⁴ Section 107 of the Act.

to undertake an acquisition if it establishes that the request does not meet the requirements prescribed under Article 40(3) of the Constitution. The acquisition is subject to prompt and adequate payment of compensation.¹²⁵ Compulsory acquisition has been identified as one of the options towards repossession of illegally acquired land. This study is however opposed to this avenue as it would validate illegal acquisitions of land, and allow persons to benefit from an illegality.

The Act finally empowers the Environment and Land Court established by the Environment and Land Court Act¹²⁶ to hear and determine disputes, actions and proceedings concerning land.¹²⁷

2.4.2 The Land Registration Act, No. 3 of 2012¹²⁸

This Act came into force on 2nd May, 2012. It sought to revise, consolidate and rationalize the registration of titles to land and to give effect to the principles and objects of devolved government in land registration. The Act applies to registration of interests in all public land as declared by Article 64 of the Constitution and registration and recording of community interests in land.¹²⁹

Part II of the Act deals with the organisation and administration of the registry and register in a decentralized manner as envisaged under the Constitution. This is essential in terms of instilling efficiency in the management of land based resources and the land itself. The Act provides for the maintenance of documents in a more secure, accessible and reliable format¹³⁰ and specifically provides for freedom of access to information.¹³¹ In order to enhance competence and eliminate the rampant corrupt practices that have characterized the management of land at the registry, the Act now provides for competitive recruitment of the Land Registrars by an independent body,

¹²⁵ Section 108 of the Act.

¹²⁶ Act No. 19 of 2011.

¹²⁷ Section 101 of the Land Registration Act.

¹²⁸ Act No. 3 of 2012.

¹²⁹ 3(a) and(c).

¹³⁰ Section 9 of the Act.

¹³¹ Section 10 of the Act.

the Public Service Commission.¹³²The functions of the registrars are clearly spelt out in the Act which in any case excludes the power to cancel a title which had been the practice previously.¹³³

The Act guarantees sanctity of title, but limits that to only legally acquired titles. It provides that the certificate of title shall be held as conclusive evidence of proprietorship except on the ground of fraud or misrepresentation to which the person is proved to be a party; or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.¹³⁴ The words ‘fraud’, ‘corruption’, ‘illegality’ and ‘unprocedurally’ mentioned in the Act are matters of facts which require proof in a court of law. This provision serves two purposes: enhancing public confidence in land holding and giving the government the roadmap to recover illegally alienated public land.

The roadmap to recovery of illegally alienated public land outlined above is however, subject to some restrictions. The Act provides that if a person acquires or receives land in respect of which the court could make an order for restoration or for the payment of reasonable compensation, the court shall not make that order against that person if that person proves that the land was acquired or received in good faith and without knowledge of the fact that it has been the subject of a disposition to which this part applies, or acquired or received through a person who acquired or received it in the circumstances set out herein.¹³⁵ This in essence means that an innocent third party purchaser without notice of any irregularity has a valid title and the government cannot therefore repossess the land. This has a net effect of making people to transfer the titles to third parties who act as their proxies in a bid to defeat the intention and effort of the government in recovering illegally alienated forests. In order however, to deal with this problem, the Act empowers the Land Registrar to place a restriction on the transfer of the land if he/she suspects any fraud or improper dealing or for any other sufficient cause.¹³⁶ Further, the knowledge of fraud by the third party is widened to include actual, constructive and imputed knowledge,¹³⁷ making it easier to discharge the burden of proof on this. The Act then clothes the Environmental

¹³² Section 12 of the Act.

¹³³ Section 14 of the Act.

¹³⁴ Section 26 of the Act.

¹³⁵ Section 53(1) of the Act.

¹³⁶ Section 76 of the Act.

¹³⁷ Section 53(2) of the Act.

and Land Court with jurisdiction to hear and determine disputes, actions and proceedings concerning land.¹³⁸

This Act creates no difference between first and subsequent registrations, allowing blanket invalidation through the courts of any land registration which has transaction which has been acquired illegally, unprocedurally, through a corrupt scheme, by fraud or misrepresentation. Although it protects innocent purchasers for value, it lowers the burden of proving that they knew of irregularities while engaging in the purchase of the land.

2.4.3 National Land Commission Act, No. 5 of 2012

The object and purpose of this Act is to provide: for the management and administration of land in accordance with the principles of land policy set out in Article 60 of the Constitution and the national land policy; for the operations, powers, responsibilities and additional functions of the Commission pursuant to Article 67 (3) of the Constitution; a legal framework for the identification and appointment of the chairperson, members and the secretary of the Commission pursuant to Article 250 (2) and (12) (a) of the Constitution; and for a linkage between the Commission, county governments and other institutions.¹³⁹ The Act provides that its functions shall be decentralized in order to enhance accessibility and wider public reach.¹⁴⁰

The Commission is given a wide array of functions which include: to manage public land on behalf of the national and county governments; to recommend a national land policy to the national government; to advise the national government on a comprehensive programme for the registration of title in land throughout Kenya; to conduct research related to land and the use of natural resources, and make recommendations to appropriate authorities; to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress; to encourage the application of traditional dispute resolution mechanisms in land conflicts; to assess tax on land and premiums on immovable property in any area designated by law; and to monitor and have oversight responsibilities over land use planning

¹³⁸ Section 101 of the Act.

¹³⁹ Section 3 of the Act.

¹⁴⁰ Section 4 of the Act.

throughout the country.¹⁴¹In order to enhance the expertise of the Commission in the performance of its functions, the Act provides that the Chairperson and the members of the Commission shall be persons who are knowledgeable and experienced in land matters.¹⁴²

Of critical importance in the recovery of illegally alienated land, the Act empowers the Commission by dint of Article 68 (c) (v) of the Constitution, to, within five years of the commencement of the Act, on its own motion or upon a complaint by the national or a county government, a community or an individual, review all grants or dispositions of public land to establish their propriety or legality.¹⁴³ On establishment of fraud or irregularity, the Commission is required to direct the registrar to revoke or cancel the Title.¹⁴⁴ This is departure from the past where the old land law regime did not provide for the power of the Registrar to expressly cancel a title. Instead it was left to the court as discussed above.

This provision seems to usurp the role of the Land and Environment Court which has exclusive jurisdiction to deal in land disputes. Further, it goes against the principle of separation of powers which provides that the adjudication of disputes should be the role of the Courts and not the executive to which the Land Commission falls under. However, it is based on an express constitutional provision, which would override any provisions of an Act of Parliament. To guard against the interests of the innocent third purchasers for value without notice, the Act protects against defeat of their interests.¹⁴⁵

The Act allows NLC to establish committees for the better carrying out of its functions,¹⁴⁶ and also co-opt members with additional skills to the committees.¹⁴⁷ It finally devolves management of public land by establishing County Land Management Boards.¹⁴⁸ These boards are tasked with processing applications for allocation, change and extension of user, subdivision renewal of leases for public land within Counties.

¹⁴¹ Section 5 of the Act.

¹⁴² Section 8 of the Act.

¹⁴³ In similar terms with the recommendations of the Ndung'u Land Commission Report.

¹⁴⁴ Section 14 of the Act.

¹⁴⁵ Section 14(7).

¹⁴⁶ Section 16(1).

¹⁴⁷ Section 16(2).

¹⁴⁸ Section 18(1).

2.4.4 Conclusion on Legal Framework after the Enactment of Constitution of Kenya, 2012

The legal framework giving effect to Constitution of Kenya, 2012 removes the restrictions of previous land laws on repossessing illegally acquired public land. It eliminates the previous provisions on absolute indefeasibility of first registration. It also broadens the grounds for cancellation of title, making it easier to discharge burden of proof for such and for courts to grant such orders. Further; through it still grants protection to innocent third party purchasers for value and without notice; it makes it easier to impeach such protection. It further provides for a comprehensive review of all previous public land allocations to determine their legality. Finally, it expressly allows the registrar of lands, under direction from the NLC to cancel title deeds for illegally acquired public land.

2.5 CONCLUSION

The legal and institutional framework as has been discussed is broad and requires a well coordinated approach in recovery of illegally acquired public land. The previous laws before enactment of the Constitution of Kenya, 2010, seem to have granted a blanket protection to first registrations of title deeds under RLA irrespective of illegality in their acquisitions. The Constitution of Kenya, 2012, together with the laws enacted under it seems to be departing from the previous provisions by providing for a window to cancel title deeds for illegally acquired lands.

The next chapter examines how courts have dealt with title deeds for illegally acquired public lands.

CHAPTER THREE: AN ANALYSIS OF JURISPRUDENCE FROM THE KENYAN COURTS ON SANCTITY OF TITLE

3.1 INTRODUCTION

Chapter three reviews the jurisprudence that has emerged from courts on the issue of sanctity of title, especially when faced with disputes about executive action to revoke title deeds in efforts to repossess illegally acquired land. It explores the legal arguments for and against the revocations so as to establish a coherent argument for this action.

3.2 ACTIONS OF REGISTRAR TO CANCEL TITLE DEEDS

The government, in repossessing irregularly allocated public land, has attempted executive action of revoking title deeds for such land through gazette notices by the Registrar of Lands. The courts have acted firmly towards such moves, terming them to be outright illegality. Consequently, they have declared such gazette notices null and void. They have further set out the options for the government in such cases. This position is evident in the cases below.

3.2.1 Kuria Greens v Registrar of Titles and Commissioner of Lands¹⁴⁹

On the 26th November, 2010 the Registrar of Titles published a notice in the Kenya Gazette, revoking the applicants Title Number 15410/2001. The applicant had purchased the suit land from Riangi Estates Limited in November, 1993 at a consideration of Kshs. 13 Million. The transfer was duly registered at the Land Titles Registry, Nairobi and a Certificate of Title dated 21st December, 1993 issued. The applicant had paid all land rent and rates due to the government since the purchase of the suit land. Prior to the publication of the Gazette Notice, the applicant had never been informed of any intention to revoke its title. Further, after publication of the Gazette Notice, there was no other communication from the government. The applicant contended that the Registrar had no legal power to revoke its title and that the Gazette Notice violated its constitutional right guaranteed by Articles 40 and 47 of the Constitution of Kenya, 2010.

In holding the gazette notice unconstitutional, the court stated:

¹⁴⁹ NAI Petition No. 107 of 2010(unreported).

Whereas unlawful acquisition of public property by citizens must be lawfully resisted, the court will be failing in its constitutional duties if it failed to protect citizens from unlawful acquisition of their property by the State through unlawful decisions taken by public officers.¹⁵⁰

The court went ahead to give options for the repossession to the Registrar. It observed that if the Registrar of Titles were satisfied that the suit land had been unlawfully alienated and that it was in the interest of the public that the land reverts to the State or to the Kenya Agricultural Research Institute, appropriate notice ought to have been given to the petitioner and thereafter the Registrar ought to have exercised any of the following options;

- a) initiate the process of compulsory acquisition of the suit land and thus pay full and prompt compensation to the petitioner; or
- b) File a suit in the High Court challenging the petitioner's title and await its determination, one way or the other.

3.2.2 Power Technics Limited v The Hon. Attorney General & 2 Others¹⁵¹

The Registrar of Lands had issued several Gazette Notices; Numbers 13104 on 21st October 2011, 3640 and 9230 on 29th July 2011 and 7751 on 9th July 2010; revoking titles issued under the RTA. The Registrar contended in court that the titles were illegally or unlawfully acquired and as such he had authority under section 60(1) of the *Registration of Titles Act* to cancel registration. The Registrar further argued that under section 65 of the same Act, he had power to, "...call documents, summons witnesses, cancel entries and titles issued."¹⁵² Hence, his position was that he was within his power to cancel the titles on the ground that they were invalid.

However, the court held that a plain reading of sections 60 and 65 shows that the powers of the Registrar are limited to correcting errors and misdescription of land or boundaries or where entries or endorsements to any grant or certificate of title are made in error or are fraudulent. This is a limited jurisdiction that does not include cancellation of titles. It further stipulated that even where the Registrar exercises such powers granted to him, the facts that are condition precedent of the exercise of such power must be shown to exist and the party against whom the power is invoked must be given an opportunity to be heard. Section 65 empowered the Registrar

¹⁵⁰ p. 7, para 6.

¹⁵¹ [2012]eKLR

¹⁵² p. 6, para 10.

to do all things that are necessary to ensure that there is a fair hearing.¹⁵³ Hence, sections 60 and 65 were held not to be applicable to the facts and circumstances of these cases.

The court, therefore, quashed Gazette Notice Numbers 9230, 7751, 3640 and 13104, declaring them null and void and of no effect.¹⁵⁴ It further issued a declaration that the revocation of titles issued under the Registration of Titles Act (Chapter 281 of the Laws of Kenya) by the Registrar of Titles, the Commissioner of Lands or any other officer authorized by them by way of publication of a Gazette Notice under the provisions of the Government Lands Act (Chapter 280 of the Laws of Kenya) and the Trust Land Act (Chapter 288) or any other law is contrary to Article 40 and 47(1) of the Constitution and is therefore null and void.¹⁵⁵ The court further castigated the Registrar's conduct. It noted that despite the Registrar having been served with similar orders in two previous cases, he never reviewed his decision to continue revoking titles by way of Gazette Notice and therefore had acted in defiance to the decisions of the Court.

3.2.3 Isaac Gathungu Wanjohi & Another v Attorney General & 6 Others¹⁵⁶

The suit is concerned land situated at the junction of Airport Road and Mombasa Nairobi Road, which was intended for construction of the Eastern Bypass. The petitioners had been issued with a title, Grant No. IR 61456 upon purchase of the property from Bach Industrial Limited, the original allottee from the Commissioner of Lands for the sum of Kshs. 18 million. In May 2011, the Commissioner of Lands served the property owners a notice of intention to acquire their land for the purpose of constructing the Eastern Bypass, Mombasa Road –North Airport Road under section 6(2) of the Land Acquisition Act. The Registrar of Titles however went ahead to revoke the title of the suit property vide Gazette Notice No. 9230 appearing in the special issue of the Gazette dated 29th July 2011, and immediately entered into possession of the land, sending graders to level the ground for road construction. The Registrar asserted in court that the suit property was acquired illegally. He further argued that with the titles having been revoked, no consequent compulsory acquisition could take place.

¹⁵³ p. 9, para 19.

¹⁵⁴ p. 11, para 30(c).

¹⁵⁵ p. 11, para 30(a)

¹⁵⁶ High Court at Nairobi NAI 102/2012, [2012] eKLR

However, the court held that Article 40(6) of the Constitution contemplated that the finding of “unlawful acquisition” must be by due process, through a legally established process and not by whim or revocation through a Gazette Notice as the Commissioner of Lands purported to do and definitely not by forceful taking of possession. It therefore declared Gazette Notice No. 9230, appearing in the issue dated 29th July 2011, null and void in so far as it purported to revoke that title. The court directed that should the state wish to challenge the title to the land held by the petitioners, it must commence such proceedings within 12 months from the date of the judgment.

Further, in view of the breach of the petitioner’s due process rights in revoking the title to the suit property and the subsequent trespass, the court awarded the sum of Kshs. 1,000,000.00 as damages.

3.2.4 Major General (rtd) Dedan Njuguna Gichuru v Registrar of Titles & Others, Nairobi¹⁵⁷

The applicant successfully sued the 1st respondent who is an important officer in land rights administration in Nairobi area seeking the Judicial Review order of certiorari to quash a Gazette Notice published on 26 November 2010 by the 1st respondent revoking titles to his 14 parcels of land at Tigoni area in Kiambu. In doing so, the 1st respondent, acting on grounds of ‘public interest’ reasoned that the land belonged to the Kenya Agricultural Research Institute (KARI) despite the fact that there were pending cases filed by the defunct Kenya Anti- Corruption Commission (KACC) seeking the cancellation of the titles. Justice Weldon Korir ruled thus:

As has been demonstrated, the Registrar of Titles does not have any power under the Constitution to make a declaration that a particular parcel of land was irregularly and unlawfully acquired. Likening the present case to that of a thief caught in the act who must be taken through the due process of law rather than be sent straight to jail by the police, the learned judge concluded:

I have, however, demonstrated that even where there is clear evidence of fraud and the unregistered proprietor does not voluntarily surrender the title, the only avenue open to the 1st respondent (Registrar of Titles) is to go to court.

3.2.5 Fahim Yasim Twaha & Another v District Land Registrar Lamu¹⁵⁸

¹⁵⁷ High Court in Nairobi JR App No. 268/97 (unreported).

In this case the court was emphatic on the lack of powers on the part of the Registrar to cancel titles thus:

“I doubt that an illegality or what is deemed as irregular or an act of impunity can be cured by another irregular action of impunity. Just because the ex-parte applicants may have obtained the plot using improper process does not mean that the same has to be taken away from them using equally improper process.”

3.2.6 Analysis

There is, thus, consensus from the courts that the Registrar cannot revoke title deeds through gazette notice. The researcher agrees with this stance by the courts. There is need to balance the need to recover illegally acquired public land and protection of property. If the Registrar had unfettered discretion to nullify title deeds, it would amount to breach of rules of natural justice, by allowing the holders of the title deeds to be condemned unheard. There is need to subject such cases to a judicial process for determination of illegality and fraud.

The current Constitution grants the National Land Commission powers to act as a quasi-judicial body and recommend to the Registrar revocation of title deeds of illegally acquired lands. In view of the backlog of cases in the courts, this is a welcome move. However, persons aggrieved by the actions of the Commission have a right to appeal to the Land and Environment Court and further to the Court of Appeal. To further streamline the process of repossession of illegally acquired land, there is need to refine this process.

3.3 INDEFEASIBILITY OF TITLE DEEDS

Several decisions from both the High Court and Court of Appeal have upheld indefeasibility of titles. Indefeasibility has been upheld for first registrations under RLA and all registrations under RTA. These cases are discussed below:

¹⁵⁸ High Court at Malindi JR App. No, 17 of 2010 (unreported).

3.3.1 Nairobi Permanent Markets Society & 11 Others v Registrar of Lands, Nairobi and 2 Others¹⁵⁹

The appellants were permanent stall owners within the Westlands Permanent City Council Market situated on a piece of land known as L.R.1870/45/IX. The Council subdivided the piece of land and allegedly unlawfully leased out a portion thereof namely L.R.1870/IX/170 to Salima Enterprises Limited on a 99 years lease. The Company therefore purchased the suit land from the Council for valuable consideration and had a registered title in its favour, duly registered under RTA. The appellants sought a declaration that the said lease in favour of Salima Enterprises and its subsequent registration was unlawful.

The Court of Appeal held that under s.23 of RTA, a certificate of title issued by the Registrar to any purchaser of land is to be taken by all courts as conclusive evidence that the person named therein as the proprietor of the land is the absolute and indefeasible owner thereof, and his title is not subject to challenge except on the ground of fraud or misrepresentation to which he is proved to be a party. The Company, as the registered proprietor of the suit land, was therefore held to be the absolute and indefeasible owner thereof. The court noted that the Company was not a party to any fraud or misrepresentation perpetrated upon the appellants in the acquisition of the suit land. There was no averment in the plaint that the Company had any knowledge or was a party to any irregularity in the transaction. Therefore, the court concluded that the Company's rights of ownership could not be interfered with by the appellants.

3.3.2 Hannah Wangui Ithebu v The Land Registrar Murang'a, Joel Nguigi Magu & Others¹⁶⁰

The case related to sub-division of plots. The claim was that in 1990, a month prior to balloting, the second defendants, in collusion with the Land Registrar, conspired to fraudulently deprive the plaintiff of plot number 289. The plaintiff had entered into a purchase agreement with the 1st defendant and paid for the plot. The title deed, showing the second defendants as the first owners of the land, was issued on 2nd February and was back dated by the Registrar to pre-empt any

¹⁵⁹ Court of Appeal Civil Appeal No.185 of 1997.

¹⁶⁰ Civil Appeal No. 86 of 1999, [2005] eKLR High Court at Nairobi.

claim on the plot by the plaintiff or by any other person. On this basis, the High court had ordered cancellation of the title to the specific plot number. The parties appealed.

In the Court of Appeal, Justice Visram noted that:

Essentially, the issue before this Court turns on a legal point: whether the title deed issued to the Appellants in respect of the suit land conferred upon the Appellants an indefeasible and impeachable title, which could not be challenged on any ground including fraud.

On the above note, the Court of Appeal upheld the fact that the Appellant's registration as owners of the suit land was a first registration. Therefore, under Section 143 (1) of the Registered Land Act, Cap 300 Laws of Kenya, such registration could not be defeated even by proof of fraud. So, even if the lower court was correct in finding that the defendants "conspired to fraudulently deprive the plaintiff of the suit land", as it did, this could not defeat the registration of the Appellants, as the first registered owners of the suit land. The judge ended by noting that:

Unfortunately, that is the law, and much though I might dislike or disapprove of it (and I must say that indeed I disapprove of it), I am bound by it. In its wisdom, the Parliament made that law, and I am duty bound to apply it.

3.3.3 Edwin Wambaa Regeru & Other v Joseph Kariuki Kibaara & 6 Others¹⁶¹

Despite a court restraining order not to subdivide or sell land, the plaintiffs subdivided and sold it. The defendants were bona fide buyers, without notice of the restraining order or irregularity in the title. The transfer was registered and certificate of title issued under RTA.

On a suit challenging the defendants' title the court held that since the buyers were bona fide purchasers for value and had no notice of irregularity, under s.23 of RTA they had indefeasible title that could not be disturbed.

3.3.4 Mbogo Ochola v Joseph Gor Obeti¹⁶²

The respondent, who was the plaintiff in the lower court had sued the appellant who was the defendant seeking for transfer of the whole of land No. KABUOCH/KOBITA/KAWUOR/1815 to himself. He claimed that the land was erroneously registered in the appellant's name. He stated that the appellant caused the land to be registered in his name through fraud. In evidence

¹⁶¹ HCCC 274 of 2009 at Mombasa.

¹⁶² Civil Appeal No. 253 of 2002 (Kisii High Court) Kaburu Bauni J.

the Respondent had said that the appellant had encroached into his land. Their lands were adjacent to each other. The magistrate in the lower court had ordered that a portion of 1/2 of an acre be excised from the appellants land and be transferred to respondent.

On appeal, the High Court held that the appellant's registration as the owner of land was a first registration and should not have been interfered with. The court observed that the finding that ½ of an acre be excised from the appellants land was not supported either by the pleadings or the evidence. It held that section 143 RLA clearly bars interference with such registration. It noted that a first registration is indefeasible even if there is allegation of fraud or mistake. The court in allowing the appeal held that the lower court ought not to have interfered with the registration by ordering the register to be rectified.

3.3.5 Joseph Arap Ngo'k v Justice Moiwo Ole Keiwua¹⁶³

In upholding indefeasibility of title under RTA, the court held that section 23(1) of the Act gives an absolute and indefeasible title to the owner of land. 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. The law was noted to take precedence over all other alleged equitable rights of title. It was held that the RTA was 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 would be placed in jeopardy.

3.3.6 Analysis

The above cases, decided under both RLA and RTA entrench indefeasibility of title registered under both Acts.

For RLA, the emphasis is on total indefeasibility of a first registration, and requirement of proof of fraud to invalidate title by subsequent purchasers. This is clearly propounded by the Court of Appeal in Hannah Wangui Ithebu & Other v Joel Nguigi Magu, The Land Registrar Murang'a & Others and the High Court in Mbogo Ochola v Joseph Gor Obedi above. Though this is a correct interpretation of Section 143 of the RLA, it remains to be a hindrance to repossession of illegally

¹⁶³Court of Appeal, Civil Appeal 60 of 1997.

acquired public land. Many beneficiaries of illegally acquired public land are the first allottees of such land. The researcher opines that the above decisions are not entirely correct. The courts ought to have relied on Section 163 of the same Act allowing application of common law and equity to revoke the title deeds in the face of outright fraud, omission or mistake as evidenced by the facts of the cases.

On subsequent registrations under RLA, the courts have consensus that such registrations are not indefeasible. The resultant title deeds can be revoked if fraud, omission or mistake is proved. However, the subsequent proprietor needs to either have had knowledge of or took part in the perpetration of the fraud, omission or mistake, for indefeasibility to be waived. This provision protects subsequent purchasers, who for value and without notice purchase illegally acquired public land.

The researcher opines that the protection of subsequent purchasers should not be extended to purchasers of illegally acquired public land. The courts should apply Section 163 of the RLA to invalidate the first registration and subsequently strictly apply the doctrine of *nemo dat quod non habet*. The resultant effect would be revocation of titles held by subsequent purchasers, for they get no better title than the first registrant had.

For registrations under RTA, the courts lean towards upholding indefeasibility of title, if fraud in which the title holder was a party is not proved, whether a first or subsequent registration. This position is propounded in *Edwin Wambaa Regeru & Other v. Joseph Kariuiki Kibaara & 6 Others* and *Joseph Arap Ngo'k v. Justice Moiyo Ole Keiwua* above. The above decisions are correct. This is because RTA and RLA are different. RTA is purely based on the Torrens system of registration of titles, while RLA is a hybrid of Torrens System and English System with common law and equity. This is evidenced in three ways. First RTA does not incorporate common law and equity in its provisions. Second, while under RLA only first registration of title is indefeasible, under RTA all subsequent ones are also indefeasible. This is because RLA recognizes equity. Third, under RLA equitable interest and rights are recognized, that is, those rights not appearing in the register but are recognized by equity. Registration under RLA is subject to the, “common law of England, as modified by equity,” which encompasses equitable

doctrines of implied, constructive and resulting trusts. Therefore, RTA overrides common law, with registration under it bound to be absolute like a company share register, with equitable interests not recognized. Hence, under RTA, title derived under defective instrument can be valid title in the hands of a bona fide buyer for value.

The object of the Torrens System, the basis of RTA, is to save persons dealing with registered proprietors, from the trouble and expense of going behind the register to investigate the history of the vendors' title, and to satisfy themselves of its validity. That end is accomplished by providing that everyone who purchases, in bona fide and for value, and is registered shall thereby acquire an indefeasible right, notwithstanding the infirmity of the vendors' title. As it remains then, RTA is a great obstacle to repossession of illegally acquired public land. It grants absolute immunity to land grabbers, allowing them to live in the safety of the knowledge that though their shady deals are discovered, they can never lose title to their illegally acquired lands.

However, *Nairobi Permanent Markets Society & 11 Others v Registrar of Lands, Nairobi and 2 Others* above seems to depart from total indefeasibility under RTA. The Court of Appeal held that RTA titles can be challenged on the ground of fraud or misrepresentation to which the title holder is proved to be a party.

In spite of the above cases, the same courts have rendered conflicting opinions in other instances as is explored below.

3.4 CANCELLATION OF TITLE DEEDS

In other instances, the courts have ordered for cancellation of title, irrespective of it being either a first registration under RLA or an RTA title. This has happened in cases where fraud has been proved. It goes against the notion of total indefeasibility of all first registrations and RTA titles. These instances are discussed below.

3.4.1 James Joram Nyaga & Another v The Hon. Attorney General & Another¹⁶⁴

In early 1970s, the government designed a link road to connect Waiyaki Way and Lower Kabete Road. Towards this end, the Commissioner of Lands procedurally compulsorily acquired L.R. No. 7741/34, measuring 5.0 acres. On 8th December 1994, the Permanent Secretary, Ministry of Public Works and Housing informed the director of Physical Planning that the plots were no longer feasible for construction of a road and could be re-planned for other purposes. On 18th December 1997, the Commissioner of Lands offered the plot to the applicants. The applicants accepted the offer on 15th August, 2000, made the necessary payments and on 20th December 2001, the President of Kenya granted the applicants a leasehold interest under RTA. They henceforth commenced development of the plot.

On 20th December 2003, the applicant's buildings were demolished by government bulldozers. They sought a declaration that they were the rightful owners of the land, holding an indefeasible title. They also sought protection of their rights and damages for the demolition. The AG however argued that since the land had been initially compulsorily acquired for public purposes, the allocation to the applicant, a private individual, was a fraudulent action, which should not be allowed.

The court held that power to alienate unalienated land vested in the President under Section 3 of GLA. The Commissioner, thus, breached the law in purporting to alienate land to the applicant in 1997. Such alienation was therefore in contravention of section 75 of the Constitution, and to that extent, unconstitutional. Though the title was registered under RTA, the Act is subordinate to the Constitution and would thus not grant indefeasibility of unconstitutional land allocations. With that the court declared the purported title to be null and void.

3.4.2 Republic v Kisumu District Lands Officer & Another exparte M & L Gateway Ltd & 4 Others¹⁶⁵

An unsurveyed plot within Kisumu Municipality was subsequently sub-divided and registered as Kisumu/Municipality/Block 13/92,93,98,99,101,102,103,104,105 and 106 in 2005. However

¹⁶⁴ Misc Civil Appeal 1732 of 2004.

¹⁶⁵ Miscellaneous Application No. 80 of 2010(e KLR)

there appeared persons, claiming to be innocent purchasers for value, with apparently valid title documents issued in 2003, two years earlier. Therefore, through a letter dated 16th October 2007, addressed to the District Land Officer Kisumu, the Commissioner of Lands directed the cancellation of the previous titles. The applicants sued in court seeking to stop the cancellation. They argued that Section 142 of the RLA, the Registrar was relying on only mandated rectification of the register and not cancellation of titles.

The Commissioner of Lands argued that the purported titles were fraudulent and not supported by the requisite amended Registry Index Map, showing the location of the plots and their corresponding sizes. The applicants had failed to produce letters of allotment and payment receipts of the purported seller and also failed to produce copies of transfer forms duly endorsed with relevant stamp duties. He had thus ordered that the leases, whose origin could not be traced, be expunged from the Land Registry in Kisumu.

However the court held that it would not confine itself to title documents but also interrogate the basis of the title documents. The applicants had no basis for their title and were victims of fraud, illegalities and nullities. It held that the RLA could not protect pieces of paper but title in the real sense, identifiable on the ground. It therefore allowed the cancellation to proceed, despite the registration of the leases under RLA.

3.4.3 Milan Kumar Shah & 2 Others v City Council of Nairobi & Another¹⁶⁶

In ordering for the cancellation of title, the court noted:

We hold that the registration of title to land is absolute and indefeasible to the extent, firstly, that the creation of such title was in accordance with the applicable law and secondly, where it is demonstrated to a degree higher than the balance of probability that such registration was procured through persons or body which claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law and the public interest.

3.4.4 Chemei Investments Limited v Attorney General and Others¹⁶⁷

Again in cancelling an illegally acquired title deed, the court noted that:

¹⁶⁶ High Court at Nairobi Misc App. 1024/05.

¹⁶⁷ High Court at Nairobi Petition No. 94 of 2005 (Unreported)

The Constitution protects a higher value, that of integrity and rule of law. These values cannot be side stepped by imposing legal blinders based on indefeasibility.

3.4.5 Analysis

In *James Joram Nyaga & Another v The Hon. Attorney General & Another*, there was no proof that the title holders were party to any fraud or misrepresentation. With the land having been duly registered, the petitioners held an indefeasible title under RTA. Despite this, the courts relied on the Constitution to declare their title deeds null and void.

In *Republic v Kisumu District Lands Officer & Another ex parte M & L Gateway Ltd & 4 Others*, the courts nullified a first registration under RLA. *Milan Kumar Shah & 2 Others v City Council of Nairobi & Another* seems to raise the standard of proof and shift the burden of proof for the fact that the titleholder was not party to any fraud or misrepresentation to the title holder himself. *Chemei Investments Limited v Attorney General and Others* circumvents the total indefeasibility given to first registrations under RLA.

The above four cases give contrary opinions to the previously highlighted cases, which upheld total indefeasibility of first registrations under RLA. They all appeal to the Constitution to override express statutory provisions.

3.5 CONCLUSION

From the above cases, it is apparent that the courts are unanimous in holding that neither the Registrar of Titles nor the Commissioner of Lands have power to cancel a duly registered title deed under both RLA and RTA. However, there are conflicting opinions on defeasibility of first registration. Whereas in some instances the courts have upheld indefeasibility of first registration under RLA, the same courts have ordered cancellation of the titles in other instances.

The indefeasibility of title has been a major hindrance to repossession of irregularly acquired public land. The next chapter shall explore how other jurisdictions have maneuvered round this concept of indefeasibility in the quest to recover irregularly acquired public land.

CHAPTER FOUR: COMPARATIVE PERSPECTIVES

4.1 INTRODUCTION

This chapter engages in a comparative analysis with Uganda, a fellow African country, on how it has handled the issue of repossession of illegally acquired land. Uganda was chosen for being a fellow developing country and neighbor to Kenya. Both Uganda and Kenya were British colonies and the land regimes left behind by the leaving colonialists are much similar. It also has faced major problems of illegal possession of public land

4.2 UGANDAN EXPERIENCE

4.2.1 Magnitude of Illegal Acquisition of Public Land in Uganda

Uganda has been facing a huge problem in illegal acquisition of public land. Powerful people in President Museveni's government have illegally and suspiciously acquired for themselves large tracts of strategically located real estate and public land in Uganda.¹⁶⁸ The Uganda Land Commission, which is tasked to manage public land on behalf of the state, is accused of overseeing massive grabbing of land for public utilities. A recent report indicts the commission for irregularly selling off to private developers green spaces in Mbale Municipality, including the Cricket and Rugby ground, Children's and Uhuru parks that are meant for recreational activities, cemetery ground and Lorry Park among others and whose power of administration is purely and directly in the hands of the Mbale Municipal Council.¹⁶⁹ These allocations, the report notes, were made without the concurrence of the Council, which is the planning authority and the Mbale District Land Board.¹⁷⁰

Muriisa *et al* note that land grabbing in Uganda takes the form of land acquisitions on a large scale and allocation of the same to private investors in Uganda mainly for oil, bio-fuels, carbon

¹⁶⁸ Charles Ochen Okwir (August, 2010), *Our Constitution Needs Kenyan Style Reforms*, Uganda Correspondent, available at: <http://www.ugandacorrespondent.com/articles/2010/08/our-constitution-needs-kenyan-style-reforms>, (last accessed 22nd July, 2013). The author quotes examples of land grabbing thus, "...massive land containing the Doctors Quarters on Kitante Road that CMI forcefully occupied is gone. UTV's land in Nakasero hill went. Shimoni Demonstration School land went. Huge chunks of Golf Course land went. Centenary Park land is virtually gone. Butabika Hospital land went. Kisozi Government Ranch went to the CEO of the Republic. All Uganda Commercial Bank (UCB) assets went. All government houses in nearly all Ugandan towns went."

¹⁶⁹ Uganda Radio Network (25th February, 2013), *Parliament Blasts ULC over Illegal Land Allocations*, available at: <http://ugandaradionetwork.com/a/story.php?s=50163>, (last accessed 22nd July, 2013).

¹⁷⁰ *ibid.*

credits and for speculative purposes.¹⁷¹ They note that in the districts of Mubende, Buliisa and Ssembabule, large tracts of community land were alienated by the government and irregularly sold to private investors for various purposes, leading to evictions of local communities.¹⁷² They identify increased population, urbanisation and the increased demand for food, bio-fuels as the key drivers of land grabbing in Uganda.¹⁷³

Friends of the Earth- Uganda Chapter, an NGO, note that land that was previously used by local communities has been seized by the government and leased or sold to outside investors, including corporations and governments.¹⁷⁴ The land is then used by the investors for growing of commodity crops to sell on the overseas market, including agrofuel and food crops. They decry a new wave of aggressive land grabbing in Uganda, driven by high food prices and growing global consumption, with multinational corporations, often in partnership with governments, seizing the land.¹⁷⁵ The Ugandan government, keen to attract foreign investment, has then irregularly allowed foreign companies to move onto large areas of land for development of a large scale oil palm plantations, carbon offset tree plantations and following the recent discovery of oil, for drilling.¹⁷⁶

The Royal Tropical Institute- Amsterdam notes that community land and public land are subject to elite land grabs and illegal land deals.¹⁷⁷ It states that there are well-documented illegal appropriations of public land by the Ugandan elite from the 1960s until today.¹⁷⁸ Mabikke adds by stating that land grabbing in Uganda is broader than “foreign” land acquisitions. He notes that it involves the active role played by domestic elites, government bureaucrats, family members

¹⁷¹ K.Muriisa, Pamela K. Mbabazi and Meldard Twinamatsiko (March, 2013), *Land Deals in Uganda: An Invisible Hand in Land Grabbing and Rural Development*, a research paper presented at the conference on Land Politics in Africa, South Africa, p. 3, available at: http://www.future-agricultures.org/workshop-resources/doc_download/1665-land-deals-in-uganda-an-invisible-hand-in-land-grabbing-and-rural-development, (last accessed 23rd July, 2013).

¹⁷² *ibid*, p. 12.

¹⁷³ *ibid*, p. 14.

¹⁷⁴ Friends of the Earth- Uganda (April, 2012), *A Study on Land Grabbing Cases in Uganda*, available at : reliefweb.int/sites/reliefweb.int/files/resources/Full_Report_3823.pdf, (last accessed 23rd July, 2013).

¹⁷⁵ *ibid*, p. 13

¹⁷⁶ *ibid*, p. 17.

¹⁷⁷ Royal Tropical Institute- Amsterdam (2013), *Food Security and Land Governance Factsheet*, p. 7, available at: <http://www.landgovernance.org/system/files/Uganda%20Factsheet%20-%202012.pdf>, (last accessed 23rd July, 2013).

¹⁷⁸ *ibid*.

and clan heads who assume power and certainly misuse it to grab land from vulnerable groups.¹⁷⁹ He states that previous communal and public lands have been grabbed by the powerful individuals such as the army, politicians and elites leaving the extremely vulnerable groups of women, children, youths and elderly barely landless wonderers in their own homeland.¹⁸⁰

The above situation replays itself in Kenya. The practice of alienating public land irregularly for personal use by Kenyan elites remains rampant, with well documented instances.

4.2.2 Addressing Land Grabbing in Uganda

Uganda has used different avenues to fight land grabbing as discussed below.

4.2.2.1 Empowering the Commissioner Land Registration to Cancel Title Deeds

The Ugandan Land Act, 1998¹⁸¹ empowers the Commissioner Land Registration (Commissioner) in enforcing the Act, without referring a matter to a Court or a district land tribunal, to take all necessary steps including: endorsement, alteration, cancellation of certificates of title and issue of fresh certificates of title.¹⁸² The Commissioner is empowered to take such steps where a certificate of title or instrument is issued in error, contains a misdescription of land or boundaries, contains an entry or endorsement made in error, contains an illegal endorsement, is illegally or wrongfully obtained and is illegally or wrongfully retained.¹⁸³ However the Commissioner before taking such action should give twenty-one days' notice, to all affected parties, of a hearing, which should be conducted in accordance with the rules of natural justice, with the decision in writing being communicated to all affected parties.¹⁸⁴ Persons aggrieved by the Commissioner's actions are allowed to appeal to the district land tribunal within sixty days after the decision.¹⁸⁵

¹⁷⁹ Samuel B. Mabikke (2011), *Escalating Land Grabbing In Post-conflict Regions of Northern Uganda: A Need for Strengthening Good Land Governance in Acholi Region*, Paper presented at the International Conference on Global Land Grabbing, p. 2, available at: www.oicrf.org/document.asp?ID=10200 (last accessed 23rd July, 2013).

¹⁸⁰ *ibid*, p. 4

¹⁸¹ Cap 227, Laws of Uganda.

¹⁸² Section 91(1).

¹⁸³ Section 91(2).

¹⁸⁴ Section 91(8).

¹⁸⁵ Section 91(10).

In *CR Patel v The Commissioner, Land Registration & 2 others*,¹⁸⁶ Justice Joseph Murangira upheld the Commissioner's power to cancel title deeds, but only limited to the grounds highlighted above. The only instance in which the Commissioner is not allowed to act is in cases of fraud. Fraud is such a serious allegation that it must be specifically pleaded and proved beyond a mere balance of probabilities. It cannot be raised and casually proved before the Commissioner Land Registration. However, the Commissioner retains the right to act in cases of illegality.¹⁸⁷

It is, thus, apparent that the Ugandan law allows the Commissioner to use this power, upon according the parties a proper hearing, to cancel certificates of titles issued illegally. It is only in instances of fraud that the courts are involved. This is a potent tool in repossessing public land acquired in clear contravention of the law.

In contrast, the Kenyan Registrar of Lands in circumstances similar to those highlighted above was previously,¹⁸⁸ and is currently¹⁸⁹ only allowed to do mere rectification of the register, not cancellation of certificates of title. The Land Registration Act, 2012 is bold by allowing the Registrar to rectify or direct the rectification of a register or document where the document in question has been obtained by fraud.¹⁹⁰ It however does not allow cancellation of certificates of title by the Registrar, leaving that to the courts.

4.2.2.2 Presidential Lands Committee

In realization of the land grabbing problem, President Museveni recently appointed a Lands Committee, headed by the Junior Minister, Lands, Housing and Urban development Idah Nantaba, to spearhead the war against land grabbing and evictions.¹⁹¹ The committee, in discharging its mandate, has proposed cancellation of title deeds to public land illegally

¹⁸⁶ The High Court of Uganda at Kampala (Land Division), HCCS No. 87 of 2009, available at: <http://www.ulii.org/ug/judgment/high-court/2013/40>, (last accessed 22nd July, 2013).

¹⁸⁷ *ibid*, p. 2.

¹⁸⁸ Sections 60 RTA and 79 RLA.

¹⁸⁹ Section 79 of the Land Registration Act, 2012.

¹⁹⁰ Section 79(2).

¹⁹¹ Moses Mulondo (June, 2013), *Nantaba Lands Committee Gets Boost in Next Budget*, The New Vision Uganda, available at: <http://allafrica.com/stories/201306102014.html>, (last accessed 22nd July, 2013).

appropriated.¹⁹² However, the Committee's work has been slowed by legal battles with land owners and inadequate funding.¹⁹³

In contrast, Kenya's avenue for repossession of illegally acquired land is now anchored in the Constitution, through the establishment of the National Land Commission, as opposed to Uganda's presidential land commission, which has no legal basis.¹⁹⁴

4.2.2.3 Uganda Land Commission

The Ugandan Constitution, 1995¹⁹⁵ and Land Act, 1998¹⁹⁶ establish the Uganda Land Commission. The Commission is composed of a chairperson and not less than four other members.¹⁹⁷ The members lack security of tenure and can be removed by the President on grounds of: inability to perform functions arising from infirmity of body or mind, misbehavior, misconduct or incompetence.¹⁹⁸

The Constitution only defines one function of the Commission, to hold and manage any land in Uganda vested in or acquired by the Government of Uganda,¹⁹⁹ leaving other functions to be assigned by Parliament. The Parliament, through the Land Act, 1998 has defined four functions to the Commission: hold and manage any land in Uganda which is vested in or acquired by the Government; hold and manage any land acquired by the Government abroad; procure certificates of title for any land vested in or acquired by the Government and perform such other functions as may be prescribed by or under the Act or any other enactment.²⁰⁰ The Act further tasks the

¹⁹² Solomon Arinaitwe & Abdu Kiyaga (May 15, 2013), *Minister Nantaba to Cancel 500 Land Titles*, The Daily Monitor- Uganda, available at: <http://www.monitor.co.ug/News/National/Minister-Nantaba-to-cancel-500-land-titles/-/688334/1853016/-/4vxpjvz/-/index.html>, (last accessed 23rd July, 2013).

¹⁹³ Sulaiman Kakaire (2012), *Museveni Calls Meeting on Nantaba Land 'Grabbing'*, The Observer- Uganda, available at: http://observer.ug/index.php?option=com_content&view=article&id=22681:museveni-calls-meeting-on-nantaba-land-grabbing, (last accessed 23rd July, 2013).

¹⁹⁴ Edris Kiggundu (March, 2013), *Museveni New Land Directives Unconstitutional- Law Experts*, The Observer- Uganda, available at: http://www.observer.ug/index.php?option=com_content&task=view&id=23967&Itemid=114, (last accessed 23rd July, 2013).

¹⁹⁵ Article 238(1).

¹⁹⁶ Section 46(1).

¹⁹⁷ Article 238(2) of the Constitution and Section 47(1) of the Land Act.

¹⁹⁸ Article 238(5) of the Constitution and Section 48(2) of the Land Act.

¹⁹⁹ Article 239.

²⁰⁰ Section 49.

Commission to administer a Land Fund,²⁰¹ using it to give loans to lawful or bona fide occupants to enable them to acquire registrable interests, purchase or acquire land where necessary in order to redistribute it to the tenants in occupancy on its terms and give loans to other persons to enable them to have their land surveyed for the purpose of acquiring certificates of title.²⁰²

The Land Act further gives power to the Commission to: acquire by purchase or exchange or otherwise hold land rights, easements or interests in land; erect, alter, enlarge, improve or demolish any building or other erection on any land held by it; sell, lease or otherwise deal with the land held by it; cause surveys, plans, maps, drawings and estimates to be made by or through its officers or agents; and do such other things as may be necessary for or incidental to the exercise of those powers and the performance of those functions.²⁰³

Currently, the Commission has eight commissioners.²⁰⁴ Two audit reports have pointed out challenges that the Commission has faced in discharging its functions. First, its sale of government land is not subjected to the Public Procurement and Disposal of Assets Act (PPDA) because the process is done without public advertisement. Second, the Commission does not have an effective working and collaborative relationship with other partner institutions like local governments in the execution of its duties, resulting in double or even triple allocation of the same land to different developers with different lease titles. This situation results in costly court cases that take long to resolve. Third, the Commission has concentrated more on allocation of land to individual developers, which is a non-core activity, with little regard to purchasing land for current and future use by government, especially in prime urban areas. Such purchases would help government save staggering sums of money it pays to rent premises in towns. Fourth it is too lean to carry out its mandate, has a narrow skill mix and provides for functions which could be divested to more appropriately skilled institutions, such as banks. Fifth, the Commission has not been processing Government Land Titles as planned, leading to loss of Government land to unscrupulous persons. Finally, the Commission has not been paying property rates to qualifying

²⁰¹ Section 41(2).

²⁰² Section 41(5).

²⁰³ Section 53.

²⁰⁴ Uganda Land Commission (2013), *The Commissioners*, available at: <http://www.ulc.go.ug/uganda-land-commission/commissioners>, (last accessed 23rd July, 2013).

Urban Councils on schedule, leading to the accumulation of debt arrears.²⁰⁵ As a consequence the commission; has had limited access to resources, failed to realize its mandate, engaged in misallocation and misappropriation of public land and engaged in duplication of roles and responsibilities. The audit reports recommend that the Commission's offices are regionalized, management is separated from the executive, with the chairman and commissioners working on part time basis and that the Land Fund is relocated and domiciled to a financial institution with which the Commission shall enter a memorandum of understanding.²⁰⁶

In contrast, the Kenyan law establishes the National Land Commission. It is composed of a fixed number of nine members,²⁰⁷ who enjoy security of tenure²⁰⁸ for a term of six years.²⁰⁹ It has much wider functions than the Ugandan counterpart including: to manage public land on behalf of the national and county governments; to recommend a national land policy to the national government; to advise the national government on a comprehensive programme for the registration of title in land throughout Kenya; to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress; to assess tax on land and premiums on immovable property in any area designated by law; and to monitor and have oversight responsibilities over land use planning throughout the country.²¹⁰ It is also empowered to review of all grants or dispositions of public land to establish their propriety or legality.²¹¹ Addressing historical land injustices and reviewing grants or dispositions of public land are unique functions of this commission.

The Commission was sworn in on February 27th, 2013²¹² after a long delay, with the Kenyan President initially being reluctant to gazette their names.²¹³ They are in the process of setting up

²⁰⁵ Office of Auditor General-Uganda (March 2011), *Value for Money Audit Report on the Functionality of Land Management Institutions in Uganda*, available at: (last accessed 23rd July, 2013).

²⁰⁶ Hussein Bogere (4th August, 2011), *Uganda Land Commission is 'Illegal'*, The Observer, available at: http://www.observer.ug/index.php?option=com_content&view=article&id=14572:uganda-land-commission-is-illegal, (last accessed 22nd July, 2013).

²⁰⁷ Article 250(1) of the Constitution and Section 7(1), National Land Commission Act.

²⁰⁸ Article 251 of the Constitution and Section 11, National Land Commission Act

²⁰⁹ Article 250(6)(a) of the Constitution and Section 8(5), National Land Commission Act.

²¹⁰ Article 67(2) of the Constitution, Section 5(1), National Land Commission Act.

²¹¹ Article 68 (c)(v) of the Constitution, Section 14, National Land Commission Act.

²¹² Cynthia Kimola (February 27, 2013), *National Land Commission Sworn In*, The Nairobi Star, available at: <http://www.the-star.co.ke/news/article-109708/national-land-commission-sworn>, (last accessed 23rd July, 2013).

structures and settling to effectively perform their mandate. The Kenyan law lacks provisions on creation of a Land Fund and also lacks express exclusive mandate to the NLC on purchase of government land.

4.2.3 Jurisprudence from Ugandan Courts on Indefeasibility of Title

The Ugandan courts have been consistent in holding that a certificate of title is defeated if obtained through fraud, mistake or misrepresentation. In cases of mistake and misrepresentation, the Commissioner Land Registration is allowed to rectify the register without reference to the courts. It is only in cases of fraud where the courts are involved. Much of the jurisprudence from the courts, thus, concerns fraud.

The Ugandan courts have extensively defined fraud. In *Kampala District Land Board & George Mitala v Venancio Babweyaka & 3 Others*²¹⁴ fraud was held to include some act of dishonest dealing in land or sharp practice intended to deprive a person of an interest in land. In *Fredrick Zaabwe v Orient Bank & Others*²¹⁵ fraud was defined to include anything calculated to deceive whether by a single act or combination of acts or suppression of truth or suggestion of what is false, whether it is by direct falsehood or innuendo by speech or silence, word of mouth or look or gesture. In *Matovu & 2 Others v Sseviri & Another*²¹⁶ and *Katarakawe v Katwiremu*²¹⁷ it was held that if a person procures registration to defeat an unregistered interest on the part of another person of which he is proved to have had knowledge, then such person is guilty of fraud.

The courts have further held that this fraud must be attributable to the holder of the certificate of title for it to defeat his or her title. It was held in *Kampala Bottlers Ltd v Damaniko (U) Ltd*²¹⁸ that

²¹³ It took a court order for the President to gazette the names of the chairperson and members of the Land Commission. See Lucianne Limo (5th February, 2013), *High Court Orders Kibaki to Gazette Land Team Officials*, The Standard, available at: <http://www.standardmedia.co.ke/?articleID=2000076645>, Diana Ngila (18th February, 2013), *Kibaki Accused of Ignoring Court Order to Appoint Commissioners*, Daily Nation, available at: <http://mobile.nation.co.ke/News/-/1290/1697324/-/format/xhtml/-/3fe0x1/-/index.html>, Willis Raburu (20th February, 2013), *Pressure Mounts on Kibaki to gazette the National Land Commission*, Citizen News, available at: <http://www.citizennews.co.ke/news/2012/local/item/8134-pressure-mounts-on-kibaki-to-gazette-the-national-land-commission> (all last accessed 24th July, 2013).

²¹⁴ Civil Appeal No. 2 of 2007

²¹⁵ SCCA No. 4 of 2006

²¹⁶[1979] HCB 174

²¹⁷(1977) H.C.B 187

²¹⁸[1990 – 94] EA 141

fraud must be attributable to the transferee, either directly or by necessary implication. The transferee must be guilty of some fraudulent act or must have known of some act by somebody else and taken advantage of such act. On the question of the required standard of proof, the courts in *J. W. Kazoora v Rukuba*,²¹⁹ have emphasized that allegations of fraud must be specifically pleaded and proved. The degree of proof required is one of strict proof, but not amounting to one beyond reasonable doubt. The proof must, however, be more than a mere balance of probabilities.

The Ugandan courts have further held that the only persons whose titles are protected despite fraud are bonafide purchasers for value and without notice. This has been propounded as the bonafide doctrine. There exists extensive case law on this doctrine. In *Hajji Nasser Kitende v Vithalidas Haridas & Co. Ltd*,²²⁰ Judge Mukasa Kikonyogo stated that for a purchaser to rely on the bonafide doctrine he must prove that: he or she holds a certificate of title, he or she purchased the property in good faith, he or she had no knowledge of the fraud, he or she purchased for valuable consideration, he or she believed that the vendors had apparent valid title, he or she purchased without notice of any fraud and he or she was not party to the fraud. In further defining a bonafide purchaser, the court in *Simon Kato Bugoba v Samuel Kigozi & Muyanja Mbabali*²²¹, held that, “in law, a bonafide purchaser is one without notice of fraud and without intent to wrongfully acquire property.” It emphasized that, “such a bonafide purchaser acquires good title irrespective of the vendor’s defective title.”

The Ugandan courts have then gone ahead to reinforce Section 181 of RTA, 1924 to protect bonafide purchasers. In *David Sejjaka Nalima v Rebecca Musoke*²²² the courts held that, “the effect of section 181 is that once a registered proprietor has purchased the property in good faith, his title cannot be impeached on account of the fraud of a previous registered proprietor. A bona fide purchaser therefore obtains a good title even if he purchases from a proprietor who previously obtained it by fraud.” In *Makerere University v St. Mark Education Centre*

²¹⁹Civil Appeal No. 13 of 1992

²²⁰ Civil Appeal No. 84 of 2003

²²¹ HCCS No. 534/ 2004

²²² CCA 12/85 reported in [1992] V KALR 132

*&Another*²²³ it was held that, “fraud committed by the predecessor in title of the defendants must not be visited on the defendants as there was no evidence to suggest that the defendants were party or knew about the fraud.”

From the above authorities it is possible to deduce that Ugandan courts uphold indefeasibility of title. They only lift the protection of indefeasibility where the fraud is clearly attributable to the transferee either directly or by necessary implication. However, where the transferee is a bonafide purchaser, without notice, constructive or actual, of fraud and was never party to the fraud, he or she is protected by indefeasibility irrespective of fraud in his predecessors’ title registration.

In contrast, the Kenyan courts, on the basis of pre-2012 land laws, have held conflicting positions on the matter of indefeasibility of title. Despite the RLA granting total indefeasibility for first registrations, courts have issued conflicting decisions; with some upholding the total indefeasibility and others holding that first registrations under RLA can be impeached for fraud. For RTA, the courts have in some instances ordered for cancellation of registrations despite lack of proof that the title holders were parties to fraud as required by the Act.

However, no cases have been decided under the 2012 land laws, which may create a uniform position from the Kenyan courts.

4.3 EXPERIENCE OF ANDHRA PRADESH STATE IN INDIA

4.3.1 Magnitude of Illegal Acquisition of Public Land in Andhra Pradesh State in India

Land grabbing was becoming a major problem in the state of Andhra Pradesh in India. There were organized attempts by certain lawless persons operating individually and in groups to grab either by force, or by deceit or otherwise lands belonging to the Government, a local authority, a religious or charitable institution or endowment, including wakf or any other private person.²²⁴

The land grabbers formed bogus co-operative housing societies engaged in large scale and unprecedented and fraudulent sales of land through unscrupulous real estate dealers or otherwise

²²³HCCS No. 378/90

²²⁴ State of Andhra Pradesh, India (1982), Statement of Objects and Reasons for Andhra Pradesh Land Grabbing (Prohibition) Act, 1982.

in favour of a certain section of people, resulting in large scale accumulation of the unaccounted wealth.²²⁵

This situation replays itself in Kenya, only that the grabbing is perpetuated by politicians, who quickly sell it off to unsuspecting buyers.

4.3.2 Addressing Land Grabbing

In addressing the expansive land grabbing syndicates, the State Government enacted the Andhra Pradesh Land Grabbing (Prohibition) Act, 1982.²²⁶ The Act outlaws land grabbing and criminalizes all activities connected with or arising out of land grabbing.²²⁷ The offence of land grabbing is punishable by imprisonment for a term not less than six months but which may extend to five years, and with fine which may extend to five thousand rupees.²²⁸

The Act establishes Special Tribunals²²⁹ with power to try all cases of land grabbing. It stipulates that every judgment of the Special Tribunal with regard to the determination of the title and ownership to, or lawful possession of, any land grabbed is binding on all persons having interest in such land.²³⁰ The Special Tribunal is empowered to pass an order awarding compensation in terms of money for wrongful possession, which should be not be less than an amount equivalent to the market value of the land grabbed as on the date of the order and profits accrued from the land payable by the land grabber to the owner of the grabbed land and may direct the redelivery of the grabbed land to its rightful owner.²³¹ The compensation, profits and cost of redelivery, are recovered as arrears of land revenue if the Government is the owner and as a decree of a Civil Court, in any other case. The Special Tribunals are granted powers of a Civil Court for purposes of review.²³²

²²⁵ *ibid.*

²²⁶ The Act, passed by the Andhra Pradesh Legislature, was reserved by the Governor on 24th of August, 1982 for the consideration and assent of the President and the President assented on the 4th September, 1982 and was published in Andhra Pradesh Gazette, Part IV-B (E.O.) dt. 6th September, 1982.

²²⁷ Section 3.

²²⁸ Section 4(3).

²²⁹ Section 7A of the Act.

²³⁰ Section 7A(4).

²³¹ Section 7A(5).

²³² Section 7A(8).

The Act further establishes Special Courts as appellate bodies to handle appeals from the Special Tribunals. Persons not satisfied with decisions of the tribunals are required to appeal to the Special Court within sixty days,²³³ with the appeals required to be completed within six months.²³⁴ The Special Court is also empowered to order repossession and or damages.²³⁵ It is both a Civil Court for conducting reviews and a Court of Session for apportioning criminal liability to the grabbers.²³⁶

4.4 CONCLUSION

Uganda and Andhra Pradesh State in India have faced similar challenges as Kenya on illegal acquisition of public land. The Ugandan problem is wider, including allocation of public land to foreign investors for a variety of purposes. The Ugandan law has provisions which are more potent in repossession of illegally acquired land. The Commissioner Land Registration is allowed to cancel certificates of title, without reference to the courts, which after proper inquiry he or she deems have been issued illegally. The Ugandan courts have been unanimous in holding that title deeds can be defeated on account of fraud, except for bonafide purchasers for value. From the Ugandan experience, Kenya can learn lessons on a variety of matters: commissioner's powers to cancel title deeds, coherent jurisprudence from the courts, the land fund and avoiding the pitfalls faced by the Ugandan Land Commission.

Similarly, Kenya can learn lessons on a number of matters from Andhra Pradesh State in India: criminalization of land grabbing, special tribunals and courts to fast-track handling of land grabbing processes and setting of timelines for deciding such cases.

From the analysis of law, jurisprudence from the courts and comparative angles from other jurisdictions, a way forward for Kenya is then proposed in the next chapter.

²³³ Section 7A (3).

²³⁴ Section 7A (7).

²³⁵ Section 8(7).

²³⁶ Section 9.

CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

5.1 INTRODUCTION

The purpose of this study was to assess the legal challenges that have faced revocation of title deeds as an approach towards repossession of illegally acquired land in Kenya. Based on the analysis, the study was to propose necessary reforms to the existing legal framework so as to allow revocation of title deeds in repossession of illegally acquired land in Kenya. This chapter summarizes the major conclusions of the study and also makes the recommendations.

5.2 SUMMARY OF CONCLUSIONS

5.2.1 Conclusion on the Power of Registrar of Lands to Cancel Title Deeds

Before 2012, both RLA and RTA granted the Registrar powers to rectify the register. However, it was a limited jurisdiction that did not include cancellation of titles. The Registrar was only allowed to make rectifications in certain instances: in formal matters and in the case of errors or omissions not materially affecting the interests of any proprietor, when there is consent by all persons interested, when upon resurvey, a dimension or area shown in the register is found to be incorrect and upon proof of the change of the name or address of any proprietor

The courts, in litigation based on RLA and RTA, were in consensus that the Registrar cannot revoke title deeds. The Registrar's attempts to revoke title deeds through gazette notices were declared unconstitutional and such notices were quashed.

However, the current Constitution allows Parliament to enact legislation to enable the review of all grants or dispositions of public land to establish their propriety or legality. In pursuance to this, Parliament has enacted the National Land Commission Act, empowering the National Land Commission to act as a quasi-judicial body and recommend to the Registrar for revocation of title deeds for illegally acquired public lands. This opens a leeway for the Registrar to be allowed to revoke title deeds in Kenya.

5.2.2 Conclusion on Kenyan Legal Framework on Revocation of Title Deeds

The laws before 2012 granted total indefeasibility to first registrations under RLA. This provided protection to beneficiaries of illegally allocated public land, for on registration of such allocations they could not be cancelled.

However, laws enacted to give effect to the Constitution of Kenya, 2012 removed total indefeasibility provisions. They allow impeachment of all titles as long as they are tainted with fraud, mistake or misrepresentation. They also broaden the grounds for cancellation of title to include corrupt practices. They further make it easier to discharge the burden of proof for fraud by widening knowledge of fraud by the third party to include actual, constructive and imputed knowledge. Though the laws still grant protection to innocent third party purchasers for value and without notice, they make it easier to impeach such protection.

5.2.3 Conclusion on Jurisprudence from Kenyan Courts on Revocation of Title Deeds

RLA provides for total indefeasibility of a first registration, and requirement of proof of fraud to invalidate title by subsequent purchasers. The Court of Appeal correctly applied this law in *Hannah Wangui Ithebu & Other v Joel Nguigi Magu, The Land Registrar Murang'a & Others* and the High Court in *Mbogo Ochola v Joseph Gor Obeti*. Despite the above applications, the courts have gone ahead to invalidate first registrations under RLA in *Milan Kumar Shah & 2 Others v City Council of Nairobi & Another* and *Republic v Kisumu District Lands Officer & another ex parte M & L Gateway Ltd & 4 Others*.

RTA on the other hand grants indefeasibility of all registrations as long as fraud or misrepresentation to which the title holder was a party is not proved. The courts in some instances have correctly upheld this principle. This position is propounded in *Edwin Wambaa Regeeru & Other v. Joseph Kariuki Kibaara & 6 Others* and *Joseph Arap Ngo'k v. Justice Moijo Ole Keiwua* above. However, in *Nairobi Permanent Markets Society & 11 Others v Registrar of Lands, Nairobi and 2 Others*, the Court of Appeal departs from total indefeasibility under RTA, holding that titles can be challenged on the ground of fraud or misrepresentation to which the title holder is proved to be a party. Similarly, in *James Joram Nyaga & Another v The Hon. Attorney General & Another* and *Chemei Investments Limited v Attorney General and Others* the

courts have revoked RTA titles, despite lack of proof of fraud or misrepresentation in which the title holder was a party.

The above shows a conflict in decisions from the same courts, creating confusion as to what should be the correct position at law.

5.2.4 Conclusion on Comparative Perspectives from Uganda

Illegal acquisition of public land in Uganda is rampant, including illegal allocations to the elite and foreign investors. The Ugandan law empowers the Commissioner Land Registration to cancel certificates of title, without reference to the courts, which after proper inquiry he or she deems have been issued illegally. The Ugandan laws also do not grant total indefeasibility to any certificates of title, holding them defeasible on grounds of fraud, mistake or misrepresentation.

Kenya can learn lessons from Uganda on a variety of matters: Commissioners' powers to cancel title deeds, coherent jurisprudence from the courts, the land fund and avoiding the pitfalls faced by the Uganda Land Commission.

5.2.5 Conclusion on the Dichotomy of using Sanctity of Title to Protect Titles to Illegally Acquired Public Land

Titles to illegally acquired public land are null and void. The study has established that titles for such land do not warrant protection under the principle of sanctity of title. Upon a fair inquiry through the National Land Commission, the titles should be cancelled and the owners should not be compensated.

5.2.6 Conclusion on Comparative Perspectives from Andhra Pradesh State in India

Andhra Pradesh State in India has criminalized of land grabbing, with offenders liable to imprisonment for a term not less than six months but which may extend to five years, and with fine which may extend to five thousand rupees. It has further established special tribunals and courts to fast-track handling of land grabbing cases. Further it has set strict timelines for deciding cases of land grabbing to ensure expediency.

5.3 SUMMARY OF RECOMMENDATIONS

5.3.1 Recommendation on Registrar's Power to Revoke Title Deeds

The National Land Commission Act empowers the National Land Commission to act as a quasi-judicial body and recommend to the Registrar for revocation of title deeds for illegally acquired public lands.²³⁷ This study hails this as a positive development. It further proposes that in certain instances, the Registrar should be allowed to revoke titles deeds without reference to the courts.

The Land Registration Act, 2012 allows the Registrar to rectify or direct the rectification of a register or document where the document in question has been obtained by fraud.²³⁸ It however fails to allow cancellation of title deeds, leaving that to the court.²³⁹ The upshot of the above provisions is that if one forges documents or engages in other illegalities and uses them to register public land to himself, the registrar can only rectify the register but not cancel the title of the individual. That creates room for absurdity.²⁴⁰

Beneficiaries of illegal allocations of public land take advantage of lengthy court proceedings before judgment and the appellate system, which drags on for many years before a case is finally decided, to continue in occupation of the ill acquired land and achieve their objectives. There is need to check this by allowing the Registrar to revoke their titles first, before commencing the court proceedings.²⁴¹

However, in cognizance of the fact that power to revoke title deeds, bestowed on an individual, can be misused, the study proposes safeguards. Being an administrative action, and informed by the need to ensure procedural justice and fairness as enshrined in Articles 40, 47 and 60 of the Constitution, this study proposes that the Registrar acts only on the recommendation of a Land Claims Tribunal, established under the Ministry of Lands. This would ensure that parties are granted a fair hearing before cancellation of title deeds for illegally acquired public lands.²⁴²

²³⁷ Emphasized by Elizabeth, an official at National Land Commission, during an interview on 7th July, 2013, at Nairobi.

²³⁸ Section 79(2).

²³⁹ Section 80(1).

²⁴⁰ View expressed by Ruth, an advocate knowledgeable in Land Matters on 9th July, 2013, at Nairobi.

²⁴¹ John, an official at Ministry of Lands concurred during an interview on 8th July, 2013 at Nairobi.

²⁴² Kaumba, an advocate knowledgeable on land matters emphasized the need for constitutional safeguards.

5.3.2 Recommendation on Kenyan Legal Framework on Revocation of Title Deeds

This study recommends that the Land Registration Act be amended to expressly authorize the Registrar of Lands to revoke title deeds. It should also be amended to provide for a Land Claims Tribunal, to advise the Registrar in exercise of his powers.

In line with the current government's manifesto providing for repossession of illegally acquired public land without compensating the grabbers, the National Land Commission Act should be amended to remove protection to bonafide purchasers. Such purchasers should have their titles revoked, but empowered to seek indemnity from the vendors who sold land to them.²⁴³ In the alternative the act should set up a Land Fund, to compensate innocent purchasers the actual losses incurred but not the market value of the land.²⁴⁴

5.3.3 Recommendation on Jurisprudence from Kenyan Courts on Revocation of Title Deeds

The conflicting jurisprudence from the courts on indefeasibility of titles remains to be a hindrance to repossession of illegally acquired public land. Many beneficiaries of illegally acquired public land are the first allottees of such land, thus engage in first registrations.

In light of conflicting decisions from the Court of Appeal, the Attorney General should petition for formation of a full bench to make a binding decision on the matter.²⁴⁵

5.3.4 Recommendation on the National Land Commission

The Commission is in the process of setting up its structures of operation. In view of the limited time-lines given to it, several things need to be put in place.

²⁴³ Kimani, an official at the Ministry of Lands, during an interview on 8th July 2013 at Nairobi, concurred with this proposal.

²⁴⁴ This was proposed by Orioki, an official at the Ministry of Lands, during an interview on 8th July, 2013 at Nairobi.

²⁴⁵ Omondi, an advocate knowledgeable on land matters, concurred with this proposal.

First, NLC should take advantage of section 16(1) of NLCA to establish at least three committees²⁴⁶ and share the workload in reviewing grants and disposition of public land in Kenya, since Independence, to establish legality. In the alternative, NLC may establish a tribunal composed of some commissioners, akin to IEBC Dispute Resolution Tribunal, and delegate to it the role of reviewing the grants and dispositions of public land.²⁴⁷

5.3.5 Other Recommendations

Section 5(3) NLCA burdens NLC with the duty of ensuring all land is registered within 10 years. This shall ensure that public land especially that reserved for public utilities is duly registered and titles issued in the name of relevant authorities. This step should hence be expedited, so as to end future encroachment on public land set aside for utilities.

Further, there is an ongoing process of digitization of land registries. This will help create a detailed database of all land registered in Kenya, assisting the Registrar to detect illegal alienations of public land.

Finally, heavy penalties should be levied on errant public officers who illegally allocate public land to individuals.

5.4 CONCLUSION

The measures proposed in this study would assist overcome legal hurdles in repossession of illegally acquired forest land. If implemented, they would go a long way in reducing illegal allocations of public land, especially forests. This would ensure

²⁴⁶ Aisha, an official from the National Lands Commission, during an interview on 7th July 2013 at Nairobi, expressed concern at the timeline needed to undertake review of over a million previous dispositions and allocations of public land.

²⁴⁷ This was proposed by Kimani, an official at the Ministry of Lands, during an interview on 8th July 2013 at Nairobi.

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