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THE MAGISTRATE JURISDICTION (AMENDMENT) ACT NO14  
OF 1981: IT IS APPLICATION WITH REFERENCE TO  
KERICHO DISTRICT: \*

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for LL.B. Degree, university of Nairobi

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(1)

DEDICATED:

TO the peasants of this country who have borne the  
brunt of the alien law imposed on them.

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ABBREVIATIONS

- E.A. - East African Law Reports
- H.C.C.C - High Court Civil Case
- J.A.L - Journal Of African Law.

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Introduction:

Problem to be examined \*

By the magistrates' Jurisdiction (Amendment) Act No.14 of 1981, an institution called the panel of elders was created and was conferred on it, jurisdiction to settle land disputes which touched on beneficial ownership of land, division of or determination of boundaries to land including land held in common, claims to occupy or work land, and trespass to land. The institution of the panel of elders is not supposed to deliberate on matters touching on title to land. The panel of elders is chaired by the District Officer of the area where the dispute touching on the above named issues arise. Once the panel of elders have deliberated on any land dispute, their proceedings are forwarded to the Resident Magistrates court of the area for confirmation.

The purpose of this paper is to inquire whether parliament's intention as expressed in the Act is being given effect by the elders. To get this one has to analyse specific decisions of the panel of elders filed in the Resident Magistrate court in the area, in our case Kericho district. Also to be perused are appeals against the elders decision. The inquiry invariably raises questions as to what is the law on paper and what is the law in practice ie. on the ground; this will give us a glimpse as to whether there is a divergence of the law on paper and practice on the ground. What factors account for the divergence between law and practice? Questions will also be raised as to whether the institution in practice really confines itself to its jurisdiction as given in the Act or at time it acts ultravires the Act. If it acts ultra vires the Act, the next question will be why and what are the consequences of acting ultra-vires. The paper will attempt to highlight whether the elders have problems of interpretation and/or understanding the provision of the act in their attempts to solve land disputes, the extent of irregularities in the application of the law in the area of study (Kericho District). The inquiry will also attempt to analyse the effectiveness of the amendment to s.9A(A) (2) of cap 10 by the statute law (miscellaneous) Amendment) No.2 Act of 1984 whose provisions were intended to protect the registered holder's title from being <sup>c</sup>enroached upon by the panel of elders. In other words whether there are <sup>h</sup>loopholes that erode the protection of title to the prejudice of



title holders. And lastly to inquire into the suitability of the institution of the panel of elders in solving land disputes given its jurisdiction.

Chapter one will trace the historical background of problem. This will invariably lead us to the 1950s when the colonial government undertook a tenure reform programme in the African reserves. This chapter will give the legislative instruments enacted to give legal basis to the tenure reform programme, this will ultimately give us the origin of the Registered Land Act cap 300 Laws of Kenya whose application on African peasantry has led to the present land dispute in the country.

The second chapter will deal with problems arising from land registration its problems arising from imposing an alien law on a people governed by customary law and whose production relations were quite different from those that the alien law sought to promote. The chapter will, invariably deal with the sections of Registered Land Act which have caused problems to the African peasantry. The section to be dealt with are sections 27,28 and 143. Case law will be used to show the consequences appurtenant to land registration under cap 300. This chapter is very essential because it forms the background to the magistrate's Jurisdiction n°:14 (Amendment) Act 1981.

Chapter three is the gist of the inquiry and will deal with attempts to solve the problems resulting from land registration under cap.300. The chapter will briefly give the provisions of the 1981 Amendment Act and briefly state the objectives of the Act. As to whether the objectives behind the amendment have been realised will be shown by the perusal of cases that have been dealt with by the panel of elders in the area ie. those filed in the Resident Magistrate's Court, Kericho. In effect the chapter inter alia will attempt to answer the questions earlier posed.

Following this chapter will be the conclusion which in effect will be based on observations and answers to the questions posed.

## CHAPTER ONE

### Historical Background To The Present Landlaw Problems In Kenya

The present land problems associated with land registration in the country can be traced to the tenure reform programme undertaken by the colonial authorities in the 1950s and which was pursued by the post colonial state despite its ~~inherent~~ <sup>inherent</sup> problems, problems that have wrought havoc among the African peasantry whose conception of land whether registered or not is that it is family land and is governed by the law they understand i.e. customary law. This law has persisted despite the imposition of an alien property law-the English property law. The imposition, it was hoped would replace customary tenure which it was claimed (by the colonial administration) ~~had~~ its own deficiencies.

The purpose of this chapter is to identify the legislative instruments promulgated for tenure reform and which therefore formed the background to the legislative instruments governing land transactions in the country. But before one deals with the legislative instruments, it is necessary to state the reasons that prompted tenure reform in African areas. Several reasons have been advanced to explain the tenure reform programme. It should however be noted that political reasons took the upperhand because the systematic expropriation of African lands to facilitate European settlement between 1900 and 1940 proved to be a big problem for colonial settlement. The Africans throughout the period had been herded into African reserves. The creation of African reserves was meant to provide land for European settlement and also to give the colonial authorities an easy hand in controlling the African reserves which operated as pools for cheap labour - Unfortunately other consequences followed the constant expropriation of African lands, with the result that a notion of territorial fixity, a notion previously unknown to African peasants emerged. The result of this was massive land<sup>less</sup>ness. There was also the deterioration of the soils due to fragmentation, overstocking and soil erosion. Erosion was due to overworking of one piece of land as opposed to former shifting cultivation where land was abandoned

when it became unfertile. Soil erosion jeopardized not only development of agriculture but also adequacy of land to cope ~~up~~ with the growing population.<sup>1</sup> The other consequence of pooling Africans in the reserve was stagnation in peasant agriculture because the farming techniques and land use pattern were not improved to suit the limited land available. Massive landlessness was quite evident in those areas within the white highlands<sup>2</sup>:

The above problems obtaining in the African reserves led to ~~unrest~~ in such areas. By 1950 the natives were pressing through a nationalist movement to get their land back, unrest in the African reserves was a threat to the colonial polity. The problems in the African reserves having been identified as overpopulation, poor farming techniques etc. co-optation was mooted out as a solution to these problems hence there was to be resettlement, destocking and permission for Africans to grow cash crops (which at the time was predominantly a preserve of the whites). It was argued that these would solve the problems in the African reserves.

However, the agronomists instead of squarely facing the problems obtaining in the African reserves as identified, decided to point their accusing finger at the existing tenure systems whose removal, they saw was imperative for development in the African reserves. They pointed out certain constraints to agricultural development in the African reserves,<sup>3</sup> such constraints, they argued included the communal nature of control of land, which so they argued, led to uncertainty in decision making in land use because of ambiguity of rights in land. Hence to remove ambiguity in land rights in the African reserves, the agronomists suggested individualisation of economic units of land as a remedy. They also identified the indigenous system of inheritance as leading to incessant fragmentation of land into sub-economic units and this hindered development such, the agronomists saw as factors inhibiting development in the African reserves, hence the need to remove these factors.

The colonial government, seeing the urgency of tenure reform in the African reserves, invited the East African Royal commission<sup>4</sup> to make recommendations for tenure reform. The Royal commission advanced an economic argument for individualisation of title to land - this being in line with the agronomists. Individualisation, it was hoped would remove the inhibiting factors inherent in communal control. Individualisation

would therefore define one's rights in a particular piece of land. It should however be noted that at this time (early 1950s) there was already some unofficial land adjudication and consolidation in central province. The Royal commission's argument for individualisation of title to land provided an impetus for tenure reform in the African reserves, the other factor which accelerated the process of reform was the emergency. The shortcomings pinpointed by the agronomists were synthesised in the swynnerton plan of 1955<sup>5</sup> which set out the objectives of tenure reform. One should note however that the colonial government, having not hammered out a clear policy as regards African reserves, was hesitant in implementing the Royal commissions' recommendation of individualisation of title to land and even the stipulations of the swynnerton plan. Hesitation was due to the fear of the danger of applying European legal concepts to African land where African legal concepts obtained. The colonial government at this time then, still favoured what was referred to as community control where as stated <sup>each</sup> native land unit ..... was to be regarded as an estate of the community and each occupier a tenant of the tribe"<sup>6</sup>. This was in complete contrast with what the Royal commission <sup>had recommended for</sup> such a policy definitely would backfire since the circumstances obtaining in the African reserves militated against it. Government hesitation delayed implementation of tenure reform.

THE SWYNNERTON PLAN AND THE LEGISLATIVE INSTRUMENTS FOR TENURE REFORM:

As earlier noted, the objectives of tenure reform were set out in the swynnerton plan which stipulated inter alia modernisation of African peasant agriculture through conferment on the African farmer of security of tenure through a grant of an indefeasible title. It was argued that a secure title in land would encourage the African farmer to invest his labour and profits in developing his holding and also that the farmer would use his land as security to obtain credit facilities for improvements on his farm. Of course a secure title had to be granted on an economic size holding hence where there had been fragmentation there had to be consolidation of such holdings or enclosures of such units in communal lands. This, it was argued would revolutionise agriculture in the African reserves and hence the swynnerton plan was implemented by the <sup>and pursued by the</sup> colonial neo-colonial state. The plan, having laid the ground work for tenure

reform, what remained for it therefore was legislative backing. It was now clear that there was to be individualisation of title in the African reserves hence earlier suggestion by the colonial government to grant a "special title" based on a modification of customary law were brushed aside. For it was clear that if the African peasants were to be given credit facilities, individual titles had to be granted. It was thought that there was no alternative but to impose English law. The banks and other money lending institutions were not prepared to lend money to Africans unless the Africans provided secure titles. The idea of individual title however was not a new phenomenon and can be traced back to 1948 when there had been an inquiry about the possibility of "setting apart" land for individual Africans who wanted to obtain titles under the Native Lands Trust ordinance 1938. The process of "setting a part" had been in use only in leasing of commercial sites usually to non Africans. The process was found to be cumbersome hence there was need for other mechanisms for granting individual titles. Pressure for individual title in African land came from among others the African court officers.

At the proposal of the African court officers, the idea of "setting apart" was abandoned and Draft rules known as the Native Lands (Rights of occupancy) Rules<sup>7</sup>. The rights of occupancy Rules were deemed a special title. The urge for individualisation of title in African land by sections of the colonists was based on a misconceived notion that at the time there were changes in African reserves in the direction of individual tenure. It was misconceived because those who argued for individualisation of title had misinterpreted the organisational structure of land units in the African reserves for it has been argued that what seemed to have emerged was a much more rigid system of land based on the family rather than the more diffuse group of 'clan' or 'tribe'<sup>8</sup>. It was on such premise that the African court officers acted and hence the drafting of Rights of occupancy rules. One of the conditions set for the applicants of the title conferred by the rule was that the applicants had to satisfy the local land Board that their land formed part of an economic unit. It should be borne in mind that the Rights of occupancy rules were not based on any legislative instrument, it was not clear whether the rules could be drafted

under the Native Lands Trust ordinance (1938) and the other big question raised by these Rules was the nature of the title to be preferred by the Rules. The conflict between the rules and the Native lands Trust ordinance (1938) arose because the ordinance provided that land was to be held according to native law - (hence communally) while on the other hand the Draft rules (Rights of occupancy), purported to create private rights holdings. If the rules were to be implemented, then there had to be an amendment to the Native Land Trust ordinance. This controversy was brought to an end in 1954 when the Draft Rules were pronounced inadequate by S.R. Simpson, the colonial land tenure specialist who recommended inter alia that there be a set of rules providing for adjudication of existing rights prior to consolidation and registration. As a result of this recommendation new rules based on registration obtaining in Sudan but adapted to Kenya were drafted. However the new rules hit a snag for the rules faced the problems encountered by the rights of occupancy rules i.e. as to whether they could be drafted under the Native Land Trust ordinance of 1938 or whether the ordinance had to be amended so as to bring it in line with the new rules. It was resolved that the Native Lands Trust ordinance 1938 would be amended to enable titles to be registered.

While the colonial legal department and the colonial authorities occupied themselves with the question as to whether there should be an amendment to the 1938 Native Lands Trust ordinance and the fact that the rules to be drafted or not had to incorporate all the policy considerations which in actual sense meant care had to be taken to incorporate all policy considerations, this meant a delay; However, at the time consolidation was already taking place in some areas especially in central province. This was carried on by colonial administrators who took the advantage of the emergency period to push ahead with land reform at the times when there was little opposition especially from the African politicians who at the time had been rounded up and detained and the peasants had been placed in fortified villages. This meant that consolidation took place without any legal backing. Acceleration of tenure reform during the emergency period can also be explained by the fact that land reform was used as a punitive measure against the 'rebels' who rose up to challenge the colonial administration. Their lands were confiscated with a view to being given to loyalists. The long term objective for tenure reform was a political one. Note that

rebellion was due to constant land alienation hence to avoid a repetition of this in future, a conservative landed - middle class had to be created to act as a bulwark to revolutionary tendencies. This would as to complete the process of co-option of the Africans into the colonial economical production arrangements. In 1956, at the Arusha conference on Land tenure it was agreed that consolidation be proceeded with without legislation but it should be followed up with a simple registration systems. Legal backing was necessary to provide security for consolidated holdings for consolidation had rested on unenforceable agreements which were subject to ever enforceable claims<sup>9</sup>: Hence in 1956 the colonial authorities passed some interim legislative measures governing the principles and procedure for the process of tenure reform, these were the Native Lands Tenure rules.<sup>10</sup>

The Native Land Tenure rules were promulgated under section 64 of the Native Lands Trust ordinance. The rules gave power the minister for African affairs to set in motion adjudication process in African areas where he considered "... that a recognisable form of private right-holding exists, in order that such private-rightholding may be regulated and registered.<sup>11</sup> In effect the rules provided the legal basis for adjudication consolidation and registration. These rules were immediately applied to the emergency districts i.e. the central province. Following the rules, was an ordinance passed which had the effect of suspending all suits in African lands. This was the African courts (suspension of Land Suits) ordinance.<sup>12</sup> System under the Native Land Tenure Rules was a forerunner of the present system of adjudication consolidation and registration and were based on what the administrative officers were doing in the field. The Rules outlined the stages of reform, the first being adjudication i.e. ascertainment of individual or group rights under native law approximating to ownership. The second stage was consolidation i.e. aggregation of all pieces of land which each individual or particular group had rights and allocation to the individual or the particular group of a unit moreless equivalent to the scattered pieces. The third and is last stage was registration i.e. entry of existing rights in to the land register and issuance of certificate of ownership of the piece of land. The Rules did not specify the effect of registration on customary rights. The parent statute<sup>13</sup>. did protect customary rights hence the juridical implications of the tenure reform were still not clear. To resolve this problem a working party on African land Tenure<sup>14</sup>. was appointed in 1957.

The working party's terms of reference were to examine and make recommendations on:- the status of land in respect of which title is to be

given, the nature of title to be given, the substantive legislation for determination of rights, consolidation and registration of title and control and registration of land transactions. The working party recommended inter alia that the process of adjudication and consolidation be based on the pre-existing system, that legal title to land be derived from the fact of registration, that such title be absolute except for matters of succession, that registration should take place outside the ambit of Native Land Trust ordinance (the parent statute to the Native Land Tenure Rules 1956) and that a simple code of modern law be introduced to provide a frame work for transactions in registered land and lastly that a system of control of land transaction similar to land control ordinance<sup>15</sup>, be created to prevent rural indebtedness and landlessness (note that swynnerton plan had warned against rural indebtedness and landlessness as a result of tenure reform).

In 1959 the working party's recommendations were incorporated into two draft statutes which superceded the 1956 Tenure Rules and which confirmed and guranteed measures taken under them. The statutes were:- Native Lands Registration ordinance<sup>16</sup>, and the Land control (Native Lands) ordinance.<sup>17</sup> The Native Land Registration ordinance re-enacted all the adjudication and consolidation provisions of the 1956 Tenure Rules. The provisions of Native Land Registration ordinance as regards the nature of title it conferred was a radial<sup>6</sup> move from the previous provision touching on African land, for its provisions transformed the legal status of African land. The ordinance inter alia conferred on the title holders named in the register as freehold owner, an "estate in fee simple in such land together with all rights and privileges belonging or appertenant there to"<sup>18</sup>. As for rights<sup>of</sup> occupation under customary law, the ordinance provided that such rights if shown in the register were deemed converted into a tenancy from year to year otherwise extinguished. The ordinance also provided that first registration was unchallengeable even if obtained by fraud (a mechanism used to prevent what had already been achieved from being undone). As seen here, customary rights not shown in the register were deemed extinguished ie. the act of registration extinguished such rights. The provision that first registration was unchallengeable opened an avenue for those who knew the effect of registration to disinherit their family members especially the illiterate who during the time of registration were ignorant of its effects since registration was an alien idea. Injustice which occassioned by these provision was soon to manifest itself in the 1970s when the innocent people who had



registered family land in an individual's name were treated to a rude awakening when the courts pronounced them as trespassers. These provisions will be the subject of chapter two.

The second statute, the Land control (Native Lands) ordinance had the aim of controlling all disposition of registered land including transmission through succession except where no sub-division was involved, the aim being to prevent re-fragmentation of the consolidated units. Hence with the ordinance, the colonial government at last had decided that there was no option but to impose English property jurisprudence on African areas if, as they claimed, there was to be an end to problems in African lands.

At independence since there was a continuity of the colonial land policy. The land laws enacted at independence incorporated the provisions of the 1959 Native Land registration ordinance were re-enacted in the Registered Land Act<sup>19</sup> which subsequently repeated the 1959 ordinance. The Registered Land Act was a new and comprehensive substantive and registration statute. Earlier registration that had been carried out under the 1959 ordinance was converted into this Act. Of interest to us are the provisions of sections 27, 28 and 143, however other sections we may touch on will be incidental to these. Section 27 confers on the registered proprietor of land absolute ownership of that and together with rights and privileges belonging or appurtenant there to. Section 28 provides that such rights (conferred by S.27) are not liable to be defeated except as provided in the Act, and are to be held free from all other claims and interests. However such rights are subject to leases, charges and other encumbrances conditions and restrictions shown in the register and to overriding interests shown in section 30, which requires no registration. However there is also the proviso to section 28 which protects the interests of beneficiaries to a trust, though it is not mandatory that a registered trustee be named as so in the register (see section 126).

Such were the rights conferred by the new registration statute. Interpretation of these provisions by the courts, caused a lot of hardship to the peasants, hardship arose from the fact of the effect of registration on customary rights and interests. Such rights have persisted from the colonial period up to the present despite attempts to ~~out~~ it and hence bring landholding in line with the economic relations. Interpretation of these provisions is the subject of chapter two which will also show the peasant conception of registration.

The

The remaining provisions of the 1959 Native Lands Registration ordinance were re-enacted in the Land consolidation Act.<sup>20</sup> In 1967 a new Act<sup>21</sup> which repeated the 1944 and 1959 Land control ordinance was enacted.

FOOTNOTES TO CHAPTER ONE

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3. Ogolla. D.B. Landlaw notes LLBII 1985-86.
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8. Okoth-Ogendo, Land Tenure and Agricultural Development in Kenya and Tanzania, Journal of the Denning Law society Vol.2 no.2.
9. Ghai Y.P. and McAuslan J.P.W.B.: Public law and Political Change in Kenya (O.U.P. Nairobi 1970) P.79
10. Legal Notice No.452 of 1956
11. Rule No 2(1)
12. No 1 of 1957
13. Native Lands Trust ordinance No 26 of 1938, section 68.
14. Working Party on African Land Tenure in Kenya Report 1957-58 Government Printer Nairobi 1958.
15. No 22 of 1944
16. No 27 of 1959
17. No 28 of 1959
18. Footnote 16 section 37(a)
19. Chapter 300 Laws of Kenya
20. Chapter 283 Laws of Kenya
21. Land control Act Cap 302 Laws of Kenya.

INHERITED LANDLAW ( AS EMBODIED IN THE RLA) AND THE INJUSTICES IT BROUGHT ON THE AFRICAN PEASANTRY:

The chapter discusses the provisions of section 27,28 and 143 of the Registered Land Act (hereinafter the R.L.A.) and the consequences of the application of these provisions on customary land rights in Kenya. Having seen in chapter one that registration of a named proprietor vests in that person "the absolute ownership of that land together with rights and privileges belonging to or appertenant thereto", the next question to be asked is what is absolute proprietorship? An absolute proprietor in respect of any land registered under the R.L.A. has been defined to mean "the person whether individual or corporate whose interest is vested and is not defeasible or determinable upon the occurrence of certain or uncertain future event and who has or whose successor in title will have the ultimate right to possess the said land and whose interest in the said land except by transfer or transmission from a predecessor in title of the absolute owner and who has or would if he were in possession have in respect of the said land the totality of claims, privileges, powers and immunities which the law permits any person to enjoy in respect to land."<sup>1</sup> The absolute proprietor can transfer all rights and then ceases to be absolute proprietor of the said land, he holds free from all other interests and claims but subject to leases, charges and other encumbrances and to conditions and restrictions if any that are shown in the register (section 28(a) R.L.A.) and subject to overriding interest listed in S.30 of the R.L.A. It therefore means that the presence of the name of the registered proprietor in the register book is proof of such title to the whole world and as against the whole world. Whether the African peasants understood the implications of the new law and the nature of the rights it conferred or destroyed was a question which manifested itself in the 1970s and 1980s years after the first exercise at adjudication, consolidation and registration.

What then were the effects of registration under these provisions on customary property rights which subsisted in African reserves? The question cannot be answered unless one first understands the purpose of the adjudication exercise. The purpose of adjudication exercise is

stated in the Report of the mission on Land consolidation and Registration in Kenya<sup>2</sup> which stated at paragraph 161 that "it is ..... a cardinal principle of adjudication that it recognises and confirms rights which actually exists". Did these rights include customary property rights? If they did then there would have been no problems arising out of registration in the 1970s and 1980s. The reader should however be cautioned that adjudication authorities, being what they were i.e. foreigners and anxious to impose the new law seems to have assumed that there existed in African reserves (areas to be adjudicated) correlative property rights as recognised by customary jurisprudence and the rights recognised by the new law contained in the R.L.A. It has been argued<sup>3</sup> that if African land tenure had evolved to a stage where it had shed off its characteristic features and had adopted the western appearance, then the problem of equivalence would not have arisen. The idea of correlative customary property rights existing in African reserves first appeared in the working party on African Land Tenure Report<sup>4</sup> where it stated that it was satisfied ..... that rights enjoyed by individual Africans in many cases had now evolved to something like full ownership and should be recognised as such". It is our submission that this was a misconception since there was nothing as rights having evolved" to something like full ownership". What had actually happened as Okoth-Ogendo puts it, was a "..... much more rigidified system of land based on the family rather than the more diffuse group, the clan or tribe"<sup>5</sup>. This misconception led to less customary land rights being ignored, and therefore not being registered. Such omissions by adjudication officials later became the root of disputes from those whose customary rights were not protected. This was especially so in cases of first registration since section 143 R.L.A. provides that a first registration is unchallengeable even if obtained by fraud. Customary rights of occupation noted in the register are purportedly protected by section 11(3) R.L.A. which deems them as tenancies from year to year hence this results in a periodic tenancy which is presumably terminable by a year's notice. It is our submission that such provision does not afford those entitled under customary law any protection at all because such rights of occupation can be terminated. It is further submitted that such provision contemplates a situation where there exists customary tenants and hence is wholly inapplicable where those

claiming customary rights of occupation are relatives of the absolute proprietor. It is clear then that customary rights not noted in the adjudication register were therefore not protected and hence extinguished even customary claims of ownership were not protected. But even with customary claims of ownership, during registration, family land could be registered in an individual's name, that individual being registered as holding land as "trustee", but one curious provision is that such registered proprietor is deemed for the purposes of registration to be an absolute proprietor, and any disposition by a trustee for valuable consideration shall not be defeasible by reason of the fact that it amounted to a breach of trust (section 39(2)). This provision does not to an extent provide any protection to the beneficiary under a trust since disposition is indefeasible - such are the provisions of the new law imposed on the African peasantry. It is questionable whether they understood the consequences of registration so that they could take all precautions to make sure their customary land rights were noted in the adjudication register and hence protecting them. It is our submission that Africans were in complete ignorance of what the new law entailed. They merely thought that it was incorporating customary law in to a codified law and in effect confirming family title. But was it not the purpose of adjudication to conform existing customary rights rather than destroy them? Yet the colonial authorities assumed that the Africans knew the effects of land being brought under the new law. It is our submission that the two parties were at variance as to what registration meant. Little could be expected from the Africans as far as noting of customary land rights was concerned since their conception of registration is as stated. But would noting have helped them in any way? It could, as far as registration of one family member as trustee is concerned because, such a person would be called upon under the proviso to section 28 of the R.L.A. to execute his obligations. But for other rights, problems would still arise, because one may ask whether there exists customary tenants, among all the communities, in Kenya. What protection does section 11(3) afford to family members asserting their customary rights? Our submission is that this provision affords no protection at all for they could still be disinherited by being given a year's notice to vacate the land of the registered proprietor.

One wonders what the adjudication authorities were adjudicating. If the purpose of the exercise, as stated by the Report of the mission on Land consolidation and registration was recognition and confirmation of rights which actually exist, then what rights actually existed in the African reserves apart from the customary rights? We shall presently show through case law that these rights were not noted and as a consequence there were many disputes later in the 1970s which pointed to the inadequacy of the work done under the adjudication exercise.

COURT'S INTERPRETATION OF ss 27, 28 AND 143 OF THE R.L.A.

The replacement of customary landlaw with English land law meant that we would hence forth apply the latter as embodied in the R.L.A. The Act provides a simple code of substantive and procedural land law for the whole country. The courts' interpretation of the sections above has resulted in what has been viewed as ~~absurdities~~ from the African's point of view. The interpretation of these provisions on customary rights has resulted in naked injustices, for the imposed English property Jurisprudence disregarded the social circumstances obtaining in the African reserves, especially there was complete disregard on inheritance as understood in customary law.

The courts in Kenya have had two Views on the interpretation of the provisions relating to the effects of registration on customary land rights. One of the views expressed by the courts is that registration confers on a person an absolute proprietorship and hence extinguishes all rights and interest except of course those noted in the register. According to the exponents of this view, the register kept in accordance with the R.L.A. is final and one does not have to look at the disputing parties' position under customary law at the time of registration. They argue that the intention of the legislature was to extinguish customary property rights and hence first registration must be understood to have embodied a record of an individual's absolute ownership unless the contrary is indicated in the register. This reasoning has been applied in a number of cases. These include

Sela Obiero V Opiyo and others<sup>6</sup>. where an injunction was given to restrain the defendants, their wives, servants or agents from trespassing on the plaintiff's land. The defendants in this case based their defence on two ground:-

- (1) that they were owners of the land under customary law and
- (2) that they had cultivated it from time immemorial and that the plaintiff obtained registration by fraud.

The defendants argued that they had a right to occupy the land under customary law and that such right existed after registration of the plaintiff as proprietor. The court held that even if registration had been obtained by fraud, the title of the plaintiff was indefeasible given the provisions of section 143/(1) of the R.L.A. since this was a first registration. As regards claims of customary rights of occupation, the court in no uncertain terms stated "I am not satisfied on the evidence that the defendants ever had any rights to the land under customary law, but even if they had, I am of the opinion that these rights have been extinguished when the plaintiff become the registered proprietor. Section 28 of the Registered Land Act confers upon a registered proprietor a title free from all other interests and claims whatsoever, subject to leases, charges and encumbrances shown in the register and such overriding interests as are not required to be noted in the register -----, rights arising under customary law are not among the interest listed in section 30 of the Act as overriding interests" per Benett J at P. 228. This case was followed in Esiroyo V Esiroyo<sup>7</sup>. where the court held that the effect of registration was to extinguish customary land rights of those not registered as proprietors. The court at P.389 said "if the legislative wanted the African customary rights to be recognised nothing could have been easier than to say so." Such pronouncements were unpalatable for Africans for its net effect was to render them landless or in more mundance terms, trespassers on land over which they claimed rights! It should be noted that in these cases the customary rights which were being asserted were not noted in the register. Even if the rights had been noted, what protection could have befallen the victims here? If the rights had been noted as required by the provisions of sections 23(2) and 23(3) (c) of the Land Adjudication Act 1968, such customary rights of occupation asserted by the victims in the above cases, recorded in the register, could be deemed a tenancy from year to year (section

11(3) of the R.L.A.) and hence terminable at a year's notice (section 46(1)(c) of the R.L.A.). The effects of this would be that the victims in the above cases could still have been given a notice to quit hence in Obiero's case the plaintiff who was a step-mother to the defendants could still have terminated the defendants rights of occupation by giving them a year's notice. What would be the consequence of this if not to disinherit those who were entitled under customary law?

The other interpretations which has attempted to mitigate the harshness of the consequences of the provisions of registration which is actually the better view of the effects of registration on customary rights is seen in a number of cases which we shall examine briefly. Note that these cases are only meant for illustrations of attempts by courts to mitigate the harshness of the new law given that there had been no legislative intervention to rescue the peasants from the harsh consequences following from the first interpretation.

Before looking at these cases, it should be pointed out that the proponents of this view argue that the register kept in accordance with the R.L.A. is intended to indicate those who are registered as absolute proprietors or as trustees as known under customary law. The main consideration in this respect relates to the capacity in which the so called absolute proprietor was registered. If as trustee then he will be called upon to execute his duties. This view it is our submission is true only to the extent that the so called absolute proprietor has not exercised his power of disposition to an innocent third party who takes for valuable consideration, for where a 3rd party has dealt with the land, those entitled to under customary law cannot be said to have any protection. The position taken by the courts and which leads to the first interpretation of section 28 of the R.L.A. - amounts to a restatement of this section. The courts in this regard argue that they have inherent powers to construct a trust and prevent the registered proprietors from unjustly enriching themselves. In Muguthu V Muguthu,<sup>8</sup> it was held that the elder brother who was registered as the proprietor of a piece of land under the R.L.A. held it upon trust for himself and his younger brother irrespective of what the



register said. The reasoning of the High court in this case was that the R.L.A. is to be read with the customary law of the members of the African community to which a person belongs. It did not therefore require noting on the register. A similar case is Mungura Wa Mathai V Muroti Mugweru.<sup>9</sup> Yet another illustrative case in this line is Sanwel Meshack Thata V Priscilla Wambui and Wanjiru,<sup>10</sup> where it was held inter alia that a registered title is a creation of the law and one must look into the circumstances surrounding each case as well as customary law and practice in force at the time of registration in order to determine whether a trust was envisaged. Next in this line of cases are Alan Kiama V Ndiya Mathunya and Others,<sup>11</sup> Sephania Nthinga V Eunice Winjira Nthiga and another,<sup>12</sup>. In these cases the courts have read a trust in order not to disinherit the peasants of their rightful ancestral lands. The courts in those cases have tried to show that the R.L.A. does not extinguish any rights that a person may have under customary law. Note in these cases the trust used is the English concept of trust, but there are formalities of creating trusts in English jurisprudence except for a constructive trust which is imposed by courts to prevent one from enriching himself hence one is not sure whether he is going to get it or not since a trust is discretionary. Injustice still stood more so that the two interpretations by the courts of the provisions of the R.L.A. have not been reconciled, hence there is nothing which prevented the judges from adopting either of the interpretations and particularly the first view discussed which is as correct as the other one.

As a result of complaints and the harshness of the consequences especially of the positivist interpretation of the provisions of the R.L.A. as elucidated by the cases, it was felt that justice was not being done, people blamed the courts for this "miscarriage" of justice. The advocates did not escape the blame either, they were seen as accomplices in the exercise of swindling people of their land by those absolute proprietors who knew the extent of the rights they had in their pieces of land. Little did these people know that the real culprit was the law alien<sup>law</sup>. From the cases cited

it is clear that the peasants knew nothing as regards the consequences of registration. To them it only confirmed their rights and it could not whatsoever have the effect of expropriating their rights in the family land. For example in Esiroyo V Esiroyo,<sup>13</sup> the sons argued that they were entitled to the land in perpetuity because the land came to their father from his father and grandfather and so forth. Hence the consequence of interpreting the provisions of the R.L.A. as extinguishing customary land rights was to render them landless. The social and political consequences of rendering whole families landless would be formidable. This was realised by the state which had to intervene to try and solve the problem. It was therefore in 1981 that there was a legislative intervention in the form of an amendment to the magistrates' court Act,<sup>14</sup> through the Magistrates' Jurisdiction (Amendment) Act.<sup>15</sup> The aim of this was to remove certain land disputes from the courts and place them upon the elders who presumably could dispense justice according to the peasant understanding and hence ultimately accommodating the people who were customarily entitled to land rather than leaving them landless.

The Magistrates' Jurisdiction (Amendment) Act inserts a new section after section 9 of the Magistrates' court Act, the new part provides:-

PART III A JURISDICTION IN CERTAIN CASES RELATING TO LAND

Section 9 (A) (1) "Notwithstanding the provisions of sections 5-9 or any other written law conferring jurisdiction but subject to the provisions of this part, no Magistrate court shall have or exercise jurisdiction and powers in a case of a civil nature involving:-

- (a) The beneficial ownership of land.
  - (b) The division of or determination of boundaries to land including land held in common.
  - (c) A claim to occupy or work land.
  - (d) Trespass to land.
- (2) An issue relating to any matter set out in paragraphs (a) to (d) in sub-section (1) shall be referred to a panel of elders to be resolved.

The Amendment was aimed at solving the injustice occasioned by the provision of the R.L.A. Ironically the Amendment does not amend the problematic areas of the R.L.A. viz sections 27 and 28, what happened here ~~is~~ with the amendment is the procedure of deciding land dispute with the same provisions of the R.L.A. remaining. However, the task of the legislative over, it is now left for the elders to implement the law and whether the elders now empowered to settle land disputes will be able to give the law a more meaningful interpretation in their local areas than was done by the courts remains to be seen and this is the subject of the next chapter.

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FOOTNOTES TO CHAPTER TWO

1. Allot, A.N. "Towards a definition of Absolute proprietorship"  
5 J.A.L. pp. 215
2. Report of the Mission on Land consolidation and Registration in  
Kenya 1965-66, Republic of Kenya, Republic of Kenya.
3. Coldham; Effects of registration of tittle upon customary  
rights in Kenya 22.J.A.L. 1978 pp.91
4. Working party on African Land Tenure in Kenya Report 1957-58  
page 34
5. See note 1 chapter one.
6. (1972) E.A. 227
7. (1973) E.A. 388
8. H.C.C.C. ~~Not 37/1978~~ No
9. H.C.C.C. (at Nyeri) No 56/1972
10. H.C.C.C. No 1400/1973
11. Civil Appeal No 42/1978
12. H.C.C.C. No 1949/1976
13. Note 7 above
14. Chapter 10 Laws of Kenya
15. Act No 14 of 1981

- 2 -

CHAPTER THREE

3. THE INSTITUTION OF THE PANEL OF ELDERS: PART ONE:-

In the preceding chapters we saw the persistence of customary land law after registration. We have also shown the harshness of the consequences of registration on customary rights as interpreted by the courts and how parliament has attempted to mitigate the consequences by taking out of the courts, disputes touching on some specific matters enumerated in the last part of chapter two. Part one of this chapter will describe the institution of the panel of elders and part two will attempt to show how this panel of elders has actually worked.

As pointed out in chapter two, parliament in 1981 passed the Magistrate Jurisdiction (Amendment) Act which introduced a new section 9 A to the magistrates' courts Act. It is this amendment which created and conferred jurisdiction on the panel of elders. The panel of elders have jurisdiction only on those matters specified in section 9 A (see chapter 2). Further limitation imposed on the panel of elders is that they are to adjudicate disputes in cases where the value of the land does not exceed £25,000 and further, the land should not be land registered in the name of a building society, a cooperative society or a company. Finally the elders are given jurisdiction only in relation to agricultural land as defined by section 2 of the Land control Act.<sup>1</sup>

3.1. OBJECTIVES OF THE AMENDMENT ACT:

The amendment sought to serve a number of purposes. The objectives set out by the Attorney-General when moving the bill clearly shows that the Act was aimed at the peasant farmers. The Attorney-General is on record saying "in recent years small farmers have been dissatisfied in the way their land cases have been handled by courts"<sup>2</sup>. It was contended that there have been feelings that the magistrates who have heard cases have not properly understood the issues or properly recorded either the issues or the evidence. As a result there had been too many appeals to the resident magistrates. It was also claimed that appeals caused the resident magistrates to remit cases for retrials and the whole process led to frustrations, delays and much expenses in briefing lawyers on the part of the parties involved. The advocates

were accused of being "sharks" bent on milking the peasants by charging high fees. It was felt that removing these cases from courts to a panel of elders to decide would minimize such expenses. It was further argued that the elders would conduct cases informally so the parties could follow the proceedings unlike before where, it was contended that lawyers use legal jargon in court to confuse the parties. It was also hoped that the new law would ease congestion in courts.

The urgency in passing the bill is reflected in the many loopholes which characterises the Act. It was felt that the amendment need not take fourteen days to read since, (it was stated) it was "a very small amendment to our laws". Despite protest by the backbench the bill was discussed and passed in five days. The backbench had sought more *time* to read and analyse the bill, but the government maintained its position that the amendment was a small one, one that "could be read and understood in half an hour". The bill was passed without any amendment to seal the loopholes that had been pinpointed by the members of parliamentary debate, one thing that the members of parliament seemed to be under misapprehension about is that long before the bill was introduced in parliament there was the practice of sending land cases to elders under the Arbitration order (civil procedure Rules Section 59). So, long before the parties to a suit go to court they have gone to elders and have disagreed, hence resort to court for determination. Hence it should be noted that the idea of elders listening to cases is not a new one as the amendment ~~parports~~ *parports*. Infact one M.P. noted that the idea of elders deciding land disputes was not a new one and hence he saw no reason why the Act was being enacted. The bill however was passed and it came into operation in 1981, though it was not clear as to what was to ~~happen~~ to the procedure under s.59 of the civil procedure Rules.

### 3.2 THE WORKING OF THE PANEL OF ELDERS - THE THEORETICAL LEVEL

The panel of elders consists of a District officer or any other person appointed by the District commissioner as chairman. The chairman appointed should have no previous connection with the issues in dispute, there has to be two or four elders agreed upon by the parties to the dispute. The chairman is required to file a written record of the proceedings and the decision of the panel of elders in the

Resident magistrates' court. The written record must contain the names of the members who took part in the deliberations and each member must sign the record. The court has power to Modify or correct a filed record, in some aspects it can remit it to the panel of elders on such terms as it thinks fit. It can also set aside the record on various grounds which include corruption. Finally, the court shall enter judgement according to the decision of the panel of elders if no application is made to set it aside within thirty days of receipt by the applicant of notice of the filing of the record. upon judgement being entered, a decree issues and this is deemed final and binding.

### 3.3 THE LAW APPLICABLE

The amendment does not specify expressly what law the elders were to apply in solving land disputes, However from parliamentary debates, it seems parliament assumed that the elders were to apply customary law (i.e. the law which the elders are conversant with). If this be the case, would this not mean that parliament is going behind the provisions of the Registered Land Act to restore the position of customary law to where it was before its replacement by the English law as embodied in the R.L.A.\* and have the courts, assisted by elders acting as jury to apply customary law? As we shall show, it was not parliament's intention to introduce customary law though as is characteristic of our parliament, this again has not been stated expressly. If the elders were to apply customary law, then land disputes would finally be settled, but this was not the case. First it is a fact that Registered Land Act remained and is thus applicable in courts. In 1982, the Attorney-General issued a circular<sup>3</sup> which was aimed at explaining the amendment. The circular at page 5 explains the analysis of cases within the jurisdiction of the panel of elders.

As regards beneficial ownership, the circular only mentions this as regards unadjudicated areas and gives what beneficial ownership embodies viz:- entitlement to a share of family land which has descended from an ancestral tree of lineage. The second type of beneficial interest will be that acquired in respect of individually purchased land. The circular states that settlement of disputes in these categories should be of preparatory stage but final in effect pending the process of adjudication.

\* What would have been better than to amend the R.L.A.

As for division of or determination of boundaries to land, including land held in common, the circular (at page 6) states that this category of land disputes arise out of unadjudicated land areas as well as land registered under the R.L.A. But the circular instructs the elders as regards unadjudicated areas only, to act according to customary law and exercise equity and fair play. Everything arising under this head be it rights of both married and unmarried daughters shall be decided according to customary law.

From the foregoing it is clear that the categories on which the panel of elders are supposed to deliberate are restricted only to unadjudicated land where the panel of elders are expected to apply customary law. No explanation is proffered as regards registered land except that the panel of elders have no jurisdiction to adjudge matters concerning title to land (see page 8 of the circular). The circular like the R.L.A. is emphatic that the registered proprietor is absolute owner and in absence of fraud, mistake or omission, the certificate of title is absolute and indefeasible. It further states that where a dispute involves registered land with claim to occupy or work that land by virtue of long occupation or challenge to the registered title, the dispute must be referred to the resident magistrate for determination. From this it would therefore mean that section 9 A(1)(c) of the amendment Act which purports to confer jurisdiction on the panel of elders to determine issues relating to a claim to occupy or work land does not apply to registered land as this is clearly stated by the circular that such issues are to be referred to court. Is this an issue of trying to safeguard customary law being introduced in registered land? Why the referral to court when an issue falling under this head arise in registered land? The circular further states that the panel of elders can deliberate on disputes touching on boundaries and trespass to registered land but should not touch on title to such land. Another provision (page 12) states that in disputes concerning boundaries to registered land, the proper chairman should be the chief Land Registrar assisted by the Land surveyor with two elders appointed by each party. The reason for this provision is not given but it would seem that the chief Land Registrar (who in most cases is a trained lawyer), would safeguard against the application of customary law and would detect those



disputes touching on title but are disguised as trespass and hence would refer them to the court for determination. Would this mean that District Officers should not chair panels of elders in adjudicated areas? If the reasons suggested above are correct, it would seem that customary law is only applicable in unadjudicated areas only. It should be noted that if the above be the case the Act solves nothing as regards registered land. This would be an irony because the very reason why the Amendment was passed was because of the injustices meted on the peasants by the strict interpretation of the provisions of the R.L.A. as regards its effect on customary rights. (see chapter 2) The disputes in the first place arose because of registration under R.L.A. and claims that arise are based on customary rights. Such rights existed in the pre-reform tenure arrangements which was capable of accomodating multiple interests in land, and these rights have persisted over time. The circular then, had the effect of delimiting the elders jurisdiction.

As if the circular was not enough to delimit the jurisdiction of the panel of elders to adjudicate upon matters touching on registered land, another Act was passed in 1984. This was the statute Law (miscellaneous Amendments) (No 2) Act<sup>4</sup> which stated that nothing contained in section 9 A(1) of the magistrates Jurisdiction (Amendment) Act shall be construed as conferring jurisdiction or powers on a panel of elders to ~~title~~ determine title to land. This was a serious limitation on the elders jurisdiction to determine disputes related to registered land, for it has been argued<sup>5</sup> that the class of disputes enumerated in paragraph (a) to (d) of the magistrate jurisdiction (amendment) Act revolves around title to land i.e. both legal and beneficial ownership of land. This is true since the lesser interests in land are derived from ownership. These categories given in the Act are intertwined with title yet the elders have no power to adjudicate on matters that touch on title! Isn't this a fallacy? Thus far, the magistrate Jurisdiction (Amendment) Act read together with the 1984 Act is a classical mediocrity in draftmanshaip. G.K. Kuria<sup>6</sup> argues that the magistrate jurisdiction (amendment) Act was based on the assumptions that there are customary land rights and usages which justice demands be recognised and that recognition of these rights and usages will not defeat the principal object of land registration. Unfortunately recognition of such rights would run courtesy to the objectives of tenure reform. This could

explain the reason why there was a restatement through the 1984 Act that the panel of elders have no jurisdiction to decide disputes touching on title. It would appear that had there been no circular and the legislative intervention through the 1984 Act, a floodgate would have been opened by the 1981 Act through which customary rights (which were supposedly ousted by registration) would be reintroduced in registered land or atleast recognised though not registered. This would negate one of the cardinal objects of tenure reform.

The foregoing however is the position of the law at the theoretical level i.e. the law as it is on paper. As to whether the law in practice conforms to the law on paper remains to be seen.

## PART TWO

### 3.4 LAW ON THE GROUND

Having thus outlined the law on paper, it is pertinent to examine the extent to which those who apply it conform to or depart from the law as embodied in the Act.

A survey of the workings of the panel of elders through decided cases filed in the Resident Magistrates' court at Kericho and through interviewing those concerned with the implementation of the Act depicts a sharp divergence between the law and practice. The disparities between law and practice have their roots in the defective paper provisions. Another reason for failure to observe the law is not just a desire for deliberate violation of the law but ignorance of the legal position by persons who are supposed to apply it particularly the elders. The issue of ignorance however is not peculiar to one subject but to all laws. But probably the most important explanation for the occurrence of irregularities in practice is the effects of the dictates of administrative convenience stemming from defective legal provisions. This is evident from public speeches<sup>made</sup> by administrators and in particular the District Officers who very often are heard to say in public meetings that all land disputes must be referred to

their offices for determination and that all land disputes have been removed from the courts. What these administrators do not understand is that the panels which they chair have very limited jurisdiction in disputes from registered land and hence could not have been removed from courts as they often assert.

The requirement of the law as regards the number of elders who form the panel is strictly adhered to. This is shown by cases perused. This is the only provision in the Act which is followed. However issues do arise as to how the panel is constituted. The law requires that the elders who form the panel should be appointed by each party to the suit. Cases do arise where instead of the elders being chosen by the parties to the suit, the District officers handpick the elders who in some instances turn out to be clan elders. This is not surprising since clan elders occasionally are spokesmen and are better known to the administrative officers of the area. It is <sup>the</sup> law that clan elders should not at any one time be chosen to form the panel (see page 4 of 1982 circular paragraph 3(iv)). The result of such an appointment is normally a biased enpanelment because a clan elder present would definitely favour his clansman. Handpicking of elders to form a panel arise especially where the parties have disagreed on the choice of the panel of elders, in such instances the District officer resort to handpicking his own choice of elders who ~~more~~ often than not are people known to him due to wealth. Handpicking is a divergence from the law since the law provides that the elders should be appointed by the parties. Such practice does not in any case serve the cause of justice as envisaged in the Act. It cannot be expected, given that the District Officers come from outside the areas they administer, that such officers know people "who are recognised by custom as elders" as is required by law i.e. if such officers were to appoint. Such defects are attributable to the paper provision, even when the parties appoint the elders, how can it be determined that those appointed are the ones "recognised by custom as elders"? It is the practice that the parties always appoint <sup>people who</sup> ~~people who~~ they think will safeguard their interests in <sup>the</sup> case. Hence it cannot be said that the word "elders" in the Act has been fully defined neither are the words "recognised by custom ----clear and unambiguous.

It can further be asked whether we still have "elders" envisaged by the Act. It is common knowledge that due to cultural contact with Europeans and the economic set up at present, many traditional institutions have been eroded. Inclusive in this category is the one through which the traditional elders who used to solve disputes was hatched. The result is that in present Kenya the calibre of elders envisaged by the Act (assuming the Act envisaged elders in the traditional sense) is difficult to find. At present the elite are looked at as the leaders while the elders as earlier known are just landed illiterate old men. Another defect is the non-provision of special qualifications for the panel of elders. The result of handpicking by the District officer is objection by one of the parties to judgement being entered when the record is filed in court.

A further divergence from the law as regards the panel of elders is seen in the form of the presence of the chiefs and their assistants of the area where the dispute arise during the proceedings of the panel. Their presence is not provided for anywhere in the Act, neither is there any provision in the Act which gives the chairman a discretion to have them (or anybody else) present. Cases show that very often such administrative officers deliberate on such matters, would this not be an anomaly? Given the fact that they are bound to influence the proceedings, what role do they play in the proceedings? Records have it that they at times act as witnesses i.e. extra witnesses not called by either party. Their presence is uncalled for since it is possible that none of the parties to a suit would have agreed to their presence. Where this has occurred the courts have not seen it fit to invalidate the record. Coupled with this is the sub-delegation of the chairman's role to the chief or sub-chief to decide the issue first and then put the verdict down in writing. The practice in such cases is for the chief or his assistant to call a public gathering which in most cases comprise of the whole village (Normally the chiefs and their assistants when given responsibility to decide the case, first, do not constitute a panel of elders but instead the case is decided

villagers).

\* <sup>is</sup> decided at the village level enpanels the elders to 'decide' the case. The verdict reached by the panel chaired by the D.O. is normally based on the one decided by the villagers and it is this that ends up being filed in the court. This practice reduces the role of the panel

\* The verdict is sent to the District Officer who, as if the case had not been--

of elders chaired by the D.O.L to the role of mere rubber-stamping. Such practice cannot come to light unless the parties object to judgement being entered to by the court. If there is any objection, the result is that the court will have to rehear the case afresh. And the ultimate result is that there are delays, extra costs to the parties and on top of it, congestion of cases in court. The Act does not provide for delegation of the chairman's role neither does it provide for the consequences of derogation from its provisions. The practice of delegating the chairman's role is a creation of the administrative officers and this may be explained by the fact that these officers are very busy with other matters, and have little time to sit to determine cases. Such are the unfortunate provision of the new Act for it adds more workload on those who already have more on their hands hence the issue of delegation to try and ease the workload but this is not without detrimental effects.

One unfortunate practice is that once a record ~~is~~<sup>is</sup> invalidated, it is remitted for rehearing by another panel; During the fresh hearing other issues or grounds of objection may arise after the newly constituted panel finalises its work, hence if the grounds are proved, forcing the courts to nullify the proceedings of the second panel and another remittance again or a fresh rehearing in court. A case of illustration here is Chuchune Mogeso V Kipkoskei Yetgei, this case was dealt with by three different panels. A ground of nullification of the decision of the first panel was that the elders did not sign the record as required by section 9c of the Act and also that the chairman of the panel filed a copy of the record and the verdict and not the original record duly signed by the elders and the chairman. The defendant further argued that he had not accepted the elders who presided over the case because they came from areas other than where <sup>x</sup> given a fair hearing by the chairman of the panel and was not even allowed to cross-examine witnesses. The plaintiff conceded that the elders were appointed

\* ~~where~~ than ~~parties~~ came from and that he was not

by the assistant chief on instructions of the District Officer. The court, on these grounds remitted the case to the District officer to hear it in accordance with the demands of natural justice and <sup>to</sup> file a record of the proceedings. The case was fixed for mention, by which time the District Officer should have finalised the proceedings which he never did. By this time a new D.O. had been posted to the area who asked for more time, he constituted a new panel, this time the verdict favoured the defendant. The plainfiff objected to judgement being entered for the defendant on the ground that elders were relatives of the defendant one being the defendant's clan elder. The grounds were proved to be true and also it was shown that the chairman alone signed the minutes thus suggesting that the verdict was the chairman's and not that of the panel. The proceedings of this second panel were set aside and the case was this time referred to the district commissioner who in turn appointed another chairman to chair a new panel. The third panel arrived at the same decision as the first panel. This case illustrates the ineffectiveness of the panels in deciding cases, it also illustrates the delays inherent in the new system of adjudication as embodied in the new Act. It also illustrates frustrations that may be experienced by the parties concerned. The case was first heard on 10th July, 1982 and was pupportedly finalised on 25th June, 1986 however the case <sup>was</sup> raised its head again but <sup>h</sup>this time in the nature of trespass and is still pending in court. As to expenses incurred by the parties in such cases, it cannot be said that the expenses are minimal because the parties have to <sup>travel</sup> travel to where the panel is sitting (which in most cases are held in the D.O.'s office) and later when they object to judgement being entered, they do ~~do~~ in the resident magistrates' courts which in most cases and particularly in Kericho, are situated in the District towns far from the parties' place of residence. If the case is heard afresh in court, in many instances, the parties have to foot the travelling and food expenses for their witnesses, this will be in addition to what they had earlier spent when appearing before the elders. It can be argued that the expenses spent by parties when appearing before the panel of elders is an unnecessary expense in a case where the court ultimately has to hear the case afresh. \* means that what the panel had arrived at is nullified which means the parties would have incurred expenses for a worthness

\* The fact that the court has to hear the case afresh

award. This is illustrative of the fact that the intention that the new Act would minimise expenses in litigation on the part of the peasant is an illusion. The objective can only be realised only if there are no objections by parties which forces the court either to remitt the case for rehearing or is to hear it afresh. It could only minimise if the elders decision was final and binding. In the case cited, court did not rule on the effects of the presence of the area chief and his assistant who took part in the proceedings of the elders. Hence the positon as regards this is not clear. Our submission is that their presence is an anomaly because the Act requires two or four elders and the D.O. as the chairman. It is common knowledge that such people as chiefs and their assistants do take sides in such disputes and it would serve the case of justice if such officers appeared as witnesses.

Although it is not clearly stated as to the role of elders in law, practice shows that they act as adjudicators. One should not overlook the fact that these elders are not independent adjudicators by virtue of the fact that they come from the area in which the dispute arises, and also by virtue of the fact that they are appointed by the parties to the suit, each party would therefore appoint a person whom he knows is sympathetic to his case. They therefore sit to adjudicate cases on with pre-conceived opinions. This is illustrated by the fact that they know the facts of the case before hand which in effect means they have evidence which may not be adduced before them and this stands to influence their decision. <sup>appointed</sup> Is it on the basis of the evidence adduced before them only, or in addition to what they know privately? Such are the questions which the new Act has not provided for. The Act was passed without much thought on its effects neither were there attempts to seal the loopholes.

### 3.5 SIGNATURES

It is the requisite of the law that all the members of the panel must sign the award. If any refuses the chairman of the panel must inform the court of the refusal when forwarding the award and the court will summon them to explain why they have refused to sign.

Cases show that instances arise where elders refuse to sign the award.

\* The question that remains is, on what basis are the elders to arrive at their decision?

Several reasons are attributable to this one, of which is that an elder or elders who feel justice has not been done refuse to sign. Some refuse because the final verdict is not what they expected or on the ground that the chairman was high handed in the deliberations. Refusal to sign on the ground that verdict did not favour <sup>the</sup> or on the ground that it should have favoured the disfavoured party is not genuine and this serves to reinforce our argument that some of the members of the panel sit with pre-conceived opinions <sup>as to</sup> of the directions in which the turn of events should take. Absence of signatures on the award is one of the grounds for invalidation, but one unfortunate consequence of the absence of signatures is that the court is forced to hear the case to establish whether the refusal to sign is genuine or not, this wastes courts time and nullifies the work of the panel. What will the panel have solved if the case has to be reheard in court?

The law assumes that the presence of signatures on the award means that the elders have read and understood the contents. It is also presumed that a signed record is a perfect record. It is our submission that these assumptions are not true for all cases. Most of the elders are illiterate and as the law stands nothing stops the chairman from creating a record of his own and having it signed by the elders. Cases filed at Kericho court show that in most of them, the signatures are in the form of thumb print which clearly illustrates that they do not know how to read and write! Yet they are deemed by the presence of their signature that they know what is contained there-in. What prevents a fraudulent District Officer from creating his own record and having the elders thumb-print it all along being under the impression that the award is what they had agreed on? If such a case arise it will therefore mean that what goes to court for filing is the chairman's decision and this may not be detected by the court unless there is an objection. This would be prejudicial <sup>to</sup> the aggrieved parties and will only be redressed where the parties know their rights. Where the parties are poor and illiterate, the chances are that the chairman's verdict cannot be objected to. It should be noted that in this country, courts have suffered a historical accident where they have been seen as just another arm of the executive, this can be explained by the role which the courts played during the colonial era. Hence a party aggrieved by a highhanded District Officer would not resort to court for redress. This is an observation stemming from interviewing <sup>8.</sup>



those who have had their cases decided by the elders, such people express sentiments that they do not expect much from the courts. Even if they were to object to judgement being entered, such people are handicapped by expenses of which they are going to incur.

It is our submission that the issue of signatures as safeguards is not unimpeachable. The only beneficiaries of these provisions are those who know their rights which in most cases are the literate. Where a parties raise the issue of being forced to sign the record, the court, having satisfied itself of the truth of the allegations, nullifies the award. This acts as a check on fraudulent awards.

### 3.6 THE JURISDICTION OF THE PANEL OF ELDERS IN PRACTICE

The issues that the elders are to adjudicate upon as laid down in section 9A(1) are very obscure. Obscurity of the provisions governing jurisdiction of the panel of elders has led to confusion in the already confused realm of property law in this country. Confusion has resulted in serious divergence, in law and practice. As earlier stated, the provisions relating to jurisdiction or the whole Act is defective. If we take the issue of "beneficial ownership", there is only an explanation proffered on this in relation to land still under customary law. What does this term mean in registered land? or this is left to the wild guesses of the elders? If the elders are supposed to apply customary law or determine the issue of beneficial ownership according to customary law, then ~~we need~~ the supervision of the courts? It must be noted that the 1982 circular is silent as regards beneficial ownership in registered land. Neither does <sup>\*</sup>this silence mean? Does it mean that a person cannot claim beneficial ownership of land in registered land? It is our submission that the question of beneficial ownership (however defined) does arise in registered land, illustrative cases here are Obiero V. Opiyo<sup>9</sup> and Esiroyo V esiroyo<sup>10</sup> where the plaintiffs claimed that they were beneficial owners of the land they were litigating about although the legal ownership or title was vested in the defendant. Though these claims were rejected by the court, that does not alter the fact that they asserted their beneficial rights in registered land such rights being based on customary law. Does

\* the Act give any elucidation on this. what does --

silence mean that such <sup>an</sup> ~~all~~ <sup>as</sup> ~~does~~ not arise at all in registered land? or does the Act assume that once land is registered then any claim of beneficial ownership based on customary law is abolished, i.e. is there a restatement of what was said in the above cases? (see chapter 2). If this is the case, the Act solves nothing in registered land and to this end the Act is self-defeating and therefore is unworkable. The very reason why there was a legislative intervention in 1981, was because of the problems that arose out of registration under the R.L.A. Yet the new Act which was supposed to solve the problems ~~cannot~~ <sup>cannot</sup> ~~court~~ by implication be applied in registered land<sup>1</sup>. Alternatively if beneficial ownership is left to the wild guesses of the elders, this would still lead to confusion in the law, for any claim can be interpreted to fall under this head. Our submission is that there should be further ~~eluc~~ <sup>eluc</sup>idation on this issue. It is not a surprise that the elders have assumed jurisdiction even where it is clear they have no jurisdiction, this is the results of defective ~~draft~~ <sup>draft</sup>manship.

The issue of jurisdiction of elders was made difficult by the restrictive amendment of 1984 through the statute Law (miscellaneous Amendment) No 2 Act.<sup>11</sup>. This Act worsened the situation because the jurisdiction which the elders have can be exercised only if they understand or make assumption as to who has ~~title~~ <sup>title</sup> in a given land. It is impossible for the elders to determine other matters e.g. division of ordetermination of boundaries or a claim to occupy or work land without taking a decision on ~~title~~ <sup>title</sup>. The big question is why was there ever an amendment in 1984? Was it that the draftsman was alarmed by the extent to which elders were applying customary law after the coming into operation of the amendment Act and hence the emphasis that the elders jurisdiction is limited? The most important shortcoming of the Act (the magistrates jurisdiction (amendment) Act and which is the root cause of confusion in this area is that the Act did not make it clear whether the four matters that the elders are to have jurisdiction are contextually within the western property law system or customary law system which applied before the imposition of the alien law. This omission by the legislature has led to serious divergence in law and ~~pro~~ <sup>pro</sup>actice, the elders have

in most cases assumed jurisdiction and have deliberated on matters that are clearly outside their jurisdiction basing their deliberations and their assumption of jurisdiction on customary law and common sense. ★

As an illustration, cases filed in the resident magistrate court at Kericho that the elders have dealt with, a large number of them are in the realm of contract.<sup>12</sup> In such cases the parties could have enforced their rights by resort to court for an order of specific performance or a court order that the other party to the suit execute his part of the or pay damages for breach of contract. A few cases of illustration can be seen by the case of Chuchune Moogeso V Kipkoskei Yetgei,<sup>13</sup>. In this case the plaintiff had bought 2½ acres of land at the cost of Shs.3,401.30. Five years later the defendant decided that he would refund the plaintiff his money because he no longer wanted to sell his land. The plaintiff refused the refund and he wanted the defendant to execute his part of the agreement. During the five year period the plaintiff had been exercising his rights as an owner over the land in dispute. The Land control Board had given consent for the land of the defendant to be subdivided and be transferred to the plaintiff. The defendant refused to sign the transfer forms. The dispute was referred to the elders and as earlier noted, the case dragged for a number of years with three panels under different chairmen deciding. Issues arise in this case as to whether the case would not have been dealt with expediently by the court. This was a clear case of contract. Another issue flowing from the case is that since the dispute arose in registered land, under what head, among those provided in the magistrate jurisdiction Act did the elders assume jurisdiction, under what head can we slot the claim in this case? Even if we were to slot it under any of the categories given, the other issue will be, doesn't the case touch on title? It is our submission that this claim touches ~~an~~ title to land and the elders can therefore had no jurisdiction. We shall explain later in the chapter why the court in Kericho is reluctant to pinpoint those cases that the elders have no jurisdiction.

A further illustration is seen in the case of Elizabeth Chepngetich Langat V Elijah Mugeni,<sup>14</sup> in this case the plaintiff bought 1.5 hectares of land from the defendant. There was a written agreement to this effect. The provisions of the Land Control Act as regards consent were complied with. But the defendant avoided the Land Control Board order

not to sign the transfer forms. The case was referred to the elders who awarded the parcel to the plaintiff. The court confirmed this and ordered the Land Registrar to nullify the land title no Kch/Kipsonoi/1343 and issue the plaintiff with a certificate. The questions that arise in the above case do arise in this again. Note that the court ordered the registrar to execute his part on the basis of the elders decision.

The above two cases show that the panel of elders in Kericho district have assumed jurisdiction in matters that are not within their jurisdiction. Even if they were to interpret such claims in such away as to bring them under a particular category in those enumerated, how are the elders to decide the case without touching on title? These cases illustrates the anomalies and loopholes inherent in the new Act. The divergence therefore can be explained if we appreciate that the Act is defective. The result of this is that we have a dead law on paper which is quite different with the living law on the ground!

The panels have also assumed jurisdiction in land succession cases under the registered land and whose testators died after the coming into operation of the law of succession Act. The case of Kimutai Arap Koibei Koskei V Daniel Kipngeno Kitur<sup>15</sup>. The dispute in this case was between brothers and the elders had to determine inheritance by the heirs. It is clear from the facts of this case that inheritance was based on customary law. The award was confirmed by the court. There was an objection on the composition of the panel of elders which was dismissed by the court, but as regards the award it was confirmed in its entirety. The issues that arise are whether the elders have any jurisdiction as regards succession cases in registered and land; if they have, what law are they supposed to apply? It is our submission that the elders have no jurisdiction on registered land as regards succession otherwise the succession Act would be rendered useless. It is however clear that there is reluctance by the courts to pinpoint that the panel of elders have no jurisdiction to decide such cases. This reluctance stems from the court view of the amendment Act as "an administrative mechanism" designed to solve albeit its deficiency, incessant land disputes. The resident magistrate when asked about his view on the awards by elders which clearly are not within the jurisdiction of elders or which touch

on title to land, he replied that almost all the awards in the district are legal nullities.<sup>16</sup> To reinforce his view that the Act is an administrative mechanism the Resident Magistrate cited an instance where the occupier of the highest office in the country presided over a land dispute in the district which as he states was out of the pervue of the elders jurisdiction. Hence for the courts, as long as there is no objection by any party to judgement being entered it affirms it. The affirmation is of course not without legal consequences e.g. if an award to subdivide land, when of course was based on customary law, and there is an order of the court directing the land registrar to nullify the original title, then the issue of protection of title by the new Act exist only in theory. Also it would mean an introduction of customary law in land registered under the R.L.A., but through the backdoor. To this extent, the new Act contradicts the R.L.A., what could have been better than repealing or amending the latter? The resident magistrate's testimony was reinforced by the District Officer, Bomet division who told the author<sup>17</sup> that some of the litigants go to the extent of petitioning the president to intervene in their cases he infact read a letter from the District commissioner instructing him (the D.O.) to deal with a certain case, because of the parties to it had petitioned the president to intervene. Despite the fact that the awards by the panel of elders may be legal nullities, the political pay-off of the Act is so high<sup>that</sup>, it seems it is there to stay. The seriousness and the sensitivity of land disputes is illustrated by the fact that some litigants petition the president to intervene. Their sensitivity shows that they may impinge on the security of the state. The courts have noticed this and hence the reluctance to declare such awards as nullities or to stick to the rigidly to the legal provisions in the other statutes. It should further be stated that to the extent that the new Act contradicts other Acts, several consequences will soon be manifested.

It is also the provision of the law that the elders have jurisdiction to arbitrate on issues touching trespass in registered land. This is the single most provision which the 1982 circular expressly state as being within the domain in land registered under R.L.A. It should have been expected that the elders in Kericho District would actually confine themselves to this issue. Unfortunately

the elders have gone out of their jurisdiction to determine a whole array of issues without bothering to ask whether they have jurisdiction. The District Officer, Bomet Division told ~~the~~ another that they enforce ALL land disputes and they donot bother even to look at the Act. This therefore, means that through the Act, a floodgate has been opened and coupled with the reluctance of the courts to pronounce some awards as nullities, means that customary law will be reintroduced in registered land.

Despite the explanation that an issue of determination of boundaries to or division of land in registered land, the proper chairman is the chief Land Registrar assisted by a land surveyor (see 1982 circular), no single case filed at Kericho court reveals this. Even with trespass to land there are those cases in which a claim to title is disguised as trespass. How are the elders expected to distinguish this? It is heard for them to distinguish this given that they are not versed in <sup>the</sup> any law, while the chairman in any case is a layman in the law. This provision therefore exist in theory and not in practice and it will be for the courts to pinpoint those cases that come disguised as trespass. It is <sup>a</sup> defect that advocates cannot appear before the panel of elders. The 1982 circular states that they are not expected to appear before the panel. This, in addition to the defective and obscure provisions of the Act explains the elders erroneous assumption of jurisdiction in matters that are outside their jurisdiction and hence further explains the divergence of the law on paper and the actual practice.

As far as legal representation is concerned, this only comes up when the parties are in court and cases show that in many instances<sup>18.</sup> the advocates have raised the issue of jurisdiction of elders especially that the case touches on title and hence the elders have no jurisdiction and more often than not the court agrees with them. The result of this is that the parties litigate in court again and this renders the elders purported verdict ultra-vides the Act and is therefore null and void. When this occurs, how can we describe elders proceedings? Aren't their ~~purported~~ proceedings a waste of

the parties', the elders and their chairman's time? What of the frustration experienced by these lengthy procedure. To the extent that the parties finally resort to court, ~~for~~ determination of their case, the panel of elders serves to protract the procedure of solving disputes. And we therefore submit that this was not the intention of the legislature and to this extent the Act does not serve the interests of justice. Further we would like to state that legal representation though a right in the constitution, <sup>in</sup> reality, however, is a privilege ~~for~~ those who can afford the legal fees. As a result therefore where a party ~~does~~ not have any legal representation, and hence safeguard ~~their~~ <sup>its</sup> title, are not afforded any protection at all by the Act. Their titles can be encroached on by elders who as we have shown assume jurisdiction to decide all land disputes. Furthermore, legal fees is another additional expenses, we should pose one question here, that is, what stops the parties from going to courts in such instances? Practice shows that the parties end up having their cases decided by the courts yet these are the same courts which the Act sought to remove them from. Such are the anomalies attendant to the new Act. The Act has created its own problems, further delays in litigation congestion of cases in courts, infact the Resident Magistrate at Kericho alluded to the issue of congestion of cases.

On the issue of jurisdiction, it can be concluded that what is on paper as the valid jurisdiction of the panels of elders is not what actually is on the ground. As stated earlier the divergence centres ~~of~~ on the defective paper provisions, ~~and~~ ignorance and obscurity of the provisions. what was supposed to be protection to the title holders exist only for those who can afford the legal fees to hire an advocate. Otherwise for those who cannot <sup>afford</sup> the fees, the protection which was emphatically given through the 1984 Act, only exist in theory. IF this is indeed the case, it would mean two legal systems exist one for the rich and one for the poor. The legislature did not provide for unpeachable provision in this issue of jurisdiction. While the courts on the other hand are passive in the sense that as long as there is no objection to the verdict it confirms it even if the issue revolves around title. As stated all the awards are based on customary law and common sense. The elders in effect are declaring that there exists other interest in registered areas though not noted

in the register. This therefore means that what is in the register does not reflect what is on the ground. It would be interesting to see how the elders would deal with family land in the context of customary law understanding) which has been mortgaged/charged by the registered proprietor (not shown as trustee in the register). When asked, ~~how~~ if he could deal with such a land, the D.O. Bonet replied in the affirmative. Such a case has however not arisen in the district. If this were to happen, it would mean that the register kept in relation to that parcel is deceptive for there will be other interest which though not registered can be declared any time by the elders. This would in effect discourage charges and mortgages. It will therefore mean that land loses value as security for credit facilities, and was this not the ~~purpose~~ of registration, Does this not go along way to nullify one of the cardinal objects of tenure reform? It is our submission that the enactment of the Act was done without any reference to other Acts.

Another obscurity exist in the form of the value of the land. How are the elders to know that the value of the land they are dealing with is below £25,000? This is an issue which goes to jurisdiction. The case of Kipkoskei A chumo V Musa Chepkwony<sup>19</sup> gives us a hint on this issue. The dispute in this case was referred to the High court because the subject matter exceeded Kshs.6,000 and therefore the subordinate court had no jurisdiction. This figure was at 1971. The dispute in this case was adjudicated upon by the elders in 1983, it is possible that the cost at the time had exceeded £25,000. The Act does not provide for a method for estimating the figure, are the elders to use the local estimates (i.e. assuming they have jurisdiction). It is possible that the elders will decide on disputes whose subject matter clearly exceeds this. In some areas in the district, the cost of an acre is as high as Ksh.50,000! which estimates then are the elders supposed to use? This provision then does not augur well for jurisdiction.

In conclusion, it would seem that the new Act would have been a sigh of relief had it not have been for the restrictive provisions that accompany it as regards registered land. Jacob Ombonya<sup>20</sup> in his article reckons that most disputes handled by various panels across the country are concerned with title to registered land. It would



be almost impossible for the elders to decide cases within their jurisdiction without touching on title. If the legal provisions are to be rigidly followed, then the elders were given powers but divested from them almost immediately by the series of circulars and the 1984 Amendment. It should be stated that the burning issue at the time of the enactment was not WHO was to determine land disputes but the problem is WHAT law should be applied.

### 3.7 THE MAGISTRATE JURISDICTION (AMENDMENT) ACT VIS A VIS OTHER ACTS

The magistrate jurisdiction (Amendment) Act, through the panel of elders, in some instances contradicts other Acts of parliament which govern land law in this country.

#### (i) Land Control Act (cap 302) Laws of Kenya

One of the areas in which the elders have jurisdiction as per the amendment Act is in connection with the division of or determination of boundaries to land. The land it refers to is agricultural land as defined in section 2 of the Land Control Act. In the same Act it is provided that some transaction specified must get consent of the Land Control Board or else the transaction will be null and void or if the land control Board does not give consent within three months the transaction will be void. Among the transaction that require the consent of the Land Control Board is the division of land into two or more parcels. The elders have jurisdiction to deal with inter alia division of agricultural land. s 6(3) (a) of the Land Control Act imposes restrictions on transmissions (testate and intestate which involves sub-division of registered land into two or more parcels. The aim of this provision was to prevent refragmentation on the death of the proprietor. However as shown by the case of Kimutai Arap Koibei Koskei V Daniel Kipngeno Kitur,<sup>21</sup> and other cases filed at Kericho court, the magistrate jurisdiction (Amendment) Act and the Land Control Act are at variance. These cases reveal that the Land Control Board is never consulted by the elders. The case above explicitly shows this, the land was subdivided in accordance with customary inheritance laws without any resort to the Land Control Board for consent. The procedure shown by the cases is that after the elders' award is filed, the court notifies the chief land registrar to effect the division, in some instances the court's executive officer ~~who~~ executes the mutation forms. (We are of course assuming that the awards are valid). In the procedure, <sup>there is</sup> no mention at all <sup>Q.S</sup> regard consent from the Land control Board. Thus far, one would

Question as to the

ask the effects of such transactions. The Land Registrar cannot by all means refuse a court order to subdivide a piece of land on the ground that consent from the Land Control Board was not obtained. When asked about this, the Resident Magistrate was of the view that since the D.Os are in most cases chairmen of the Land Control Board, there was no harm in not seeking its consent. To him, it is as if the presence of the D.O. at the elders proceedings and he being the chairman of the Land Control Board is enough to validate the subdivision. But it is clear that the elders do not play the role of the Land Control Board neither can the D.O. alone constitute the Land Control Board. When asked about the same, the D.O. Bomet division was of the view that when the award has been filed and judgement entered by the court, the party seeking subdivision uses the court order when appearing, before the Land Control Board. The problem however is that even if the Land Control Board would have refused its consent on the ground that to subdivide a piece of land would result in subeconomic units, it will not refuse a court order to do the same despite the results of subdivision. This in actual fact means that the Board will then be a mere rubber stamp and its work is thus rendered obsolete as far as such cases are concerned. It is evident from the foregoing that, in either way of approach to the issue, there exist a defect which cannot in any way be justified. This is the result of enacting an Act in complete isolation of other Acts which touches on the same subject matter.

(ii) The Limitation of Actions Act (cap 22 Laws of Kenya)

The amendment Act has no limitation period. As a result of this very old cases, some dating to independence days have been reopened. The Attorney General's circular of 1982 state that "care must be taken not to reopen old cases." It is not however stated as to how old cases would otherwise be statute barred. A case to note here in this regard is Kipkoskei A. Chumo V Musa Chepkwony<sup>22</sup>, this is a land dispute which is traceable to independence days. The case was before the High Court in 1971 (H.C.C.C NO 1322/71) where the court issued a temporary injunction with no fixed duration against the defendant. The defendant did nothing all this time upto 1983 when the amendment Act was in operation when he filed the dispute in the D.O.s Office.

A panel was constituted and it is on record that the elders and the witnesses seemed not to know anything about the case. The elders award was declared null and void as the dispute revolved on title this was pinpointed by counsel for the applicant. Should there be no<sup>an</sup> end to litigation? Such a case illustrate that the amendment Act contradicts the Limitation of Actions Act. Mr. Justice Aganyanya when addressing members of the bench at Kakamega<sup>23</sup> lamented that although the government had introduced the Magistrate Jurisdiction (Amendment) Act to facilitate settling of land disputes, many people had misunderstood it and were "opening old wounds even if the cases had been settled by the High court". The Amendment Act therefore revives matters that have been finalised, a contradiction of the principle of resjudcata.

The case of the absurd consequences which the amendment has occasioned, have partially been explained i.e. it was an amendment to one Act in complete isolation of other Acts governing land. The Act was passed with good intentions but it has occasioned its own confusion. We therefore keep our fingers crossed while hoping that parliament will clarify the position in this area of land law.

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FOOTNOTES TO CHAPTER THREE

1. Chapter 302 Laws of Kenya
2. Daily Nation 25th November, 1981
3. Guidelines circular manual for implementation of the Magistrates' Jurisdiction (Amendment) Act 1981: Dated 16th April, 1982.
4. No 19 of 1984
5. Bondi Ogolla "The legal Regime and the Peasantry: The case of Land Tenure reforms in Kenya (unpublished).
6. Kuria "Need to Rethink the role of elders" Vol.3 Nairobi University Law Journal P. 73
7. Miscellaneous Application case No 6 of 1983
8. Interview with Joel Arap Koskei, on 14th December, 1986
9. See note 6 chapter 3
10. See note 7 chapter 2
11. Note 4 above
12. Such cases include (i) Chuchune Mogeso V Kipkoskei Yetgei (Note 7 above)  
(ii) Elizabeth Chepngetich Langat V Elijah Mugeni Miscellaneous Application No 24 of 1984.  
(iii) Stephen Maritim Arap Soi V Joel K. Chumo Miscellaneous Application No 18 of 1986.
13. Ibid (i)
14. Ibid (ii)
15. Land succession civil case No 43 of 1984
16. Interview carried out on 10th December, 1986
17. Interview carried out on 16th December, 1986
18. E.g. Kipkoskei Chumo V Musa Chepkwony Miscellaneous Application case No 17 of 1983.
19. Abid.
20. "The Registered Land Act and the Magistrates Jurisdiction (Amendment) Act." - Unpublished
21. See footnote 15 above
22. See footnote 18 above
23. Daily Nation 19th December, 1986 P. 4

## CONCLUSION:

In this paper we have tried to trace the root of the landlow problems obtaining in the country. We have shown that it was not until 1950s that a Machinery for Wholesale transformation of traditional to received tenure was devised. Such machinery involved an adjudication process, consolidation of scattered plots into economically Workable Units, and registration in an official register. It is, therefore, to this whole-sale transformation machinery that we trace the current problems.

We have also endeavoured to show the consequences of an imposition of an alien law attendant to a capitalist mode of production to pre-capitalist society. The harsh realities of such a legal system manifested itself in the 1970s, years after the first registration process was undertaken. It should be noted that underlying the changes was a basic philosophy which involved replacement of what was considered a restrictive static economy by a modern exchange one. One thing was however overlooked that is, that land tenure changes must demonstrably be within the borders of acceptability of the people i.e. people must understand it and accept the values which the changes incorporate otherwise any arbitrary ~~imposition~~ would lead to a total collapse. The cases we have seen in chapter two indicate non-acceptability of the changes inherent in the new law. It was, therefore the harsh interpretations of the provision of the new law by the courts that forced the legislative to intervene in 1981 to try and resolve the contradictions between what the new law provided and what the people perceived as the law governing them in their daily activities.

An attempt to see whether the new law has brought any sigh of relief to the peasants is undertaken in chapter three. Such an attempt involves the task of ascertaining the practical implementation of the Act in the district. In this chapter, we have tried to illustrate the good intentions with which the magistrates jurisdiction (Amendment) Act was passed. We have, however, tried to show that the Act as enacted and as read together with the statute law (Miscellaneous Amendment) Act and the AG's circular cannot achieve its intention. The Act only achieves its intention as long as the elders awards emanating from registered land are not challenged in court by reason that the issues touches on titles which title has been jealously safeguarded by the legislature. The amendment was aimed at solving the injustices occasioned by SS.27 and 28 of the R.I. These sections (as shown in chapter 2) had the effects of extinguishing customary rights in land as soon as a piece of land is registered under

The result of these provisions were that people who were otherwise customarily entitled could be evicted from their land as trespassers due to the fact that their rights did not appear on the register. This was the unfair situation which had to be corrected. It was hoped that the new Act would do this. *Unfortunately, the law as contained in the Act as shown in chapter three does not seem to do this to an extent.*

A survey of the practical implementation of the Act shows a serious divergence between law and practice. What was intended to be protected from the elders' encroachment, its title can only be protected as the aggrieved party resorts to court, the very same courts which the Act purported to remove their cases from. The law that was not to be applied in registered land because of the fact that such areas were already under a legal system which purported to oust the other, has found its way through the backdoor. The Act gave powers to the elders to decide certain disputes on one hand, and it took by the other. We have, therefore, shown that the Act has its own inherent weaknesses. The obscurities in the Act which have aided the disparity between law and practice does highlight the weakness inherent in the legislative. The truth is that contrary to the common rhetoric that parliament makes laws, it never makes it but only endorses it. Very few members understand the consequences of some particular legislations, hence these go through unchanged.

The practical implementation of the amendment Act is characterised with confusion. What is theoretically the elders' jurisdiction is not what it is in reality. We have tried to give reasons for this. The heads of disputes conferred on the elders cannot be dealt with efficiently without touching on title. To this extent the amendment Act is meaningless. If the legal provision as contained in the Act are to be adhered to strictly, then the elders have virtually little or no role to play in registered land. The underlying problem that has faced the policy makers in this area ever since the process of adjudication, consolidation and registration was started is the persistence of customary law in such registered area. The conflict between the two legal systems demands a reconciliation of the two. However, a solution to the conflict cannot be allowed by the production relations which the state wish to maintain. There is no mid-way solution to the problem. With the new Act, therefore, as we have shown, customary law is being reintroduced in registered land, this is so because the elders' awards are based on customary law.

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Of particular attention here are the succession cases which as shown, arise in these areas and the elders determine them on the basis of customary law, this is despite the fact that there is the law of succession governing inheritance. This shows that law is culture specific. Such awards also show that although title may be individualised in one generation, succession patterns which is an integral feature of the social life ensures a re-conversion to the lineage system in the next generation. Succession cases on the district are based on the lineage system, with the sons insisting on subdivision of their father's land. The machinery of doing this has been afforded by the amendment Act (though not expressly). But can't such claims be interpreted as to fall under the beneficial ownership though the land may be registered? The truth, however, is that the elders on the district have assumed jurisdiction in this area regardless of the legal niceties.

The amendment is a piecemeal modification of our land laws which amends only one statute in isolation of all other statutes. It is not a surprise, therefore that the new act contravenes other statutes which it did not repeal but are still effective. The amendment Act goes behind the R.L.A. and defeats the aims with which the latter was passed. In fact it nullifies to an extent the objects of tenure reform. This is done through introduction of customary law in the registered areas; this has the effect of restoring customary law to its position during the pre-reform tenure period. Despite the emphatic provisions that the elders are not to touch on title the exercise of elders deciding cases goes on undeterred. Challenges to their decisions only take place in court and this has the effect of congestion of cases in court. As we have shown, the amendment Act has reopened old cases, which cases at times date to independence days (which period, adjudication and consolidation had not taken place in some areas), this has the effect of rendering the present title uncertain and more particularly in consolidated plots. What prevents parties who were disputing their rights on certain plots during this period from resurrecting their claims before the panel of elders? It is common knowledge that in central province and other areas adjudication process was undertaken when some members of the community were absent. What then prevent such persons from reasserting their claims before the panel of elders.

In total, the new act has come with its own confusion and contradiction. It should be stated that the real culprit of the injustices occasioned on the peasantry is the alien English law as embodied in the R.L.A.

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This is the Act that should have been amended and not the magistrates courts Act. The problem existing is not and it will not be who should determine land disputes (this is what the amendment Act answers) but what law should be applicable. The legislature should not have addressed itself to the procedure of settling land disputes, but to the substantive law. As long as the substantive law remains, the problems also will remain unresolved. The courts, had realised this and hence the attempts to read the R.L.A. in light of customary law in existence at the time of registration. The legislative should have followed the courts. It cannot be said that the policy makers are unaware of where the problem lies. The reluctance to amend or repeal the substantive law can only be explained by the fact that the dictates of production relations <sup>which they wish to preserve</sup> cannot allow this. To sum up, we say that the elders, long as their decisions as regards registered land, are not challenged in court on the basis of title, their decisions will to an extent mitigate the injustice occasioned on the peasantry. But to the extent that their decisions are challenged on the basis that they touch on title, then the problems still remains because this will have to be resolved by the courts, the same courts that apply the alien law.

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