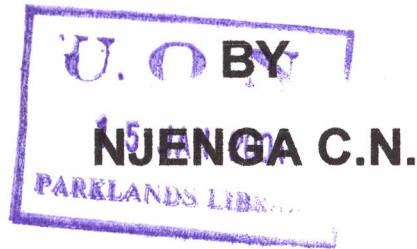


***Land ownership ceiling law and policy as
an instrument of land redistribution in
Kenya.***



**A DISSERTATION SUBMITTED IN PARTIAL
FULFILLMENT FOR THE AWARD OF THE
DEGREE OF BACHELOR OF LAWS (LL.B.)
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DEDICATION.

To my mother who has always believed in me and encouraged me through hard times.

To my father Njenga Waweru who taught me that hard work opens all doors.

Appreciation.

To my supervisor, Mr. H. Agumba for his invaluable help and positive criticism that has helped make my work what it is.

To my family, for being there, Dad and mum for your love and support, Thank you.

To my brother Kubai Njenga for the tireless effort and concern in making this work possible.

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To my friends Mbugua G.N, Kamau, Kamau I. M , Gachie S.M, Kangata I, Chocha. J, Kivuti .D and Gitanga M.Juniour

Your positive criticism and support inspired me to exploring new ideas and presenting them in this work.

To the P.C.C.U. Executive Committee of the year 2002 and to all my brothers and sisters in the P.C.C.U.

Your prayers saw me through, may God bless you all.

To all the young people from Githurai. Its another day, it's a brighter day

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1. The Constitution of Kenya.
2. Government Lands Act. Cap 280
3. Indian Land Acquisition Act. Act No 8 of 1894
4. Indian transfer of Property Act (I.T.P.A)
5. Land Acquisition Act (Cap 295)
6. Land Control Act. Cap 302
7. Land Titles Act Cap 282
8. Registered Land Act. Cap 300
9. Registration of titles Act CAP 281
10. Trustlands Act Cap 288
11. Physical Planning Act Cap 278
12. Agriculture Act Cap 318
13. Water Act. Cap 372

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1. *Obiero V Opiyo* [1972] E.A 227.
2. *Esiroyo v Esiroyo* [1973] E.A 388.
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- East Africa (Acquisition of Lands) Order-in Council of 1897.
- Crown Land ordinance of 1915.
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- Kenya (Highland) Order-in Council of 1939.
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TABLE OF OTHER STATUTES REFERRED TO:

- Constitution of the United Republic of Tanzania.
- Tanzanian Land Act of 1997.
- Village Act of 1961.
- Tanzanian Local Government, District Authorities Act of 1982.
- Eritrean Land Proclamation of 1994
- 1979 Constitution of Zimbabwe.
- Constitution of Uganda of 1998
- Uganda Land Act.

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INTRODUCTION

This work was largely inspired by my experience as a rapporteur with the Constitution of Kenya Review Commission during its constituency hearings in the year 2002. In this respect I wish to thank Commissioner Maranga for his inspiring thoughts and debates. Land has occupied a central role in the discourse of political and economic reforms in this country and this work offers a different perspective to this discourse, which I wish to raise as part of this recurring debate.

Chapter One offers the context of this work and paints the picture of the matter as it stands.

Redistribution is analyzed in different time continuums respectively the pre-colonial period, the colonial period and in the present day Kenya.

Chapter two presents the case for a land ownership ceiling and the various legal aspects of this proposed Law. The technical and the jurisprudential perspectives are presented in a summary form.

Chapter three compares this proposed law with other approaches that have been utilized by different jurisdictions in the quest to achieve equitable land redistribution and general land reforms. The experiences of various states are discussed in this chapter and compared to the Kenyan experience.

Chapter four offers the conclusions and the corresponding recommendations and also borrows heavily from the recommendations offered by the various institutions that have addressed themselves to this issue.

This work is basically foundational and it is subject to further debate and discussion. Any critique is welcome as we seek to get a workable formula to achieving societal justice and national development based on the resources that nature has endowed us with, as a nation. It does not purport to be in any way exhaustive of the issues pertinent to the land reform debate and it is my hope that it will form the basis for further research and discussion.

CHAPTER ONE:

LAND DISTRIBUTION IN KENYA AND THE NEED FOR REFORM

“...it was a man’s pride to own land and property and his enjoyment to allow collective use of such property”

[SOURCE: Jomo Kenyatta, Facing Mt Kenya, p.25]

1.0. INTRODUCTION.

The discourse of land to form in Kenya, which has been both intriguing and contentious, centres on the question of land redistribution and thus assumes a political, economic, sociological and even a purely conceptual dimension depending on the forum in which the issue is raised. Kenya being largely an agrarian state depends on economic activities directly related to land and it thus suffices to state that the distribution of land has wider societal ramifications than can be casually adjudicated. Land tenure has been widely argued and recognised as being the subject of the Land reform discourse in Kenya but due regard has not been accorded to the wider question of equitable land distribution in the society. Arguably, these two concepts are intertwined and inseparable since the core of the tenurial problem is the quest for a tenure arrangement that places the people at the heart of its institutional and normative formation as opposed to the issue of prioritizing development strategies at the expense of the wider society.

Much activity, legislative and judicial has been aimed at curing the historical problem of tenure where the government through the instrumentality of The Registered Lands Act¹ that embodies the Absolute Proprietorship Estate, deliberately seeks to replace all other existing tenure

¹ Cap 300, Laws of Kenya.

arrangements and entrench a semblance of English property law paradigm here in Kenya which stresses the individual ownership of interests in land. This policy has continued to inform the tenure reform process in Kenya through the processes of land adjudication, consolidation and registration. The question of equitable land redistribution has thus been relegated to the periphery of the Land reform discourse in Kenya, with the resultant effect of massive landlessness and the co-related phenomenon of poverty and low standards of living in the society.

The independence government focused primarily on the transfer of political power from the colonial government and the occupied land from the settlers to the Africans without due consideration of how this land would be shared out in the post-colonial era so as to ensure that the transferred land was equitably redistributed amongst the Africans. The policy adopted for this transfer of land by the independence government in concert with the British government as agreed in the first and second Lancaster Conferences was that the Africans could only access the white highlands through purchase under willing buyer, willing seller schemes or through purchase by the post-colonial state for resettlement of the Africans and redistribution. The latter initiative was to be funded by the post-colonial state for resettlement through loans advanced by the U.K government and the Colonial Development Corporation, West German and the World Bank.² This arrangement was largely ineffective and only served to present an opportunity for the emergence of, and entrenchment by a solid middle class population that acceded to and entrenched themselves in large scale capitalistic agricultural production. The most elaborate land redistribution arrangement was the Million Acres Settlement Scheme through which over a million people were resettled on holdings ranging from 25 (twenty five) to 40 (forty) Acres from 1962 to 1966. The settlements were categorized into high-density low income holdings which covered 970, 000 Acres, Low density

² Details of this agreement are documented in Wassermann .G, "The independence bargain ;Kenya Europeans and the Land issue,1960-63",Journal of commonwealth political studies,(1973) Vol II,No 2

High Income Holdings of 40 acres each which covered a total high Income Land size of 180, 000 Acres, 'Z' holdings for urban workers and local politicians and also squatter settlement schemes of 10 acres each which covered a total area of 460, 000 Acres.³ Later on the 1970's Shirika Schemes were implemented where plots were allocated in specified areas to squatters but title to this plots vested with the settlement fund Trust which also employed farm managers to administer this scheme for the benefit of the allottees.

The government also pursued and explored other pro-active measures of ensuring equitable land redistribution including the incorporation of land buying companies and farming co-operatives which are predicated on the principle of pooling together of resources by the poor peasants in order to circumvent the pecuniary impediments that stricture the process of land acquisition. Land so acquired would be sub-divided and individual members would get indefeasible title to the portions of land. However, later on, the corruption and financial mismanagement evident in the country effectively crippled the structures of this initiative with many would be beneficiaries being swindled out of large amounts of money by the managers of this companies amongst other inhibitive management and administrative inefficiencies.⁴

None of these arrangements adequately provided an effective remedy to the poignant problems arising superimposed in the country by the colonial government. The available arrangement to access Land involved an outlay or finances and hence were inaccessible to the poor and landless African peasantry. These schemes were exploited by the emerging petty bourgeois elements to accumulate to themselves large tracks of also to install legal and administrative structures to preserve and perpetuate the status quo. This class as the society also used its political

³ These figures are taken from the Economic Development of Kenya, 1963. Report of the Mission Organized by the International Bank for Reconstruction and Development.

⁴ Mboi -I-Kamiti Land company has been riddled with administrative and financial problems since the early eighties, Daily Nation 4th may 2000

power and comparatively higher position of knowledge to resist various attempts aimed at redistributing land to the citizenry on an equitable basis and this aspiration still stands elusive to the present day.

1.1 LAND DISTRIBUTION IN PRE-COLONIAL KENYA⁵

Much has not been written on the manner in which individuals and societies used to access and own land in pre-colonial Kenya but it can be safely surmised that whatever tenure arrangements existed, they were fundamentally different from that existing in Feudal England. While appreciating the diversities and complexities in traditional societies, historical accounts demonstrate that by and large, similar tenure arrangements existed in this 'acephalous' societies and which tenure system can be termed as the 'communal' tenure system. Here community land reposed with the sovereign who would either be an individual (King or Chief) or a collective (council or elders). The sovereign guaranteed and granted the right of access to the land by individuals depending on the use to which the land would be put. Such land had to be employed in good faith and in the interest of the community as a whole and the sovereign had to balance between the availability of Land and the exigencies of individual members of the community.

Distribution of land in this context was a product of the social formation of the people and the dictates of their economic mainstay which was largely dependant on the societies' stage of development for example some societies practised hunting and gathering, nomadic- pastoralism and others , settled farming. The community adhered to the philosophy of equity which is also formed the societal bond that inspired unity and coherence in a community , which was important for its self-preservation and perpetuation. The level of equity in land distribution and communalism in

⁵ The phrase pre-colonial Kenya is a misnomer and its herein used in a loose sense since Kenya as a state didn't exist before the colonial era.

land tenure varied from community to community and although tendencies individual land tenure were discernible in certain ethnic groups in Kenya,⁶ the community guaranteed ownership or basic sizes or land to every productive member of the society. This arrangement manifested in the equality of living standards within a community and the uniformity or near uniformity of the economic activities undertaken by the members of the community and a communal approach to other forms of property within the community for example intellectual property. In Kenya a semblance of this form of land tenure and distribution paradigm still subsists amongst the nomadic communities that occupy most of the arid and semi- arid areas of the country. The vestiges of this pre-colonial tenure system survived the introduction of individualized tenure system which notion has not permeated the structure of these societies mainly due to the nature of their economic activities. The attendant processes of land adjudication and consolidation that facilitate the registration of individual claims to land, have also not been undertaken and therefore the scope of this land redistribution discourse will not extend to this areas. The argument here is that within this communities and societies, such structures and factors that buttress a communal land tenure system are still alive and they inherently ensure equity in the access to and utilisation of land by the members of that community.

1.2 IMPOSITION OF THE ENGLISH TENURE SYSTEM IN KENYA.

Arguably, Kenya was conceived as a state in 1996 under the Anglo-German Agreement of that year under which both the British and German governments recognized the Sultan of Zanzibar's dominion over the territory and consequent to which the Sultan conceded to the Imperial British East Africa Company the administration of the area beyond the coastal strip. Kenya was later to be

⁶ See K. Kibwana, Land Tenure in pre-colonial Kenya and post independence Kenya, in Themes in Kenyan history, Nairobi, Heinemann, 1990. He allude to the Kikuyu Society

formerly declared as a crown Protectorate in 1897⁷ and thus came properly under the jurisdiction of the England Foreign Jurisdiction Act⁸ which Act was the substantive legislation for the exercise of power by the crown within a protectorate ,using orders- in -council. The protectorate status however, did not confer to the imperial government the power to acquire land for the settlers without stifling the jurisprudential Impediment to such a process since the radical title to the land reposed in the societies that occupied such lands. To confront this philosophical inhibition, the British colonial officers opined of the possibility of legally acquiring good title to the land within the protectorate.⁹

'.... The land is a foreign soil and does not become vested in Her Majesty, as is the case in a territory, which actually annexed to the British dominions. Its therefore advisable, to avoid making grants or leases or other dispositions purporting to be alienations of land by the British authorities to when it does not in fact belong. Where native owners exist, it is not of course designed to interfere with them but where no such owners exist and the land can be regarded as vacant, the object desired may be obtained by other methods. In such cases, the British authorities may. permit persons to take possession of land and may undertake to secure him in that possession but which granting is an administrative Act which does not transfer title, though for all practical purposes, it gives the occupier a land certificate to occupy the land.'

The 1897 East Africa Order -in Council was passed and it imported the provisions of the 1894 Indian Land acquisition Act¹⁰ that legally mandated the imperial government to compulsorily acquire land for the railway and for the ten-mile zone on each side of the railway line ,for the establishment of government buildings and other administrative facilities. This application of the

⁷ This was through the passing of the East African Order in Council No of 1897.

⁸ No 114 of 1890

⁹ Colonial office to the Foreign Office, 4th Sept 1896, Office, Confidential print 6861, p. 212.

¹⁰ Act No 143 of 1894

Act raised the recurring jurisprudential question or to where the radical title to the land so acquired vested since it did not allow the owners of this land to resell it to other parties. To resolve this, the 1898 East African (Acquisition of Lands) Order-in council¹¹ was promulgated and which vested the title of the land so acquired under the Act, in the commissioner to hold in trust for the crown and he could in this capacity transact and sanction transactions in the land.

The 1897 East African land regulations¹² empowered the commissioner to sell the freehold land of the crown which was not part of Sultans land but in the rest of the protectorate, he could only offer certifications of 21 years occupancy which was renewable (the period was later extended to 99 years). The problem of radical title to the land within the protectorate still stood unresolved and the law officers who were seized of this issue by the 1899 foreign office, gave their opinion on how the government could legally appropriate land within the protectorate, this opinion provided in part;¹³

“in such regions (waste and unoccupied lands), the right of dealing with land accrues to her majesty by virtue of her right to the protectorate and her majesty might if she pleases, declare them to be crown lands or make grants of them to individuals in fee simple or for any term. The question to be pursued, is one of policy and not of ideology”

This opinion found expression in the East African (Lands) Order -in -Council of 1901 , which gave the commissioner the power to make grants or leases of land defined by the legislation as Crown land on such terms and conditions as he deems fit but subject to the directions of the secretary of state who was the crowns representative in this respect. The 1915 Crown lands ordinance¹⁴ replaced the 1901 Ordinance and it redefined Crown lands to include “Land in actual occupation of native

¹¹ No 148 of 1898

¹² The regulations were made under the East African Order-in -Council, No. of 1897

¹³ M.P.K. Sorrenson, settlement in Kenya found in, Origins iof European settlement in Kenya app. 1 p. 673

¹⁴ No 139 of 1915

tribes and land reserved by the Governor for the use and support of members of native tribe or a member thereof the right to alienate the land so reserved.” In summary, the 1915 Crown land Ordinance, the Kenya Annexation Order-in-Council of 1921¹⁵ and the 1921¹⁶ Kenya colony Order – in-Council presided over the total disinheritance of the indigenous population and the vesting of all the Land in the crown ,thus rendering the natives as tenants at the will of the crown in the land actually occupied.¹⁷

1.3 DISTRIBUTION OF LAND DURING THE COLONIAL PERIOD.

Against the aforementioned legal background, the colonial government appropriated large tracts of productive agricultural land and established the institution of capitalist settler agricultural production. Individual settlers were encouraged to acquire large tracts of land whereas the natives were displaced and confined to Native reserves. Its approximated that about 10, 000 settlers settled in Kenya between the years 1902- 1952 and who expropriated over 3 million hectares of land which represents 70% of the most productive and in the country.¹⁸ This expropriation created an unprecedented land distribution disparity that persists to the present day and which has resulted in other co-incidental problems that have not been strongly confronted legislatively or administratively. The colonial government made various attempts to redress the problem of African pleasantly when the Africans vigorously and sometimes violently agitated for equitable land distribution and where this posed a grave danger to the political stability of the colony. The 1932 Carter Land Commission offered piecemeal solutions to these problems including the expansion of the reserves to comfortably accommodate more people and also guaranteeing the sanctity of the title

¹⁵ No 140 of 1921

¹⁶ No 141 of 1921

¹⁷ See H.W.O. Ogendo, *Tenants of the Crown; Evolution of Agrarian Law and Institutions in Kenya*; Nairobi; Acts. Press, 1995.

to the Land in the reserves to the Africans therein.¹⁹

The recommendations of this commission were effected through various legal provisions the most notable one being the 1938 Crown Lands (Amendment)²⁰ ordinance which envisaged the proposed dual policy where both the natives and settlers interest were to be safeguarded in law. This ordinance amended the 1915 crown land and excluded native lands from the definition of Crown lands and vested the same in the Native Lands Trust Board. It provided for the setting aside for use and occupation by natives, land that was to be privately owned and known as Native leaseholds, but still all African claims outside the reserves remained extinguished. The Kenya (Highlands) Order – in council of 1939²¹ stipulated that the highlands were to be expanded and that their boundaries were not to be altered save for exceptional circumstances that were provided in the in the Crown Lands Ordinance of 1930 and the Native Lands trust ordinance of 1938. To this end, the Highlands board was established to address the arising issues within the highlands in it was to work in co-operation with the imperial government. The above provisions did little to avert the problem of inequality in land holding as between the settlers and the natives but the Imperial government ostensibly ignorant of the plight of the African sought to enhance the colonial hegemony by inviting and encouraging more settlers to settle in Kenya, especially after World War II.

The respite in terms of political security of the colonial government was short-lived since Africans intensified their agitation for radical lands reforms and this formed the basis of the Mau Mau movement amongst other political and quasi-political initiatives initiated to force the government into conceding to the demands of 'land and freedom' to the Africans. The 1955

¹⁸ Report of the select committee on the issue of land ownership along the Ten mile coastal strip.

¹⁹ M. Carter, Report of the Kenya Land Commission, 1934.

²⁰ No 301 of 1938

²¹ No. 138 of 1939.

Swynnerton Plan was hatched and implemented this Plan proceeded from the premise that individualization of the African land tenure system would confer exclusive rights over land to the African owners and mitigate conflicts between the natives and the government. The plan ignorantly and naively assumed that by upgrading and modernizing African peasant agriculture, they would create a '*landed African gentry elite*' that would counter or bulwark the radicalism fronted by the crusaders of a comprehensive land reformation programme in Kenya. As such proposals providing for economic size farm holdings to African, were brought to the fore and also the consolidation of fragmented holdings or the enclosure of communal lands and the granting of security of tenure over this land, which proposals were concretized in the Native Land Ordinance of 1938²² and the Native Land Tenure Rules made thereunder. The recommendations of the Swynnerton plan were incorporated in the Native Lands Registration Ordinance²³ and the Land Control (Native Lands) Ordinance.²⁴ The former Act was to be applied in such native areas where it appeared to the Minister that ascertainment, consolidation and registration of rights and titles should take place within the area in accordance to the demarcation, adjudication and consolidation provisions of the 1956 Rules.

From the generality of the foregoing, it is clear that the Swynnerton plan shied away from the question of land redistribution and concentrated on tenure reform. Section 37 (a) of the Native Lands Registration Ordinance²⁵ provided that the registration of freehold title, vested in the Registered proprietor 'an estate in Fee Simple in such land together with all rights and privileges belonging to or appurtenant thereto. This Legislation was repealed and re-enacted before independence as the Registered Lands Act, cap 300, Laws of Kenya, which is a comprehensive

²² No. 27 of 1959.

²³ No. 29 of 1959.

²⁴ No. 34 of 1967, now cap 302; Laws of Kenya.

²⁵ Supra note 21.

statute providing for registration of individual claims to land. It operates alongside the Indian Transfer of property Act of 1882 as amended in 1958, which is proposed to be phased out once the process of conversion, is over. The plan did not provide for a viable formula that would ensure that the land so expropriated from the settlers other land registered under The Native Land Registration Ordinance of 1959 would be equitably distributed amongst the formerly displaced Africans. The modernization of agriculture under the plan was also opportunistic and it focused on benefiting a few Africans who were sympathetic to the colonial government and thus equity did not find home in this process, the net result being the evident concentration of land in the hands of a few individuals. The greater tragedy was the entrenchment of this status quo by the independence government in the new legal and political dispensation, where the question of land redistribution was relegated to the periphery of governmental priorities.

1.4 LAND DISTRIBUTION AT INDEPENDENCE.

As at the declaration of independence in Kenya in 1963, Kenya had 591, 00 acres of land being held on 99 year leases, 6, 350,0 00 acres on 999 tear leases and approximately 560, 000 acres of land under freehold tenure by the existing settlers and a few registered African land owners.²⁶ In the first Lancaster House conference, the Kenyan position was that the white highlands and other claims or land ownership by the colonial government should be unconditionally surrendered back to the Kenyan people. However, in later deliberations, the colonial government manipulated the proposed Kenyan leaders to make substantial concessions of an economic and constitutional character to the colonial government in exchange of a speedy transfer of political power. Independent laws protected the sanctity of private property and also the validity of colonial

²⁶ The figures are taken from the report of the economic development in Kenya, 1963 organized by the International Bank for Reconstruction and development.

expropriations, which position was immortalized by the constitutional provision of the right to own private property anywhere within the republic and the prohibition of state or third party appropriation of private property without the satisfaction of the requisite conditions provided by section 75 of the constitution. The practical effect of this position was the maintenance of the hitherto existing unequitable distribution arrangement where land was concentrated in the hands of an oligarchy of land owners whilst the majority stood landless or owners of small uneconomic holdings of land. Further on, this regime of law characterized by the emphasis on registration of land under the Registered lands Act after the process of consolidation and adjudication, formed the basis of the employment of land tenure reform as a means of entrenching capitalist development and therefore class formation. The right of settlers to sell land without any state regulation of the distribution of the disposed land and the right of Africans who had acquired individual rights even over their relatives and other land users, to lawfully keep such land and exclude the other parties from access and use of this land., hallmarked this move. Access to land was subject to availability of funds save for exceptional circumstances where the state intervened but by and large, most of the land was appropriated by the emergent landed middle class within the society who apart from being opportunistic, were enterprising and had the benefit of finances and knowledge backed by their evident political propriety. On this ground, Kenya's land reform programme in independent Kenya, has been criticized on its ability to create a landless and a substantial squatter population,²⁷ a legacy that persist to the present day, Communal land tenure which had a dimension of equity in distribution was systematically replaced by the capitalistic individual tenure where the judiciary also buttressed the capitalistic individual tenure where the judiciary also buttressed the statutory position in the various decisions made in respect of the question of the effect of sections 27 and 28

²⁷ Prof. P. Mbiti and C. Barner, Spontaneous settlement problems in Kenya, Nairobi E.A.L.B, 1975.

of the Registered Lands Act for example in Esiroyo V Esiriyo [1973] E.A 388 and Obiero v Opiyo [1972] EA 227.

From this, one can safely and with a fair measure of certainty state that land redistribution in a proper sense did not really occur. Ideally, the colonial government handed over the political power to independent government and transferred land to a small fraction of the population, which has consolidated and preserved their control over land in Kenya to the present day.

1.4 LAND DISTRIBUTION IN POST-INDEPENDENCE KENYA.

Resettlement programmes in the past and at the present have always faced impediments of varying natures and characters but predominantly, lack of finances and the requisite political will but the government of the day. Land redistribution is further complicated by the scarcity of agriculturally viable land vis a rapidly increasing population and the lack of an industrial capacity which leads to over reliance on agriculture and other related economic activities. The landed elite as such, makes enormous profits with they acquire more land of land hoarding and speculative land holding. Presently, approximately 72% of the 77, 792 Sq. Km of land categorized as government land has been appropriated and allocated to about 1, 200 beneficiaries within the municipalities, most allocated being politically inspired.²⁸ Trust lands constitutes 68% of the total land area and here, various communities inside and occupy the land in accordance to the provisions of their respective customary laws and thus tenure has not been completely individualized but the processes of adjudication and registration still continue²⁹. However, administrative inadequacies and corruption have led to the influx of people from without the jurisdiction of these local authorities at the

²⁸ Republic of Kenya (1991), Handbook on land use, planning and administration development procedures, ministry of land use, planning and administration development procedures, ministry of lands and housing.

detriment of the bona fide occupants of the land, who are subsequently displaced. Only 107, 953 Sq. Km of land are presently classified as private land held by individual person in freehold and leasehold estates. Subsequent developments from independence to the present day have resulted in the large scale transaction in land which has been fragmented and sub-divided numerously where presently over four million persons have been registered as bona fide land owners out of a total Kenyan population of approximately 30 million Kenyans.³⁰

In summary, the disparity in land distribution within the Republic is glaring with the large farm sector being controlled by slightly over 500, 000 persons whilst the small farm sector holds over 2,236, 000 persons whose subsistence is directly dependant on this land. About 3.5 Million Kenyans and their families have an average plot size of one hectare whereas we have about 1, 500 individually owned farms with a model size of between 500 and 1000 hectares in the naturally well endowed areas.³¹ Statistically, this translates to about 17% of the population owning on average of 700 hectares per person whereas the remaining 83% own less than two hectares per person. While this is a moving average estimation, we have people at the extremes who own over 3, 000 Hectares and those who own nothing, in terms of land. Redistribution of the land is thus an issue that cannot be ignored or wished away and it must begin from a legal footing through a conducive legislative framework where parliament should enact laws for the reorganization of the economic setup through redistribution ,which laws should propose acquisition of lands which lies idle and the reduction of the land owned by some individuals. One of the ways of achieving this end is by limiting the size of land ownable by individuals by enacting a ceiling of maximum land ownable by an individual person. The law can be used to set and enforce this benchmark and the specifics and intricacies appurtenant to such a legal provision .

²⁹ IBID P.23

³⁰ Central Bureau of statistics, population and census report, 1999

1.5 .LAND REDISTRIBUTION LAW AND POLICY

The achievement of independence for Kenya as a country was a function of intense political negotiation and armed struggle. Inevitably, the grant of independence became a compromise agreement where the colonial government ensured that the rights and interests of the settlers who opted to remain in Kenya were safeguarded and guaranteed in law, in exchange of the surrender a political sovereignty over the colony, to the independent government.

The independence government on the other hand adopted a policy of land reformation and redistribution but legal provisions as to the sanctity of private land as concretized in the constitution, strictured this process. This provisions retained and entrenched colonial laws and policies, which still obtain to the present day in the form of the substantive provisions on land tenure and are buttressed by prevalent agronomic argument for individualization or tenure. Where such individualization was adjudged to be largely unviable specifically in the semi arid areas, the Land Adjudication Act was amended in 1968 to accommodate the registration of group rights alongside individual rights under the instrumentality of the Land (group Representatives) Act. The quest for land redistribution and settlement of the landless was still alive and thus the independent government in concert with the British government and other international financial institutions, instituted ambitious settlement schemes with the sole aim of resettling squatters on abandoned and neglected European farms and other available land. Through these programmes, a fair number of people acquired land although the initial goals were not in essence achieved. Whereas the philosophical underpinning of these schemes was principally to achieve societal justice through redistribution of land, the methodology employed to this end, defeated this purpose since the land

³¹ Figures from the World Bank Kenya Poverty assessment Report, 1995.

was offered by the Settlement funds trust to prospective settlers of a price allottees where they were required to satisfy this pecuniary expectations amongst other conditions before acquiring freehold title to the land, which position still sutisists to the present day. This pecuniary inhibition effectively locked out many 'bona fide' squatters and opportunities middle class entrepreneur exploited this opportunity to a mass for themselves vast portions of land. The government did not consider the adverse consequences of this evident procedural loophole and this further accelerated the land distribution divide to unprecedented heights. Other governmental initiatives to redistribute land were also short-lived and largely ineffective while other vices have operated to stifle their intended efforts. Land buying companies and farming co-operatives soon fell into disfavor with the government due to mismanagement that presided over the exploitation of many enthusiastic landless citizens. Presently, land distribution is largely if not entirely a function of the market forces with little or no governmental intervention.

Broadly, speaking, we do not have a comprehensive programme for land reform and redistribution despite the much legislative activities that have not secured equitable regulation a land interest or even instituted reformation of the institutions, which govern the management, and use of land. The currency of land issues in Kenya centres on principally the interplay between states, the present landowners and the dynamics of the land market system. The case for land redistribution in Kenya is further intensified by the growing pressure on land imposed by user need and demand for land for other indirect users for example, capital accommodation, societal prestige e.t.c. However, land redistribution raises fundamental question about the nature of ownership, jurisprudence of land tenure and the antagonistic need for sustainable and equitable access to and use of land. The scope for land redistribution is uncertain but the law has to find a solution to major and potentially highly explosive and fatal issues created by the existing tenure arrangement. This

scope is multidimensional since in the Kenyan context, the inability to achieve equity in division of land and safeguarding of the land rights, impacts heavily on large proportions of the poor population.

This demand for a creative strategy that would disentangle competing interest in land distribution can only be satisfied by a regime that provides ceiling as to how much land one can hold. In the vortex of conflicting claims and competing rights to land, such a land ownership ceiling, law and policy would strive to attain an amicable and objective balance and utilize the sanctity of the law, to implement this compromise. Basically, a land ownership ceiling would redefine and reorganize the scope of the land market and also mitigate the usage of land for speculative purpose. Such a law and policy, which is herein proposed to be both of a constitutional and legislative character, would effectively free vast amounts of land held by individuals for such indirect use as storage of wealth speculation and land hoarding. The immediate result would be a fall in the land prices and increased utilization of land for productive purposes where more individuals get access to the 'freed' land at affordable prices. A land ownership ceiling would also have wider societal ramifications including the political empowerment of the majority and enhance social stability. The dynamics of such an enactment are plethoric and diverse and the fixing of such a ceiling would have to be a product of comprehensive and objective assessment of social-economic factors that attend to our society presently. Legally speaking such an enactment would raise fundamental issues on the jurisprudence and promulgation of the law relating to land in Kenya. The following chapter seek to evaluate some of these trivialities and demonstrate that with the requisite political will, a land ownership ceiling backed with corresponding changes in terms of access to capital, technological inputs and a conducive political atmosphere is the most efficient way of achieving realizing and objective land tenure reformation and equitable redistribution.

CHAPTER TWO.

THE CASE FOR A LAND OWNERSHIP CEILING LAW AND POLICY IN KENYA.

*'it is better to abolish serfdom from above than to wait for the day when it begins to abolish itself from below'*³¹.

2.0 INTRODUCTION.

In the Kenyan legal context, the primary law relating to land is contained in the Constitution and other pieces of legislation which include *inter alia* the Registered Lands Act. This therefore means that we don't have in this country a single comprehensive frame work in the form of one whole legal code which is pertinent to land regulation. Instead we have several of them which apply to different aspects of land tenure and administration in Kenya. The underlying point to be stressed however is that the content of land law in Kenya and the attendant constitutional and institutional regimes in place are so fashioned as to front and perpetuate the capitalistic ideology which informs our economic policies and thus any law or policy that would seek to entertain such equitable policies as land redistribution ,would thus be manifestly against the spirit and the letter of the prevailing legal-economic order.

This state of affairs presents a strong case for the enactment of a land ownership ceiling law and policy to confront the existing legal strictures and provisions in this country all of which tend to militate against equity in distribution of land, a process that would of necessity arouse and also require political and administrative impetus. This in our view would be a better and prudent

³¹ Source :Tsar Alexanxander II as quoted in G.T Robinson's "Rural Russia under the old regime of history of the Landlord -Peasant world ,in prologue to the peasant revolution of 1917

approach in lieu of the multiplicity of legislations relating to land and which should be urgently adopted. . Such a land ownership ceiling would have to be adroitly and meticulously promulgated so as to find expression in such a way that would be reconcilable with the other substantive legal provisions relating to land. The overall objective should be to ensure that, the same is as far as possible reflective of the underlying jurisprudence that necessitates its enactment in the first place. What this essentially means therefore is that such legislation should be expressed in such a way as to be easily operational without occasioning inconsistencies in the provisions of other land law and related statutes so that we don't end up with a 'legislative snarl-up' that would occasion loss and injustice to innocent parties.

Accordingly, the current legal provisions would need to be simultaneously and appropriately amended so as to accommodate such 'land ownership ceiling' requirements. That being the case, it would be necessary to effect some changes in the provisions regarding land tenure, registration and administration. The basic provisions that would be affected range from the constitution to the primary legislations relating to land. It is therefore imperative that each of these important areas for change be treated and or evaluated separately.

2.1 THE CONSTITUTION.

The Constitution presents itself as the basic law of the land from which all the other laws derive their validity and sanctity. Drawing from this Constitutional principle ³², any provision in law regarding land and property in general should of necessity be in tandem with the constitutional provisions on the same. The present Constitution not only embodies the sanctity of the institution of private property in Kenya but also provides for extensive state ownership and alongside a trusteeship system that seeks to protect the interests of the public with regard to Trustlands. Chapter

IX of the Constitution as read together with the Trustlands Act provides comprehensively for the programmatic framework for this public trust with respect to public land where the overall authority to regulate, distribute, manage and dispose of such property reposes in the local government. The institution of private property as provided for in the Constitution is however not absolute and the state can acquire land in the public interest under the relevant provisions of the Land Acquisition Act.³³ The phrase “public interest” isn’t defined in the Constitution and it would appear that its proper construction should be carried out in light of particular legislative provisions or under circumstances^{that} as can be termed as being sufficiently of public character. The Constitution does not provide expressly or impliedly for a limit or minimum threshold as to how much private property ~~that~~ any one individual person can hold. This position should hardly be surprising for it is principally a manifestation of the economic policy of capitalism that Kenya has pursued and encouraged vehemently since independence. Technically speaking it follows that as matters currently stand, any legislation that purports to limit the scope of private property ownership in Kenya would automatically fall foul of and be rendered void by virtue of its inconsistency with the overriding Constitutional provisions as regards scope and quantum of property rights in Kenya, which presently knows no limit. Our Judiciary has consistently protected this position³⁴ underscoring the pre-eminence that the Kenyan society in general attaches to the hallowed institution of private property.

The edifice of private property law in Kenya being Constitutional in character, a land ownership ceiling would have to be so expressed as to have efficacy in implementation. This can only be achieved by making such a legal provision a constitutional principle. In order to institute fundamental change, such a principle would have to commence from a policy level whereby the

³² Section 3 of the Constitution of Kenya embodies the principle of the supremacy of the Constitution.

³³ CAP 295, Laws of Kenya.

government would have to state in no uncertain or equivocal terms, its land policy framework that would reflect the primacy of land in the country and the attendant imperatives to the manner of its holding, use and general management with a view to achieving equity, efficacy and sustainability. . . Such a policy would also have to emphasize the need for the government to ensure equitable access to land and other resources 'ejusdem generis' by the populace and at the same time guarantee security of land rights for all *bona fide* landholders, users and occupiers. Such a policy framework would then provide the underlying principle and purpose required, legislative formulation and implementation of a land ownership ceiling law, which in our present context would entail an appropriate amendment to the constitution. The ideal position would be that such a Land ownership ceiling law should be phrased in such a declaratory manner as to make all land owned by an individual over and above and or to the extent that it exceeds a such given threshold as may be by law be set by the government or the relevant agency, to be public land held in trust for the purpose of Kenya by the government or its agency. Such land would become public land by due operation of the law and title thereto would vest in the state as a trustee of the Public and not as an absolute title holder. This position would then allow or facilitate the redistribution of such land under an equitable criteria that ensures actualisation of the intended societal justice. For such a land ownership ceiling and with regard to the emotive issue of land, to work, it would of necessity require the creation of a Constitutional governmental institution that would exercise the prerogative of fixing and administering all matters relating to land ownership and the ceiling to be placed thereon. The terms of reference of such an institution would have to be expressed in such a way as to be incongruent with the substance of such private property law as may be provided in other legislations.

³⁴ See the dicta of Kimicha .J In Mtongori Nyamagani V Richi(1961)L.C.C.A No 62/1965

The constitutional provision for a ceiling in land ownership would in principle and procedure borrow heavily from the jurisprudence that obtains in the application of the doctrine of *eminent domain* which though an imperial feature of the English land law provisions, still obtains in Kenya to the present day. As such the ceiling would have to appreciate and give effect to the rights adhering to an affected party by virtue of his ownership of land which are principally the overriding rights to prompt and adequate compensation for loss occasioned by the operation of this law. This provision can be phrased thus or in such a like manner as to express that;

“The state shall define and keep constantly under review a national land policy ~~un~~directed at ensuring *inter alia*;

1. Equitable access to land and associated resources where individual holding to land in the terms of private land shall not be in the excess of the size so prescribed by the specified schedule hereunto referred.

The schedule referred to would then classify the various geographical regions in Kenya according to their principal utility value in terms of economic activities that such regions can sustain. In consideration of the comparative advantage between certain regions, a specific ceiling on land ownable within these areas, would be set and gazetted accordingly, for example in agricultural areas, the ceiling would reflect the minimum size of land required to sustain economic production of commercial crop produce, whereas in land within the municipalities, the ceiling would reflect the viable size for settlement purposes.

2.2 REGISTRATION OF TITLES ACT³⁵ AND THE LAND TITLES ACT.³⁶

These statutory provisions provide for the registration of the primary interest in land embodied by

³⁵ Cap 281, Laws of Kenya.

³⁶ Cap 282, Laws of Kenya

the Indian Transfer of property Act,³⁷ which interest is technically referred to as an estate in fee simple. The fee simple estate as a freehold tenure of land is unlimited in scope and in duration since theoretically speaking the holder has the absolute power of use and abuse and disposition and he is deemed to hold such land, free from all strictures, section 11 of the Indian Transfer of property Act imports the common law position that any limits imposed against the owner of the estate as against third parties is void. Practically speaking however, this power is subject to various provisions of the law notably the exercise of police power by the state through the effecting legislations such as the Physical Planning Act,³⁸ the Agriculture Act³⁹ and the Water Act⁴⁰ among others. The Land Control Act⁴¹ caveats the prerogative of the holder ^{of} the estate in fee simple to alienate by deed or will his interest in land within special areas, these provisions are tailored to satisfy an intended societal aspiration that may be of an economic, administrative or political character.

A land ownership ceiling, constitutionally enshrined would in a like manner structure the scope of the fee simple to the extent that a holders estate ^{surpasses} ~~supposes~~ in terms of size the cut off size set by the government or its agency. The substantive provide provisions of the Transfer of Property Act would thus rightfully apply in relation to a holder's estate to the extent that and in so far as it is within the confines, in terms of size, of the land ownership ceiling. The holder's rights over the remainder would thus stand extinguished and this land would then revert to the regime of public land that would be apportioned to other parties. The Registration of Titles Act and the Land Titles Act would then have to be amended to make reference to and appreciate the legal provisions applicable to land declared to be public land by virtue of and in view of the proposed land ownership ceiling, law and policy.

³⁷ Act No of 1882 as Amended in 1958

³⁸ Cap 278, Laws of Kenya.

³⁹ Cap 318, Laws of Kenya

2.3. THE REGISTRATION LAND ACT.⁴²

The Registered Land Act embodies the Absolute proprietorship estate, which is historically a product of individualization of tenure in the early 1950's, as rationalized in the Swynnerton plan,⁴³ and it thus stands as the legal embodiment of the colonial efforts to transform African Land Tenure. Ideally, this estate is a disguised fee simple estate though some jurists⁴⁴ depict it as an estate '*sui generis*' with allodial characteristics. This reference alludes to the history of individualization of tenure in particular, the Native Lands from the 1915 Crown Lands Ordinance and vested the same in the Native Lands Trust Board. At independence the Native Lands Trust Board was abolished and its and its authority and functions taken over by local authorities and thus African lands became Trustlands recognized and governed by the constitution and other legislations. Section 116(1) of the Constitution envisages the registration of individual title to land within the Trustland and provides that land so registered ceases to be Trustlands and absolute title vests on the beneficiary of such registration. As such, this kind of an estate presents itself as an allodium rather than a tenancy in the feudal sense.

The absolute proprietorship estate is expressed as being absolute and indefeasible in title.⁴⁵ The rights accruing to the holder of such an estate are unlimited in scope and in duration in a way analogous to the fee simple estate. Evidently, a landowner ceiling would be manifestly confronting this indefeasibility and to prevent such a confrontation, it would have to be drafted in such a way as to be an overriding interest comparative to those provided for under Section 30.⁴⁶ It can also be accommodated by stretching the interpretation of subsection (c) of the said section which

⁴⁰ Cap 372, Laws of Kenya

⁴¹ Cap 302, Laws of Kenya

⁴² Cap 300, Laws of Kenya.

⁴³ See M.P.K Sorrenson, Land Reform in Kikuyu country, Nairobi, O.U.P, 1967

accommodates the provisions of other written laws that provide for rights of a state to compulsorily acquire private land. The legal effect would be to restrict and contain the provisions of the Registered Land Act to land properly within the size prescribed^{b4} the ceiling law whereas the superfluous land would be held by the government or its agency for purposes of redistribution.

It should be appreciated with utmost clarity that the concept of Land ownership ceiling focuses primarily on the size of land ownable by an individual person. Accordingly, this provision should not in any way encroach on the right of the owner to use, abuse or dispose his land in any way unless such limitations are expressed in other statutes. To this extent, the preserve of the provisions of the aforementioned substantive provisions on land would still apply in defining the content of the various estates in land recognized by the law. The various provisions of law that relate to land would just need to include an unequivocal reference to the land ownership ceiling and also some adjustments on its dynamics and this would suffice to give it the necessary effect required without causing an inconsistency in legislation.

2.4. THE JURISPRUDENCE OF LAND REDISTRIBUTION.

The overriding need for land redistribution is predicated on the ideology that property relations are fundamental to societal order and the administration of such relations is purely a matter of governance. This proposition effectively integrates the issue of land redistribution to the broader discourse of its Constitutional order and place within the country. The fundamental key to reforms in this vital areas thus depends upon understanding the stake held in land within the nation itself .In our context one can safely surmise that the discourse of land redistribution really ought to focus on ameliorating the ills that are attendant to individualization of tenure. The Land reform

⁴⁴ The Holfedian analysis in Lloyd .L. Weinreb, Natural Law and Justice, Harvard College(1957)

⁴⁵ Sections 27 and 28 of Cap 300,Laws of Kenya

program in Kenya has previously been criticized ⁴⁷ as being unable to redress landlessness and squatting thus producing a superfluous population which has the capacity to threaten the very existence of the capitalistic state as a coherent political entity. By parity of reason, the concept of individualization of tenure need not only to be appreciated against the background of Kenya's economic path of development, but also in the context of the broader global; economic policies that affect us as well, all of which are heavily inclined towards capitalism in nearly all spheres including the Agriculture sector which is Kenya's economic mainstay. In view of such externalities, it would be illogical and absurd to advocate for a return to customary land law, family tenure provisions or any reversion to communalised tenure system. This would be detrimental to the prevailing economic order that has sufficiently being buttressed by the Law as it stands today.

The foregoing notwithstanding, policy makers should accommodate within the present Land tenure arrangements, a regime that will facilitate and ensure equitable access to land for the majority of the general populace. This imperative is necessitated by our prevailing social-economic order where Kenya like other African countries, has no industrial base capable of absorbing the landless but skilled or able population.⁴⁸ This predicament and in due consideration of the primary and paramount of equitable property relations in any stable society necessitates a rational and explicit provision that limits the land ownable by an individual, under the predominant institution of individualized tenure. The ills and adversities of absolute and untenured individualization tenure were anticipated and apprehended from the initial stages of its commencement and particularly by the East African Royal Commission (1953-1955),⁴⁹ but which nonetheless recommended individualization of tenure on the justification that its benefits by far outweighed the resultant ills.

⁴⁶ Cap 300, Laws of Kenya.

⁴⁷ Read P. Mbithi and Carolyn Barnes, *Spontaneous settlement in Kenya*, Nairobi, Heimann, EALB, 1986

⁴⁸ World Bank Report, *Kenya Poverty Assessment*, 1995

⁴⁹ No 10 of 1958⁹ and No 6 of 1960

The instance of a land ownership ceiling does not constitute sabotaging the institution of the private property system, but it serves to accord more attention and sensitivity to measures of land redistribution where the micro legal reform initiatives such as settlement schemes and group tenure⁵⁰ provisions, should be buttressed by macro legal stipulations in the form of constitutional provisions. Such constitutional provisions would stifle the current development of a superfluous group of citizens who have neither access to the labour market, nor to land even for purposes of subsistence.

2.5. THE ELEMENT OF“EQUITY” IN THE REDISTRIBUTION OF LAND

From a purely conceptual dimension, the meaning of equity, even as an expression of an ideal and its credentials as a fundamental political value are uncertain. To a large extent, many great political philosophies do not on the whole treat equality⁵¹ as a dominant theme and although political systems proclaim the natural equality of persons as a principle, it is rarely given much weight. Inequality of persons is perceived by Hobbes⁵² as a natural fact in the ‘state of nature’ and thus to him equity has not crystallised into a natural or civil right within a legal jurisdiction. In the civil state, the sovereign has no more obligation to preserve or promote equality than any other actionable individual claim but the government has a duty to take deliberate measure to ensure that equity prevails in the society. From a metaphysical perspective, equity presupposes equality of all men as creatures of God⁵³ but on the same scale, it acknowledges the differences inherent amongst men in terms of capacity, efforts and circumstances, which difference later assume an economic dimensions that occasions disparity in society.

⁵⁰ see the provisions of the Land (Group Representatives)Act ,CAP287,LAWS OF KENYA

⁵¹ Karl Marx ,Das Kapital and its allusion to human equality in the terms that every person should be taken as an individual despite their diversities.

These inequalities are then preserved from generation to generation by societal institutions, which guarantee and enforce the right to property. On this, Rousseau⁵⁴ argues that natural inequalities of pre-societal human beings were greatly increased by social institutions created and preserved by the law. He states that:

*“The prodigious diversity of men obtains in the education and manners of life of the various orders of men in the state of the society. From this state, inequity of materialism inheres”*⁵⁵

In as much as the reality of inequality is appreciated in the society, there has been a consistent underscore on the undesirable adversities of the states of ‘extreme wealth and poverty.’ The substratum of the liberal and technical institution of the doctrine of equity, lies on the profound right of man to some principles generally accepted as adhering to man by virtue of mere existence and which principles relate to his interaction with other people and with property within the society. The content of equity varies from society to society and it’s a legal imperative within society to demystify the underlying jurisprudence and to specify the level of equity that a particular society aspires to achieve. Property relations are arguably the best manifestations of how the civil states strive to enforce equity and land being the ‘ultimate property’⁵⁶ holds an esteemed position within the ‘Cosmos’ which term captures the concrete arrangement of ‘deity’ or ‘utility’ and relates this with the overriding abstraction of a good, orderly, moral and stable societal order.

This position should thus be respected within contemporary society and Locke⁵⁷ emphasized on this position by highlighting with vehemence that land as a natural right should not be subjected to the

⁵² An analysis of Hobbes T, The Leviathan

⁵³ The Holy Bible, Genesis 1.27, N.I.V, Translation

⁵⁴ Rousseau, Discourse on Inequality (NY) E:P DUTTON, 1950 P.231-232

⁵⁵ Opp.cit,p.232

⁵⁶ Lloyd. L. Weinreb, Natural Law and justice, Harvard college (1957), describes land as the primary and ultimate property, see p.8-10.

⁵⁷ Locke . J, Two treatises of Government, Ed, Peter Laslett, Cambridge university press

felicitous societal arrangement in which incipient capitalists ‘busily accumulate wealth and leave just enough for the others.’ This position should thus be respected within contemporary society and in the same allusion was made by Natural Law jurists particularly the stoics who fronted the thought that God being the lawgiver prescribed a societal order in which land was divine. To them, man was entitled to land by virtue of an overriding endowment by the ‘absolute deity’ and not by a mortal achievement.

Historical materialists pioneered by F.K Savigny⁵⁸ saw property relations as a product of the ‘volkgeist’ of the innate popular consciousness and to them, law per excellence was customary law. This school of thought emphasizes the close interrelation of legal, ethical, economic and psychological inquiries and that the state and the law which represent the societal superstructure, are determined by the societal economic base which is the mode of production and exchange. To them,⁵⁹ the society cannot function without appropriate regulation of the factors of production and exchange, which regulation ensures that the essence of the society is not defeated by economic impediments. Land as a primary factor of production is thus perceived as a communal resource that should not be appropriated for purely individual gain. A land ownership ceiling would in principle draw from this school of thought in imbuing the partial control of distribution of land within the state, in the light of the agrarian nature of our economy.

The Kelsian⁶⁰ pure theory of law is premised on the notion of a ‘ground norm’ from which the justification for describing any particular rule of law derives and this ground norm derives validity from the fact that it has been accepted by sufficient number of people in the community. He argues that legal theory must be isolated from psychological, sociological and even ethical matters but that it must address itself to the equity of its subjects to economic predisposition and the

⁵⁸ Savigny..f, Of the vocation of our age for legislation and Jurisprudence(1831) Eng. Trans.

⁵⁹ See K.Renner, Rechts –institute des privatecats (1994)

protection of the law. As such, the grundnorm should not prescribe injustice or inequity nor should it preside over property institutions that defeat the purpose of the state and the law. In effect the law should guarantee access to all of equal opportunities and access to such primary resources as water, air and land. In contemporary legal-political structures, the grundnorm is usually equated to the Constitution and thus by analogy, Kelsen's⁶¹ line of thought was in the terms that the policy and legal framework governing the access to and exploitation of such resources as land should be provided for in the supreme law of the land and the guiding principle should be reflective of the desired social justice, for a stable society to thrive.

The highlighted jurisprudential issues form recurring themes in the history of the development of land law which is largely a product of the evolution of society as necessitated by changes occurring in the various aspects of society. The jurisprudence of land redistribution obtains in the objectives of veritably all political revolutions, which are usually a response to internal and external pressures to resolve or avoid an economic, social or political crisis. This redistribution of land whilst principally aimed at redressing economic adversities and injustices prevalent in a society, produces wider social-political ramifications which serve to instil a fair measure of equity even in power relations within a society. The rationale behind the usage of a land ownership ceiling as an instrument of land redistribution is that, in a basic society, land is the primary resource and its distribution determines the patterns of wealth and income distribution as well as exercise of political influence. To regulate the tenure and quantum arrangement of land within such a society, is in actual sense regulating the society and thus ensuring its perpetuity. It also mitigates the ills attendant to untenured private ownership of land, most profoundly; social stratification, economic exploitation and political subjugation of the economically disadvantaged within the society. A

⁶⁰ Kelsen .H, General Theory of law and the state,(1945)

⁶¹ Kelsen .H, "What is Justice?",(1957)

broader concept of land reforms which is fronted by the classical economic jurists perceives land reformation as part of a greater economic endeavour that incorporates other factors of production including labour and entrepreneurship. This school of thought has in recent times and in various jurisdictions⁶² gained currency where reform is perceived in the terms of incorporation of technology in agricultural production, development of credit systems, improved marketing and a wholistic development of a country.

The concept and usage of ceilings on land enable by an individual is not a novel concept and various antiquous⁶³ and contemporary jurisdictions have employed this mode of land reform with diverse results. The Kenyan society as contextualised in chapter one herein, demands such a positive provision which help our society develop taking into consideration the level as our development as against our laws. Protagoras a stoic Greek jurist remarked on the development of property law in a society that:

*'societies develop laws as part of their progress towards civilisation and development and that this laws are necessary for the achievement of the desired communal life'*⁶⁴

To project this discourse further, its imperative to evaluate how similar provisions have been instituted and implemented in other jurisdictions. The question of inequality and inequitable distribution of land and other primary resources has a character of universality, being a common feature in the emerging economies of Asia, Latin America and Africa, various countries in the course of history have thus adopted different approaches to land reform with most states most states shying away from radical reforms in their quest for maintenance of political stability, but this approaches have proved ineffective since glaring inequities in land redistribution still obtain in this

⁶² For example the Japanese Land Reforms ,Encyclopaedia Britannica, Vol .VIII

⁶³ The Reforms of the Gracchi-Roman Reforms by the Tiberious and Grachus of 133-121 B.C

⁶⁴ This view of Protagoras is based on Platos Portrait in the 'Dialogue' of that name. Refer also to History of Greek philosophy,P. 63-64

jurisdictions to the present day.

2.6. COMPARATIVE POLICIES IN OTHER JURISDICTIONS.

Land reforms have often accompanied political revolutions and the 19th and 20th Centuries witnessed widespread comprehensive land reform programs in number of countries. Earlier centuries had seen radical political revolutions that translated into land tenure revolutions that necessitated exhaustive land reforms. The French revolution of 1789⁶⁵ and the reforms thereafter freed all persons from serfdom, abolished feudal courts and cancelled all payments not based on real property. Land reforms were not based on any restrictive legislation but the governmental policy of economic reforms sufficed to institute the needed reformation in the distribution of resources. The Russian land reforms of 1861⁶⁶ were realized by the promulgation of the Emancipation Act of 1861, which abolished serfdom and presided over the redistribution of the freed land amongst the peasants. The adoption of communism as an economic and political policy translated to the nationalization of land where the state regulated its distribution, use and disposition. The development of industries in the country eased off the burden on land by absorbing a substantial number of propertyless proletariats and the need for radical reformation on land tenure and distribution subsided. Where this industrialisation was absent, land reforms were inevitably imminent due to the pressure of population expansion and other changes that accompanied the process of decolonization. The international community and other external factors also oriented developing states to the adoption of policies that could spur economic growth and such included land reforms.

In Japan, land reforms were instituted after the Second World War under the aegis of the

⁶⁵ Full analysis of the French Revolution can be found in G.Lefebure, 'The coming of the French Revolution, 1789(1947)

supreme command of allied powers (SCAP) plan of 1946 which became law in 1947. The Japanese Constitution was also passed in 1946 and it came into effect in 1947. The preceding 'Meiji'⁶⁷ government had formally abolished feudalism and declared the land to be the property of the citizenry. However, the usurpation of the land by the rich and the moneylenders had created a class of perpetual tenants and absentee landlords.⁶⁸ Rents were high with tenants paying an equivalent of up to 48% of the land's product as rent whilst population pressure resulted to fragmentation of holdings.⁶⁹ Society was stratified on tenurial basis with the resultant effect of constant friction between the landlords and the tenants and general political instability that threatened a resolution. The occupation government saw this as an impediment to development and it did not rhyme with their preferred political and economic paradigm, which inspired it to enact reform laws where the land reform law of 1946⁷⁰ established a ceiling on individual holdings. It also provided for expropriation and resale of excess land to the tenants on the basis of long-term payments.⁷¹

Landowners were compensated by way of thirty (30) year bonds and the beneficiaries were obligated to join marketing and credit co-operatives. Accompanying political changes⁷² restructured the pyramid of government ensured the implementation of these reforms at grassroots levels and with a fair measure of immediacy.

The result of this reform initiative were almost immediate where tenancy declined by about 80%⁷³ and the crop yields per unit of land marginally increased. The ensuing political tranquility provided a conducive environment for industrialization, which absorbed large portions of the

⁶⁶ Full review of the Russian analysis is available in the Encyclopaedia Britannica, Vol X..p.639

⁶⁷ Meiji means 'enlightened rule' which had been instituted by Emperor Mutsuhito between the years 1868 and 1912.

⁶⁸ Reference is made to Charles .D.Sheldon,The Rise of the Merchant Class in Tokugawa,Japan(1600-18680,1958,reprint,1973.

⁶⁹ Data taken from the SCAP, Report ,1948

⁷⁰ The Japan Law on Land is

⁷¹ Payments were pegged to the productivity of the Land, Encyclopaedia Brittanica, VOL VIII

⁷² The Local Government Law of 1947 provided for the Local Authorities jurisdiction over land issues within their territory.

hitherto unemployed and landless population. Gross land productivity also increased substantially and the glaring gap between the rich and the poor was narrowed. These results are the aspirations of many third world countries and it is trite to assert that land reforms provided a foundation to the reaching of this end. The Kenyan situation can benefit from the Japanese experience where the institution of land ownership ceiling effectively panacead the ills that hallmarked unchecked individual ownership of land. As such it would be rational and logical to explore this avenue and apply it with appropriate changes in the Kenyan context.

In Egypt, land reforms followed the revolution of 1952 which ousted the *wafdist* government and installed new leadership under Gamal Abdul Nasser. The new regime presided over the most comprehensive reforms outside communist states and which was focused primarily on the private land held under the prevailing legal system. Private land in Egypt then accounted for only 70%⁷⁴ of the land whereas the rest of the land was held under a trust system known as the 'Waqf'. By 1950 just before the revolution, the land ownership disparity was glaring with one percent of the land owners holding over twenty percent of the private land and seven percent of the total population held more than two thirds of the total available land.⁷⁵ The resultant effect was exorbitance in rents and widespread exploitation of the peasantry by an elitist bourgeois middle class who acted as land rent brokers and thus had amassed large portions of land for speculative purposes. The Agrarian reform law of 1952 instituted a regime of an ownership ceiling which fixed individual holdings on a maximum of 200 'faddan'⁷⁶ which was later reduced to 100 faddan but with a special allowance for male children. The new government moved to implement this reforms and provided for the redistribution of the vast portions of expropriated land in parcels of an average

⁷³ Figures taken from the SCAP interim report of 1957

⁷⁴ World Bank Report, Egypt Poverty Assessment Report, 1956

⁷⁵ Ibid P.35

⁷⁶ One Faddan is the equivalent of 1.038 Acres

size of five faddan. The allotment was on condition that the beneficiaries would join co-operatives in order to improve efficiency in production, marketing and credit and that the beneficiaries would not sublet the land. This was to prevent further fragmentation and further amendments were made in the Tenancy law to buttress the reforms, where contract replaced traditional terms of tenancy although rents were also subjected to statutory control to avoid the exploitation of tenants.

The discourse of land redistribution in Egypt is watered down by the apparent economic inconsequence of the 1952 reforms as postulated by some historians.⁷⁷ Some increases in gross agricultural yield have been claimed but the evidence is insufficient which is explicable by the lack of capital investment in productive agriculture. However, the social-political effects of these reforms are manifest and positive with the economic empowerment of the peasantry being a notable achievement.⁷⁸ Political participation by the populace was enhanced and the infamous institution of the middlemen brokers was abolished and replaced with co-operatives at the primary and secondary level. The main anti-thesis and aphorism of the Egyptian reforms was the lack of expansion in its industrial capacity which translated into incapacity of the land to sustain the expanding population and thus great difference in landholding persisted and such adverse activities as black market rents gained currency. In this respect, most land reforms in Africa have failed as they failed to envisage and appreciate the need to incorporate technology in the production process leading to little or no change economically.

In Latin America more particularly Cuba, reforms in land tenure and distribution were pegged to the 1958 political revolution.⁷⁹ The reform was multi prong, aiming at elimination of the 'latifundia' (a form of absolute proprietorship) tenure, expropriation of land owned by foreign

⁷⁷ Read Charles Issaw, Egypt in Revolution

⁷⁸ The Commentary By H.Hopkins, Egypt The Crucible(1969)

⁷⁹ Comprehensive Analysis is found in the Encyclopaedia Britannica, Vol XP.641

multinational conglomerates and raising the standards of living and national economic development. The Cuban reform is arguably the most radical yet pragmatic land reform programme undertaken in Latin America and it commenced with the promulgation of a landholding ceiling on individuals which was set at thirty 'caballerious' [one caballeria is equivalent to 13.4 hectare]. A provision of 100 caballerious was provided for viable economic operations required such a scale. The declaration also led to the nationalization of all foreign owned farms subject to equitable compensation and all the public land was converted into state farms managed by state agencies with the peasants being permanently employed in this farms. Co-operatives were introduced where plantation agriculture was practised in order to avoid fragmentation of the holdings and the state supervised the reform process by organizing national farmer associations, public stores, supply of machines and fertilisers and extension of credit facilities. Later on, the ceiling on individual holding was lowered to five caballerias⁸⁰ and this divided land privately owned family farms. The reform law⁸¹ provided for compensation of the owners of expropriated land, by way of pension for life. Follow up amendments were undertaken in 1963⁸² and in other government policies and strategies attendant to economic development.

The Cuban Land reformers claim achievement of goals specifically the social-political goals and more profoundly economic goals. The government claimed higher yields of sugarcane, vegetables and fruits but foreign western observes⁸³ who regarded Cuba as a 'pariah' communist state, disputed this results. However, objective analysis⁸⁴ indicate that Cuba's reform program was more successful than that of its contemporaries in Africa and Latin America. Its wholistic approach led to increased capital formation and outlay in agriculture, changed land distribution patterns and

⁸⁰ This is Approximately 50 Hectares

⁸¹ The Egyptian Land Reform Act

⁸² State farms were recognized which were of an average size of 500 Hectares

⁸³ See P. Wyden , The Bay of Pigs ,The Untold Story

enhanced social-political stability although the sovereign in Cuba is still a form of totalitarian autocracy. The gap between the rich and the poor has also considerably reduced with an increased in the G.D.P⁸⁵ being recorded.

In Kenya, the quantum of interests in land at the incipency of colonialism was the prerogative of the crown through the commissioner. The 1901 Order-in –council permitted the commissioner, “ to make grants of leases of any crown lands, on such terms and conditions as he may think fit”, but subject to the directions issued by the secretary of state. In 1902⁸⁶ Commissioner Eliot undirected by the central secretariat in London, issued a notice permitting the sale of land at two rupees per acre and leases for 99 years at a rent of land at the rate of fifteen rupees per one hundred acres. The notice was approved by the foreign office on condition that no more than 1000 acres were to be sold in any one lot. Although the later statutes did not specifically provide thus, the power to sell freehold estates in land within the protectorate remained firmly with the commissioner. Through this office, the sovereign regulated the distribution of land both quantitatively and qualitatively and thus ensured premium productivity by the settler community. The colonial government thus appears to have appreciated the co-relation between the productivity of an agrarian economy and the commensurate distribution of land amongst the citizenry from which principle the independent government appears to have departed. The colonial government however applied this equitable policy only in so far as the settlers were concerned and the natives were relegated to the periphery of its economic policy. The promulgation of a land ownership ceiling law and policy would extrapolate the principle and apply it in the contemporary jurisdiction where the government would’ve a firmer grip on issues of land within the country.

⁸⁴The Economic Development Report of 19 7

⁸⁵ Ibid P.43-36

2.7 CONCLUSION.

Economically speaking a land ownership ceiling provision in Kenya would be viable if and when the ceiling is set at the point/size of optimum production within a small scale farming setting. This size appreciates the capacity of a landowner to develop the accessible land and obtain the maximum yield possible and in a context of labour intensive production, large scale farming is highly unviable. The government has persistently pursued a dual policy of encouraging subsistence and commercial farming⁸⁷ which policy has been criticized as being unable to withstand present and future challenges of internal needs and international market forces. In due consideration of the above, it is pragmatic to appreciate that in the absence of a sound industrial base in a country with an increasing population, unemployment and shrinking arable land, land tenure and distribution laws must address themselves to the recurring quest for productive efficiency and distributive justice.

The foregoing was resounded in the Report of the Presidential Commission of Inquiry into the Land Law System of Kenya chaired by Dr Charles Njonjo⁸⁸ which was based on the views of Kenyans collected from across the board, on pertinent issues related to land. A spectrum of issues were raised but core issues arising were the lack of a comprehensive institutional framework for land administration in Kenya and the inability of the prevailing legal order to establish a land regime that will be equitable to all but also providing for secure title to land. On land redistribution, the report proposes the implementation of a policy on maximum land holdings especially where land is not developed or where it is being hoarded and used for speculation⁸⁹. It was a popular concern that redistribution of available idle land would found a base for increased agricultural production, reduction of poverty and human resource/capacity building in the society.

⁸⁶ The colonial office to the Foreign Office, Confidential Report, 6861, 1902, P.212

⁸⁷ Policy documents including the Sessional paper No 4 of 1981 on National Food Policy and No 1 OF 1986 ON Economic Management for renewed growth.

⁸⁸ Report was made public on May 6, 2003.

Redistribution is expressed as an important aspect of the proposed comprehensive restructuring of the prevailing tenure and distribution system but other issues have also to be addressed so that the reform process becomes wholistic and exhaustive. The Report ⁹⁰however appreciates the ills attendant to uncontrolled fragmentation of land and its sub-division into uneconomic units and recommends that logistical precautions would have to be appropriated into any land reform policy that will balance this aspects of reform with the need to address population growth in so far as land distribution is concerned..In all this, the general public feeling is reflected and the report does not fall shy of proposing constitutional amendments and other legislative reforms ⁹¹that will seek to address the recurring questions of land tenure, land administration and land distribution in Kenya .The foregoing discussion has highlighted instances of such reforms in other jurisdictions with various measures of success and Kenya should move fast to address the issue of land, before hoping to realise any substantial success in development as a country. The succeeding chapter evaluates some comparative approaches employed by various countries in the endeavour to resolve such issues as are herein highlighted.

⁸⁹ Annex 2, Summary of land and related issues raised by Kenyans

⁹⁰ Annex 2:xiii(par 2),p.153

CHAPTER THREE:

COMPARATIVE APPROACHES TO INSTITUTING VIABLE LAND REFORMS.

“Land belongs to a vast family of which many are dead, few are living and countless members are still unborn”

[SOURCE: C.K Meeks, “Landlaw and Cuctoms in Colonies”, 1971, Northwestern Un.Press, p.67]

3.0. INTRODUCTION.

There is a near universal political and juridical concurrence that land being a primary resource, occupies a special place within society and thus any policy (s) that would lead to ejection of man from this ‘source of life’ into a state of homelessness and uncertainty is intrinsically flawed and inherently dangerous.⁹² To this end, various jurisdictions have adopted different and varied approaches to land reforms with differing results. Third world countries, which share a common colonial heritage, are faced with hard and delicate decisions to make on how to effect land reforms, against a background of an interface between the pre-colonial communal land tenure system and the contemporary individualized tenure system. Alongside tenure reforms, others dynamic social changes have taken place that indirectly inside to the question of land. A perennially rising population and the lack of commensurate industrial capacity to sustain this population, increases t he pressure on land and imbues states to come up with ingenious modes of land reformation that will ensure equitable distribution of land as a resource and also institute and preside over production use and management of such land.

⁹¹ See Chapter 6, Proposed legislative amemndments, p.57-63.

properly and meticulously define the confines within which the government is supposed to operate in establishing equity in law relations without unduly prejudicing the sanctity of private property. The enactment of a land ownership ceiling law in the Kenyan legal system as proposed in this research paper, is principally a function of the evident inefficiency of other approaches to land reform and re-distribution, that have been applied hitherto and prescribed by the law. The efficacy of this proposed law and policy would be more explicit when it's analyzed against other instruments of reform that have been proposed or applied in various contexts.

3.1. THE TRUST INSTITUTION

In the Kenyan legal system, the institution of Trusteeship in relation to land tenure stems out of liberal interpretations sections 27 and 28 of the Registered Lands Act.⁹⁴ These sections embody the content of the absolute proprietorship estate, that across to a beneficiary of registration of individual title to land under this Act. Section 27 provides that the registration of a person as the proprietor of land vests in that person absolute ownership of that land together with all rights and privileges belonging or pertaining thereto. Section 28 on its part provides that the rights of a proprietor whether acquired on first registration or subsequently for valuable consideration or by an order of the court, shall not be liable to defeat and shall be held by the proprietor together with all the privileged and appurtenances thereto, free from all other interests and claims.

This radical provisions came into use when they were juxtaposed against the hitherto existing customary rights to land and the courts sought to appropriate and define certainty and clarity, the effected of registration of individual rights to land over customary rights to land over

⁹² Read a comprehensive analysis by Dr. Akinyi Nzioki, Effects of Land Tenure Reform on women's access to and control of land for food production in Mumbuni location, PHD Thesis, U.o.N 119

⁹³ Republic of Kenya, 1970, Development plan of 1970. Nairobi, Governmental Printers.

⁹⁴ Cap 300, Laws of Kenya.

customary rights to land. The judicial interpretation of this provisions proved diametrical in character with some judges⁹⁵ adopting a strict positivist interpretation, that upholds the legislative position and as such finding that registration of individual rights to lands effectively extinguishes any customary rights over land and that the only rights that the registered proprietor is subject to are overriding interests specified in **section 30** of the Act.⁹⁶ On the other hand, some judges disabused their minds from this interpretation of the said provisions that had the effect of declaring family members landless where conversion from customary land tenure had occurred. Mulli. J. as he then was, in *Misheck & Others V Priscilla Wambui*⁹⁷ perceived an individual holder in a customary land tenure scenario as a trustee on behalf of himself and of all those who had rights under customary law. He rationalized this position thus;

“... Registration of 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 surrounding the registration of title to determine whether a trust was envisaged.”

The distinct and outstanding character of this school of thought is its use of the device of a Trust to mitigate the unfairness occasioned by untenured individualization of tenure. The courts in construing this spectrum of Trusteeship, address themselves to the factual situation surrounding the dispute in issue, rather than the strict legal rules applicable. Madan.J, as he then was, in *Muguthu V Muguthu*,⁹⁸ observed that the process of land adjudication and registration was not meant to expropriate family land and transfer it to individuals but rather the purpose of such registration was to guarantee family title, the registered proprietor merely holding as a Trustee and not as the absolute owner. He argued that within the African customary land relations context, an inherent

⁹⁵ See Bennet J. in *Obiero V Opiyo* (1972) E.A 227s. see also the ruling of Keller. J in *Esiroyo V Esiroyo* (1973) E.A. 388.

⁹⁶ *Ibid*, Section 30

⁹⁷ H.C.C. No. 400 of 1973.

concept of a Trust is vested in the titular head of a family and that unless contrary intention is shown, this trust is presumed under **sections 27 and 28** of the Act.⁹⁹ In his words;

“There’s no need to register the defendant as a Trustee for he was registered as owner, as the eldest son of the family in accordance to Kikuyu customs, which has the notion of trust inherent in it.”

The implication of this line of thought is that once it is demonstrated that such land as maybe in dispute is family land, a Trust necessarily arises which ought to attract the protection of the law. Cotran.J, as he then was, in *Edward Linuli V Marko Sabayi*¹⁰⁰ concurred with his brother in the case aforementioned and although subscribing to the liberalist, Natural law school of thought, he took issue with the institution of a Trust within the African customary law. To him, such an institution, in its proper sense is not easily detectable in customary law and thus he argued that it would be safer and more rational to construe an English Trust, which is more ascertainable and definite both in character and content. He could however, not express what type of a Trust it would be, but maybe inferable, it would be a Resulting Trust. In commenting on section 28, he said;

“Its now generally accepted by the court in Kenya that there’s nothing in the Registered Lands Act that prevents the declaration of a Trust in respect of Registered Land even if it is a first registration and there’s nothing to prevent the giving effect of such a Trust while requiring of Trustee to do his duty.”¹⁰¹

The discourse of the use of trusts to mitigate the adverse rigours and proprieties that bedevil the institution of individual tenure to land is further advanced by the misapplication or absent application of the Registered lands Act, in large areas of land here in Kenya. In these areas,

⁹⁸ C.C No. 377 of 1968

⁹⁹ Ibid at No. 3

¹⁰⁰ C.A No 42 of 1978

¹⁰¹ O.P. Cit p. 6

customary law persists and the customary institution of Trust that adheres to persons of responsibility by virtue of their capacity and position within a family, obtains with communal approval. The nexus between the use of the Trust institution and the discussion of land redistribution is that it can be reinforced in law to aid in such redistribution of land that is family land but has been appropriated by a person occupying a fiduciary position through the process of registration. Such land would belong to the beneficiaries under the applicable customary law for all practical purpose and intents but for purposes of securing family title to the land, title vests in the registered owner. This would reduce the number of people been rendered landless and homeless and also ensure that the land registered is kept lean where only titular heads of families are registered as owners as opposed to every person. Further, social relations still obtaining in society would act to ensure that access and control of land within society is equitable. The tenacity of group tenure underscores the continued existence of defined and determinable relations in a family setting or communal setting and this relations being alive in society can be further buttressed by legislation and applied to ensured that family land is accessed by the majority.¹⁰²

3.2. MARKET BASED APPROACH.

The primary instrument of reform established soon after the inception of the independent government favoured the commodification land as product of exchange, which was a salient departure from the customary tenure paradigm. It'd be unwise to disregard the influence of the colonial power and the emergent petty bourgeois class, with a pre-occupation to depart from the customary tenure and embrace the western market system, which invariably favoured them. This approach was multi-prong where two main schemes were employed. In the first instance, the World

¹⁰² A commentary by K.Kibwana, Efficacy of state intervention in curbing ills of individualization of land Ownership in Kenya, in Essay on land Law (ed) S.C Wanjala ,U.o.N ,Press, 2000.

Bank, the British government, the German, provided loan facilities to people to enable them acquired the formerly settled land. The government largely acquiesced into the moderate stand on land reforms that was fronted by the settler-colonial government, which had the principal ideology that acquisition of land would be strictly on a willing seller willing buyer basis. On the other hand, banks and other financial institutions through the usage of the mortgage institution advanced loans to those who availed themselves to this facility for purposes of buying land. The government also moved to entrenched the imperialist processes of land management where the primary focus was facilitating a transition from traditional subsistence to modern large-scale production farming system. To this end the Agricultural Development Corporation was created, which had as an objective, the concentration of land holdings into larger farms.

An analysis of the market based reform system in Kenya, shows that it only served to provide the emergent middle class, urban elite and wealthier peasants, with an opportunity to accede to and entrench themselves in large scale capitalistic agricultural production.¹⁰³ The intended beneficiaries who were the landless peasants could not raise the money to buy land nor could they have raised securities to enable they access the available bank loans. By this time, it was clear from the historical process that at the advent of independence, a distinct social category with vested interests in the continuity of colonial property and political processes had emerged. This group largely used this market-oriented approach to land reforms to increase the disparity between the landed and the landless.¹⁰⁴ Accordingly, the government explored the concept of settlement schemes, the most notable initiative being the 'million Acres' settlement scheme.¹⁰⁵ Through this scheme, over a million people were settled on holdings ranging from 25-40 Acres,

¹⁰³ See G. Wasseman's commentary, land Reform and politics in Kenya, Journal of Modern African Studies, Vol 9 no. 2, 1971 p. 231

¹⁰⁴ J.N. Habersson, Nation Building in Kenya, Northwestern Un. Press, 1973

between the years 1961-1975,¹⁰⁶ the schemes proved to be just a permutation of the market based approach. Since land was purchased by the government and vested in the settlement fund Trust which in turn offered it in lots to prospective settlers at a price. This pecuniary condition served to defeat the original intention of the policy and instead of resettling the landless, middle cross farmers and businessmen acquire holdings in settlement schemes. The market based land reform approach has over time proved to be ineffective in effecting land redistribution since land as a commodity does not in strict terms, adhere to the market forces of demand and supply in the determination of its price-land available to Kenya as a country is also limited and thus the government cannot afford to leave its disposition entirely on the dictates of the markets forces but a balance has to be struck between land as a national resource and land as a marketable commodity. The process was further hampered by the lack of funds on the part of the government, political lethargy and other extraneous factors that largely attend to the process of market-based reforms.

The same fate has befallen other jurisdictions that adopted this approach to land reforms notably Brazil, South Africa and Colombia¹⁰⁷. The South African government instituted market based reforms in 1994 up to 1999 where an outlay of USD 3.3~~M~~ was made to enable the redistribution of thirty percent¹⁰⁸ of South Africa's farmland. The greater goal was to stimulate substantial investment in Agriculture, rural development and poverty reduction, but administrative inefficiency faltered the process and by 1999, only 0.6% of the targeted land had been redistributed and only 0.2% of the targeted households received land¹⁰⁹.

In Zimbabwe, the constitutional property clause is as rigid in its protection of the existing order and as restrictive of any reforms, as that of Kenya.¹¹⁰ The underlying ideology that informs

¹⁰⁵ Million Acres settlement scheme in Republic of Kenya (1974), land book on land use, planning and administration, Ministry of lands & Housing (1974)

¹⁰⁶ Ibid p.40.

¹⁰⁷ Full analysis in Jeffrey Riedinger, Market Based Reforms: An imperfect Solution, Michigan State Un.press, 1998

the land relations in Zimbabwe is purely economical and its based on the market approach of a 'willing buyer – willing seller' transaction. However the constitution departs slightly from section 28 of the South African constitution and borrows heavily from section 75 of the constitution of Kenya, in providing explicitly for the expropriation of derelict land, under-utilized land and land used for subversive purposes with limited compensation to owners. The context of the Zimbabwe reforms is that of a historically advantaged and privileged whites who held most of the productive land being the sellers and an economically depraved and challenged African population that did not have the capacity to buy this land. Land reformation and redistribution thus this culminated into a nasty and politically instigated occupation of the settler farms by the Africans.¹¹¹ The process threatened the very existence of the state but principally the government in power was exploiting a situation of real need on the part of the natives to achieve selfish political ends. Be that as it may, it remains clear that the market based reforms failed to achieve their desired end in this county. The Zimbabwe experience fairly captures the eventualities that attend to unchecked individualization of tenure without any due regard to the social-political aspects of land. This discourse also suggests the enactment of a land ownership ceiling, which has occasioned political instability and economic stagnation. The settlers can be allowed to own prescribed sizes of land in law, to enable the majority peasants to access the remaining land, although economically, this is not exactly viable.¹¹²

3.3 DIRECT STATE CONTROL OVER OWNERSHIP AND CONTROL OF LAND

At its extremes, this approach involves the nationalization of land where land as a recourse reposes on the community and all citizens share in its enjoyment. As a political philosophy this

¹⁰⁸ An equivalent of 29.74 M Hectares.

¹⁰⁹ All figures taken from the Development of Land Affairs Report, Government of S.Africa

¹¹⁰ Sections 11 and 16 of the Constitution of Zimbabwe

¹¹¹ An overview can be read in the Daily Nation ,May 5,2003.

approach developed from antiquous religious communities, but the Utopian socialists of the 19th century perfected it by replacing the religious emphasis with rational and philanthropic idealism.¹¹³ They had in mind a selfless socialist society in which production would be based on individual ability and these goods would be distributed on the basis of need rather than endeavor. In 1917, the Russian Bolshevik revolution saw the institution of a new economic policy¹¹⁴ that was based on strong state control of all primary resources. Land was nationalized and farmers were only granted user rights commensurate to their needs and the overriding goals of the state. Individual tenure¹¹⁵ was abolished and a semblance of equity based on the nationalization was also adopted by other countries¹¹⁶ that embraced communism as a radical measure against land capitalization that had resulted in undesirable social ills.

In Africa the Tanzania paradigm of villagisation¹¹⁷ adopted in the 1970's under the auspices of the then President Mwalimu J. Nyerere, provides a good example of the employment of radical state control as an instrument of land redistribution. Social equity and justice was attained although it wasn't accompanied by the intended economic growth.¹¹⁸ To this date, Tanzania and Mozambique have mainly weak individual and community tenure rights which exist alongside a predominant strong formal state ownership and control of land. To a large extent, this position is ideal for purposes of access to land, subject to the existence of a particular kind of political leadership and prevailing global power relations. If and when the leadership and the accompanying condition conditions change in favour of less egalitarian ideals and goals, very weak or even non-existent individual tenure rights facilitate greater and faster extinction of any existing rights thus

¹¹² The economies of Scale argument

¹¹³ Marx..k and Engels.F, The Communist Manifesto,1848

¹¹⁴ Lenin(VladimirIrrichUlyanov),What is to be done?(1902)

¹¹⁵ Lenin ,The 21 Conditions in R.N Carew-Hunt, Theory and practice of Communism,5th Edition (reproduced in 1961)

¹¹⁶ Among others Yugoslavia, Czechoslovakia etc, Encyclopaedia Brittanica,VOL IVP.1025

¹¹⁷ Detailed account Of Ujamaa, in Nyerere.J, Freedom and Socialism,TED,1968

paving way for unchecked private primitive accumulation ,which is not desirable. The rationale in maintaining weak land tenure rights is to enable the government to expropriate or alienate with little jurisprudential and administrative effort and prescribe the manners in which such land would be used. However, nationalization of land and the maintenance of strong state control over land exposes the people to the shifting dictates or traditional structures and governmental wishes and whims,. This arouses the inevitable need for reforms that would maintain a balance between protagonist positions and as the Tanzania reform recommendations¹¹⁹ suggest, the strategies objectives are and should be the attainment of equitable distribution of resources but within a context of secure tenure rights for the beneficiaries.

Strong control of land any the government or nationalization would as a matter of fact decommodify land thus exclude it from the commodity market. The policy also proceeds from the premise that a viable government acting bona fide and in good faith would be a rational user and a holder of land for the benefit of the nation. Whilst this is a laudable aspiration, its not a reality and the institution of individual tenure should not be compromised for any sustainable growth and production to be realized. This balance can be achieved by the enactment of a land ownership ceiling law that would maintain individual tenure but subject to overriding governmental supervision in distribution and disposition of land. Such a position was suggested to the South African constitutional debate by Shadrack. B. O Gutto¹²⁰ who proposed the over concentration of ownership and control powers over land, in the state and only weak and marginal rights of security of tenure for individuals, families and communities. He however, recommended the inclusion in the constitution of a flexible property and land rights protection clause accompanied by strong

¹¹⁸ Ministry of Lands and Housing ,Government of Tanzania,Report of the Presidential Commission of Inquiry into Land Matters, Vol 1(1994)

¹¹⁹ OP.CIT P.18

independent public organs entrenched in the constitution to oversee the allocation and use a land for economic development and social well-being. It thus appears that nationalization of land is undesirable in most countries and as such, other more flexible approaches should be explored.

3.4. GENDER MAINSTREAMING IN PROPERTY OWNERSHIP: ¹²¹

The discourse of land reform and redistribution would be incomplete if it failed to address itself to the gender question in relation to the holding of interests in land. Women have been sidelined in relation to the holding of interests in land redistribution process, where the bureaucratic reference point in relation to all this process, has always been the man. The problem is historical and social and it was engraved in the 1954 Swynnerton plan, which gave precedence to individual ownership, invested in male heads of households and in turn, marginalized usufruct rights of women formally guaranteed under the lineage tenure. At independence, this plan had crystallised into an important ingredient of the land tenure policy and it largely informed the substance of the Registered lands Act being the preferable registration legislation on issue of land. The Act prescribed the due process of land adjudication and consolidation before registration but this process were so structured as to favour men which served to threaten the security of tenure of women and children and the security of economic opportunities if entire families through the right of disposal conferred on the male head of the household.¹²² This culture is party historical where its been argued that by African customs women did not take part in land disputes and it was unreasonable that they should be allowed to take part in the present dispensation.¹²³ Other

¹²⁰ Shadrach B.O Gutto, land and property rights in Modern Constitutionalism 'experiences from africa and possible lessons for S. Africa, Presented at Cape town 1995.

¹²¹ Road a detailed analysis by Dr. Akinyi Nzioka, Gender Aspects of the land question, presented at the CKRC Land Seminar in white Sands Hotel (May) 2002

¹²² Green J.K., 1987, on evaluating the impact of consolidation of holdings, individualization of tenure and Registration of title: lessons from Kenya paper 129 land tenure centre, Madison Un. Of Wisconsin Press.

accompanying changes further tilted the scales in favour of the men in the terms of preferential treatment accorded to them when it came services, the advancement of technical inputs and agricultural extension services, the resultant effect being that women's economic status has moved from one of relative self-sufficiency to one of relative dependency.¹²⁴ Women continued to be the principle contributors of labour in subsistence food production whereas men exercise an increasingly dominant role in the management of property including agricultural inputs, control of land and the distribution of goods and services.

The land reform process which involves redistribution of public and private land, resettlement schemes and changes from communal to individual land tenure, has invariably excluded women where customary use rights, individual or communal, have been discouraged in favour of legal measures that have circumscribed land parcels and placed them in the hands of individual male owners. The hitherto existing principles of kinship, residence and allegiance through which women's land rights were guaranteed and protected by the very principle under which these rights are prescribed rights have been eroded by the institution of private and individual tenure, which is detrimental to women in the country.¹²⁵ Land reform issues of whatever character have to address the gender issues that arise in relation to land and to ensure that in the family setting, the quantum and quality of right enjoyed by the spouses are equitable and that one party does not prioritize its aspirations and sub-ordinate the other's rights, in terms of how the land is to be used. Theoretically, the discourse of tenure reform assumes that equal chances are accorded to both genders to own land, but practically few women have the capacity to avail themselves to these rights. Changes in family composition, land law and economic structures have

¹²³ Pala, 1978, women's access to land and their role in agriculture and decision making in the form: also in Kenya, paper No. 263 IDS, un of Nairobi press.

¹²⁴ Davison J, 1987, land and women's agricultural production, the context in African, (ED) Boulder, West view Press, P. 11-22.

also impacted on the women's access right to land, making them less secure. The market based reform approach does little to remedy the situation where liberalization of the land market is based on direct negotiations with the landowners who are usually the male household heads.¹²⁶ An in-depth analysis of the compounding issues that arise in the land reform debate, indicates that today, change requires more than just simultaneous struggles over property, but also involves changes in the norms governing gender roles and behaviour and also the public decision making authorities, with an aim of bridging the highly unequal access of both genders to economic, political and social power.

Instituting land redistribution using the instrumentality of a land ownership ceiling would be ineffective in implementing comprehensive land reforms, if it failed to appreciate that an engendered constitution is foundational, in the societal aspiration of achieving social justice and equity. Contemporary thinking that has gained a lot of currency, dictates that in the context of limited economic opportunities in the country, ownership of land is a critical entry point for challenging unequal gender relations and power structures especially in largely agrarian society.¹²⁷ In lieu of this proposition, some African countries have moved to articulate women's rights to land within the other land and gender policies applicable within these jurisdictions. The 1994 Land proclamation by the Independent Government of Eritrea, declares full respect to women's equal rights in land in the context of regime where land is fully owned by the state, The land proclamation states in terms ;

“Any Eritrea citizen shall have, pursuant to this proclamation and governmental authorization, the right to obtain land for housing or farming or both housing and farming

¹²⁵ Position expressed by K. Kibwana, 1990, Land tenure: Themes in Kenya's history, U.o.N Press

¹²⁶ Comparative analysis taken by Hill rest J, 2000 ,women's land right: current development in sub-Saharan Africa, in evolving Land rights, policy and tenure in Africa, ed (C. Toulmin and J. quan) EDS London National Resource Institute.

activities in existing villages or other places to be established... Any Eritrean citizen shall enjoy these rights equally with no discrimination on the grounds of sex, belief, race and clan.¹²⁸

Other provisions that buttress this position entitle spouses to individual rights from land allocated for farming activities in their place of permanent residence where such spouses are eligible to obtain usufruct right over farmland. As such, each spouse can be allotted land and have it registered in his/her name in addition the obtaining usufruct rights over land for farming or on the vicinity of the place they choose to permanently reside. Comprehensive analysis of this reforms reveal that an informed consideration was given to different categories of women whether a wife, single, widowed or divorced woman and also utility provisions such as rules for converting the usufruct rights over the allotments, to a lease right under the relevant provisions of the Eritrean Civil Code.¹²⁹ This provisions or other provisions '*ejusdem generis*' should be given thought and expression in the Kenyan land tenure and distribution jurisprudence, and where a land ownership ceiling is in place, greater efficiency in equitable distribution and optimum utilization of available land in Kenya would be reasonably guaranteed.

The Tanzania experience stemmed out of the report of the Presidential commission¹³⁰ on land which recommended *inter alia* that radical title to land be vested in the village Assemblies in order to undermine the concept of clan land which is the cradle of customary law and which denies women direct and secure access to land. The report further recommended that the names of both spouses should appear in documents of title to land and that all transactions in family land be vetted by the *Baraza la Wazee* (council of Elders) to certify that both parties are agreed on such an undertaking. These recommendations partially found expression in the current constitution of

¹²⁷ Nasimiyu R. 1984, participation of women in the political economy: A Case study of Bukusu women in Bungoma district 1960 department of history M.A Thesis, U.o.N

¹²⁸ Art 6 of the Eritrean Land proclamation of 1994

Tanzania,¹³¹ which whilst providing for equality between sexes also grants individuals the right to possess property and state protection of the property that is legally acquired. The Tanzania Land Act¹³² provides expressly for the rights of every woman to acquire, hold, use and deal with land to the same extent and subject to the same restrictions as are accorded to men.

The Act also extends its protection to both rights of occupancy and customary right and hence protects such owners of land as are in the rural areas where customary tenure is still pre-dominant.

The Tanzanian village Act¹³³ is also reform oriented in that provides for allocation of land to applicants from both genders by the Village Council subject to approval of both parties and the Village Assembly, which Assembly in its constitution provides that a third of the members, should be women.¹³⁴

In Uganda, the constitution also provides in terms for the equality of both genders in relation to property in the context of a marriage or of its dissolution. Radical title to land is vested in the citizens and the applicable tenure systems are also constitutionally provided.¹³⁵ The Ugandan Land Act of 1998 operationalizes the constitutional Land position and all other provisions relating to land ownership, management and use within the country. However, despite the considerable effort that has been made to engender the applicable land provisions, the practice has not quite tallied with the law. The disparity is largely attributed to the social context where customary practices such as patriarchal marriages, male inheritance and the male control of decision making bodies, have systematically excluded females from ownership of property, especially land.¹³⁶

¹²⁹ .Aommentary by Tsegal Teamrat, 1996, Technical paper on the Potential impact of Land Proclamation on communally owned Land in Eritrea.

¹³⁰ The Shiuj. Report, Ibid., No. 27, P. 40

¹³¹ Constitution of the united Republic of Tanzania, 1997, Art 24.

¹³² The Tanzanian Land Act of 1997, section 3(2).

¹³³ Village Act of 1961, Section 58 (5).

¹³⁴ See the constitution of the Assembly in the Local government, District Auth. Act, 1982

¹³⁵ Constitution of Uganda, 1998, Article 26: 1, 31: 1 and 237: 1.

¹³⁶ See the Uganda Land Alliance Report, 2000.

Efforts are being made to change the status quo and notable development has been achieved in the restriction of, family members from transferring land without written consent of their spouses and that of dependent children of adult age at the committee for children below adult age, as a measure to protect their social-economic interest.¹³⁷

The foregoing represents various approaches to land reforms and there's a consistent underscore on the need to achieve equity in the distribution of land against a background of secure land tenure rights. The land reform discourse in Kenya should as of necessity, seek inspiration from these experiences in other countries but also aspire to address the uniqueness of the Kenyan situation. The enactment of a land ownership ceiling coupled with other attendant land reform provisions would induce the requisite changes in the distribution of land and curb the ills that accompany unchecked individualization of tenure. The future of Kenya's land reform and tenure policy can be deduced from the provisions of the Draft constitution¹³⁸ prepared by the constitution of Kenya Review commission (C.K.R.C), from views collected from the public. The following is a brief analysis of this provisions and how they are structured to instigate and preside over desired land reforms in Kenya.

3.5. LAND REFORM POLICIES AS PROPOSED IN OUR DRAFT CONSTITUTION

The provisions pertinent to land and property as a whole are concretized in chapter eleven of the draft, which is largely declaratory and not constitutive. **Article 232** proposes a land policy framework that commences by acknowledging that land is a primary resource in Kenya, which as of necessity calls for it to be held, used and managed in a manner, which is equitable, efficient, productive and sustainable. The policy is proposed to be effected by such legislation as will ensure

¹³⁷ Uganda Land Act, 1998, Article 40:1.

¹³⁸ Currently being debated by the National constitutional Conference.

inter alia the equitable access to land and associated resources and also the security of land rights for all land holders, users and occupier in good faith. **Article 233** proposes to vest the radical title to land in Kenya, on the people collectively as communities and as individuals.¹³⁹

It also seeks to exclude foreigners from acquiring any interest or right in land in Kenya, save for leasehold tenure of not more than ninety-nine years. This proposition indirectly allude to the discourse of land redistribution but on a foundational basis where there's a deliberate emphasis on equity in access to land. No practical method of operationalizing this ideology is suggested but suffice it to say that such measures as the enactment of a land ownership ceiling are vaguely implied.

Article 234 proposes a constitutional classification of land on Kenya with all land being designated as public, commodity or private land. The Article provides a detailed exposition of what should constitute public land and also community land.¹⁴⁰ Private land is defined in the draft in the same way as it is currently defined in the draft in the same way as it is currently defined by the various tenure systems as contained in legislative enactments and a saving clause is included which incorporates into the definition of private land, all such land as is acquired by mechanisms under any law which confers upon any person, exclusive ownership or occupation of land. This classification is important since from a historical perspective, the ambiguity manifest in the definition of different classes of land, was opportunistically exploited by politicians and bureaucrats to appropriate large tract of land from the public. The institution of public land has been sharply in focus, with illegal expropriation of unalienated government land¹⁴¹ contributing significantly to the disparity existing in Land distribution. Furthermore, redistribution of land by any means including the use of the instrumentality of a land ownership ceiling law and policy has

¹³⁹ Also Proposed in the Land: Mali ya Umma paper by Kenya Land Alliance and Kituo cha Sheria, 2001.

¹⁴⁰ See also the classification of Public Lands by Kagangona. R, Public Lands in Kenya, 1996, Lib Dissertation, U.o.N.

to commence from a definite and clear demarcation of the various classes of land. Accordingly, this proposition is laudable, but the line of difference between public land and community land as presented in the draft raises some ambivalence which should be ironed out, before its adoption, **Article 235** is largely declaratory of the existing tenure system and it appreciates customary holdings in land¹⁴² and also acknowledges the need to enact effecting legislation and thus it proposes that such laws as are in tandem with its provisions should be passed within two years of its adoption. This article also proposes the enactment of specific legislation that will address the resettlement of landless people including spontaneous settlement communities in urban areas.¹⁴³ On redistribution of land, the Article envisages market based reforms where a land fund would be established which fund would facilitate access to land on an equitable basis, to those who avail themselves to facility. **Article 236** enshrines the proposed constitutional protection of property in land and incorporates the epistemology of the Doctrine of *eminent domain* as an integral part of Kenya's property law jurisprudence. The provision borrows heavily from section 75 of the current constitution with slight modifications especially regarding the modalities of payment of compensation. The Article also in sub-article 3 reiterates and emphasizes the overriding power of the state to regulate and control the use of any land, interest or right in land, in the interest of defense, public safety, public order and public morality.¹⁴⁴

The entire chapter eleven of the Draft constitution presupposes the existence of the proposed National Land Commission, a constitutional institution that would be charged with the principal function of holding title to public land, in trust for use and access by and for the people of Kenya. The members constituting the commission are proposed to be appointed in accordance with the

¹⁴¹ Land held by the Government in the terms of the G.L.A, cap 30.

¹⁴² See Sub-Article 2(a).

¹⁴³ See Sub-Art 4(a) viii of Art 235.

¹⁴⁴ This list is not exhaustive. The Draft Constitution has the complete list

provision of chapter seventeen of the Draft constitution and the Commission is expressed as being an alternative to the position of the commissioner of Lands. The commission proposed would also carry out other functions such as laws and the enactment of new legislation and also to perform such other functions as may be prescribed by the law creating it. The provisions of chapter Eleven are also expressed to be part of a whole constitutional continuum and as such should be construed in the light of the Draft constitution document as a whole.

3.6. CONCLUSION:

The various propositions to the land tenure reform and redistribution debate that have been explored in this chapter are fairly comparable to the proposed land ownership ceiling law and policy discussed in this research paper. What emerges is that all these approaches are complementary and not mutually exclusive. The underlying principle is the achievement of equity and no single approach can purport to be an adequate panacea to this recurrent issue especially in most if not all sub-Saharan countries.¹⁴⁵ The challenge of land redistribution has to be tackled by a multi-prong approach and a land ownership ceiling as complemented by other modes of reform and redistribution, should not be given due consideration in the quest for societal equity and justice. As such, the experience of such jurisdictions as have been discussed in regard to this issue should be imported and domesticated but on a locally applicable latitude and thrust.

The discourse of land redistribution should also appreciate the capitalistic setting of our economy and land as a resource should not be completely de-commodified in order to allow the operation of the market forces in resource distribution. The enactment of land reform laws should not unduly prejudice the commodity aspect of land hence the ideology that obtains in

¹⁴⁵ Okoth-Ogendo H.W.O, A commentary on legislative approaches Towards Customary tenure and Tenure reform in East Africa, in Evolving land rights, ED J. Quan and C. Toulmin, National Research Institute (NRI).

market based reforms, should not be discarded altogether but a balance should be struck between state control and the market dynamics¹⁴⁶. A land ownership ceiling law and policy appreciates this balance by allowing land transactions within the prescribed sizes of land and the state would only exercise control in relation to the limit of the size of land ownable by an individual .

By and large, this discussion demonstrates that land redistribution requires innovation both at the promulgation and implementation levels ,for it is to be effective. The process is also invariably time-intensive and requires substantial resources outlay which gives it a political impetus. The long-term goals however, are appealing to the welfare of the nation as a whole and thus, deliberate effort should be taken to their achievement. Equitable land distribution can be achieved with the necessary political will and administrative efficiency operating under a constitutional and legislative regime that provides for a land ownership ceiling.

¹⁴⁶ P.M. Sygga, Draft paper on Management of Land use, presented at the CKRC Land Seminar, white sands Hotel, May 2002 analyses thus interface between the state and individual owners of land.

CHAPTER FOUR:

CONCLUSION AND RECOMMENDATIONS

“It is the soil that feeds the child through lifetime and again after death, it is the soil that nurses the spirits of the dead for eternity”

[Source: Jomo Kenyatta, ‘Facing Mount Kenya’ pg 21]

4.0. INTRODUCTION.

In the light of the issues raised in this research paper and with particular emphasis on the institution of a Land Ownership ceiling law and policy in Kenya and in consideration of the situation prevailing in most african states, One can generally draw the conclusion that the extent of the new land policy making in the african continent and in particular, the level of strategies thinking emerging from this process, warrants an assertion that a veritable wave of land reform is promised in Africa. A general evaluation of emergent land reform process in Africa¹⁴⁸ reveals that despite diversity in catalysis and objectives of reform, ultimately most states are having to face relatively common short falls in current property relations and their management and often adopting quite similar new policies to address these. The land reform process in Africa has been characterized by the promulgation and adoption of seriously flawed strategies that are mostly unworkable and thus occasion serious disadvantage to the society in which they are so applied. In all this, its important to comprehend that the Land reform discourse has gained a lot of popularity in Africa at the level of social relations and their administration, which is more of a matter of governance. The interphase between property and societal relations and governance, links the discourse of land reforms with that of the constitutional reform process¹⁴⁹ which is part of a greater

democratization imperative that has gained a lot of currency in contemporary Africa.

As has already been generously alluded to, the Constitution has a duty to address the issue of property within the society. This is particularly crucial if a devolutionary and democratic transformation in property relations is to be achieved here in Kenya and in other like jurisdictions. In making considerations towards this, it would appear crucial that firstly, access to property itself be located and defined as an issue of rights and the issue of administration of property relations in society, should be viewed as a matter of governance. The Constitution is 'obliged' to set out the spirit of the process through which governance of land relations is undertaken and in the Kenyan context, it should be both developmentally sound, fair and democratic, through fully devolutionary governance. An area of primary concern is the recognition of existing tenural paradigms and giving them due protection as well as the need to provide mechanisms of access to and for those who do not have such access. Integral to this approach, is the evaluation of the role of the state in land administration as well as the judicial location of the radical title to land and the wider question of how to recognize the different tenure regimes existing in the country.

The discourse of land reform, presents many other lessons and challenges that have to be addressed by any such process, for it to be regarded as being successful. Close attention needs to be paid to the very process of reform in order to enhance its practicality and local participation of the populace so that the net product, would reflect the aspiration of the people. Such propositions as devolution of tenure institutions to the most local level possible and the utilization of existing institutions to implement reformative policies, need to be considered. For logistical reasons, any reformation process has to be determined to keep tenure related procedures simple, cheap and

¹⁴⁸ Read Liz Alden Wily, *New Land Policy in africa: An overview of emerging trends*, C.K.R.C. 2002

¹⁴⁹ The Kenyan Constitutional reform process is a case point under the aegis of the C.K.R.C.

accessible since historically, ambitious and expensive survey and mapping system have often crippled the intention of land tenure reform and thus rendering such processes unsustainable.

4.2. THE CONSTITUTION AND A LAND OWNERSHIP CEILING.

The principal focus of this dissertation paper is the evaluation of the viability of the employment of a land ownership ceiling law and policy as an instrument of land redistribution in Kenya. Chapter two herein has discussed extensively the case for such a law and policy in Kenya and highlighted the need to have such a law being of a constitutional character over and above finding accommodation in the substantive Acts applicable relating to land. The constitutional provision for a land ownership ceiling, is herein proposed to be an addition to the proposed land policy framework expressed in the Draft bill of the constitution of Kenya.¹⁵⁰ This draft can be taken to be a pragmatic rendition of the public views in relation to various national issues and a provision for a land ownership ceiling, would be so phrased as to be a declaration of the proposed general state obligation of promulgating and keeping under review a national land policy. It is proposed herein, to be phrased thus:

“The state shall define and keep constantly under review a national land policy ~~un~~directed at ensuring *inter alia*;

Equitable access to land and associated resources where individual holding to land in the terms of private land shall not be in the excess of the size so prescribed by the specified schedule hereunto referred.

The schedule referred to would then classify the various geographical regions in Kenya according to their principal utility value in terms of economic activities that such regions can sustain. In consideration of the comparative advantage between certain regions, a specific ceiling

on land ownable within these areas, would be set and gazetted accordingly, for example in agricultural areas, the ceiling would reflect the minimum size of land required to sustain economic production of commercial crop produce, whereas in land within the municipalities, the ceiling would reflect the viable size for settlement purposes. This sectoral rather than a wholistic approach would be a more pragmatic rendition of the diversity in needs of land within the country and the attendant necessity for comprehensive consultations to be undertaken before these ceilings are set. It is recommended that the proposed National Land Commission in concert with other stakeholders consult and negotiate in setting this threshold size. To buttress this institutional provision, the constitution would also have to refer other provisions of subsidiary legislation¹⁵⁰ and also provide for their amendment to reconcile them with the proposed provisions of the constitution.

The promulgation of this proposed constitutional amendment would have to be in the context of a clear definition and demarcation of tenure systems applicable in Kenya and a corresponding classification of land as has been proposed in the Draft constitution and Article 234 therein.

4.3. PROPOSED INSTITUTIONAL FRAMEWORK FOR LAND ADMINISTRATION.

The challenge of a sustainable land distribution and tenure order would persist even in the face of promulgation of a land ownership ceiling, if a suitable institutional framework for land administration is not established and maintained. Successive governments in Kenya have made no attempt to create a comprehensive institutional framework for land administration, and this has greatly contributed to the sorry state of land affairs that is evident in Kenya. Land distribution in

¹⁵⁰ see Article 232(1)

¹⁵¹ Provisions of Article 235(4) of the draft Constitution would be apt

Kenya is still largely governed by institutions established by the colonial government. Further to this, existing institutions have been subjected to the social and political pressures that have presided over the inefficiency and corruption manifest in such procedures as selection of allottees.¹⁵² The letters of allotment have assumed the standing of marketable securities and coupled with unprocedural systems of land allocation, this has created the very basis of illegal land speculation at the expense of the public.¹⁵³ These improprieties have overtime seriously undermined the public confidence in the system of land administration and compromised the value of registered title to land.

Integral to these features of the existing system, other genuine concerns have been raised over the manner in which land is administered in Kenya, both as the legal and the institutional level. A near universal grievance, is the concentration of power over land in the hands of the President and the Commissioner of lands. This concentration has been abused by the executive in utter disregard of the legal procedures, applicable in the allocation of land as provided by the relevant statute,¹⁵⁴ and this has occasioned the grabbing of public and private land throughout the country. Land administration has also been strictured by such administrative improprieties as inefficiency in the few land registries that are operational and interference in all land matters by the provincial administration. As concerns redistribution of land, the public opinion¹⁵⁵ is that settlement schemes originally intended to alleviate the problems of squatterism and landlessness has degenerated into a semi-official method of land grabbing by local and central government officials and politicians. The process of allocation of land in settlement schemes is flawed and discriminative with the resultant effect being increase in landlessness and squatterism especially

¹⁵² The establishment of Plot allocation committees has no legal basis ,but its applied as a procedure by the commissioner of Lands.

¹⁵³ Read the public notice by the commissioner of Lands, dated 20/9/02 and appearing in the East African Standard of 1st October 2002

in the coast and Rift Valley provinces.

In consideration of the foregoing and with the centrality of land in the economy of Kenya, need arises for the institution of a new framework for land administration. A restructured land administration and management mechanism has to be founded upon a clear and pragmatic land policy that would set out the guidelines to be adhered to in land administration. This dissertation is of the view that the proposed national land policy framework contained in the draft constitution would suffice and institutions should be created to give effect to the proposed policies. In the creation and running of the proposed institutions, radical departure from past experiences, needs to be taken and the Report of the Presidential Commission of Inquiry into the Land Law Systems in Kenya, proposes¹⁵⁶ the setting up of independent institutions both at the national and local levels to direct, supervise, monitor and control the administration of all land matters currently being undertaken by technical departments of the Ministry of Lands and settlement. There is a dire and urgent need for the establishment of focussed and efficient systems that are sensitive and responsive to the needs and aspirations of Kenyans. The Report referred to herein, in fact makes daring recommendations for the establishment of an organizational structure that runs more or less along private sector lines and yet at the same time, it is accountable to the people and responsive to their needs.¹⁵⁷ It is proposed that a National Lands Authority be established at the national level and District Land authorities at the local level as a move to decentralize land administration.

The draft constitution on its part proposes¹⁵⁸ the establishment of a National Land Commission as a constitutional office with the express mandate to administer public land on

¹⁵⁴ Government Lands Act, Cap 280.

¹⁵⁵ *Ibid.*, P. 104 par 288

¹⁵⁶ Charter 7, Paragraph 298.

¹⁵⁷ *Ibid.* Chapter 11, Article 232.

behalf of the government and local authorities. The philosophical underpinning of both proposals is similar and in consideration of the need to localize land administration, this research paper proposes the establishment of district land authorities over and above the National Land Authorities. This concept and mode of decentralization of land administration mechanisms, is not novel and it has been utilized in other jurisdictions that have undertaken land reforms including Botswana, Uganda, Malawi, Tanzania and Switzerland.¹⁵⁹ The Botswana National Policy and Land Tenure Paper¹⁶⁰ makes similar proposals as are reflected in the 'Njonjo Commission's report, on the proposition that the National Land Authority proposed, should take over the functions of the technical department of the Ministry of Lands and Settlement. The District Land Authorities are proposed¹⁶¹ to take over some functions of the county Council and other local authorities and all functions of the land control boards. The new institutional framework should be entrenched in the constitution to ensure that established institutions operate independently and that they steer clear of political interference and manipulation. The powers and structures and functions of these bodies would then be set out in effecting legislation as proposed in Annexure 1 of the Report which will certainly entail the amendment of existing legislation.

4.4 AN EVALUATION OF THE REPORT OF THE PRESIDENTIAL COMMISSION OF INQUIRY INTO THE LAND LAW SYSTEM IN KENYA.

The above-mentioned report of the inquiry into the land law system in Kenya that has been generously referred to in this research paper, was released by the ministry of lands and settlement on Tuesday, May, 6, 2003 needing popular demand for its release. At its release, the then Minister

¹⁵⁸ Article 237 (2)

¹⁵⁹ Refer to the Uganda Constitution. Government of Malawi National Land policy, 2001, Government of Swaziland Draft National Policy, The Tanzania "Shivji" Report.

¹⁶⁰ Government paper No. 1 of 1998.

of Lands and Settlement¹⁶² on behalf of the government promised the nation that he would have a 'Draft National Land Policy' based on the 'Njonjo commission' report in six months time from the date of its release.¹⁶³ This manifestly displays the governments intention and desire to be responsive to the popular view that finds expression in the report but even on this, we should all be alive to the fact that the process of National Land policy development, is long and deliberate and it involves a number of steps. Such steps include;

- Public inquiry into the land issues identified and this inquiry should be guided by clear terms of reference set out by the state.
- Public debate on the conclusions and recommendations arrived at through the first step of the inquiry.
- Formulation of principles arising from agreed position by the public.
- Formulation of the national land policy framework to guide the land related operations.

The release of this report concurred with the National Constitutional Conference which conference is also debating pertinent issues relating to land as proposed in the Draft constitution.¹⁶⁴

An evaluation of this report as against the terms of reference of the 'Njonjo Commission' reveals that the Commission did not exhaustively cover all its intended mandate.¹⁶⁵ It would be undesirable if the Ministry of lands through its 'experts' assumed the role of the commission and finalized this report but may be the commission should be reconstituted to enable it finish its mandate. Such a move happened in Tanzania, where Professor Shivji who chaired a similar commission, later confessed that the government had pre-empted the process by handing it over to the ministry which drafted the position paper that formed the substratum of the prevailing

¹⁶¹ Ibid. chapter 7 Par. 306.

¹⁶² Hon. Mr. Amos Kimunya. M.P.

¹⁶³ Report carried by the Daily Nation, Tuesday, May 6, 2003.

¹⁶⁴ Chapter Eleven of the Draft.

Tanzanian Land policy that has already undergone through numerous amendments even before their implementation.

The Report enjoys the benefit of being principally informed by the public view on the issues raised in the report. It gives a succinct overall goal of the proposed national land policy and correctly observes that it should be situated within the broader national development framework and strategies. The Report outlines the principles of a national land policy framework, that underscores the importance of efficiency, productivity, equity and participation in the use and management of land and land based resources. These principles are informed by the underlying jurisprudence that land and associated resources should be held and used for the benefit and in the best interests of the present and future generations. This is a significant departure from the hitherto existing culture characterized by gross abuse of natural resources by the ruling elite. These propositions are laudable and the public should be afforded an opportunity to debate and make any necessary amendments before adopting the principles and policies proposed by the Commission. The Report makes bold recommendations that are replicated in the Draft Constitution Bill currently under debates that seek to place the state under a constitutional duty,¹⁶⁶ to take reasonable steps ,to enable citizens gain equitable access to land, to promote security of tenure and to provide redress to those who were disposed of their land as a result of past injustices and practices.¹⁶⁷ In the same thrust, the Report recommends that radical title to land be vested and held by the National Land Authority on behalf of the people of Kenya and that all community land should vest in the community based institutions. Annex 2 of the Report also sets out a proposed classification of land which should be entrenched in the constitution.

¹⁶⁵ Such Issues as Land tenure reforms, Redistribution of land, informal tenure system and Land transfers have not been exhaustively covered.

¹⁶⁶ Annex 2 No. XXI, Provides the Constitutional position on land.

¹⁶⁷ Refer to chapter 4 of the report on the critical land issues that are peculiar to the coast province

It is not possible to enumerate all the proposals set out in the report but in relation to the gist of this research paper, it would be wise to offer a critique on the issue of historical claims to land and land redistribution as addressed in the Report. Given that our land ownership and land development patterns strongly reflect the political and economic conditions of the historical land dispossessions, its surprising that the Report scantily addresses this issue. On the minimum, the Report should have suggested a mechanism to investigate and resolve these claims and the principles that would guide these mechanisms.¹⁶⁸ Historical claims are weighty issues that can only be informed by meticulously gathered and analyzed information, and the commission which had the benefit of listening to Kenyans ought to have been able to assess the areas around which there was consensus, and make suitable recommendations but it shyed away from making a potent proposals. Though it is arguable, this research paper is of the opinion that in the absence of the formulation of clear principles on historical claims, it would have been more prudent for the Commission to completely leave this issue out of its report. Another area that the report does not squarely attempt to address is the recurring problem of public access to land and associated resources and the need for an established mechanism for land redistribution. It should be appreciated that land redistribution is an issue that needs urgent redress through the setting up of a programme or establishing a legislative framework within which the urban and rural poor would access land for productive and residential purposes in order to improve their livelihoods. This research paper has extensively explored the use of a land ownership ceiling law as an instrument of land redistribution in Kenya and its our contention that this concept is germane to the discourse of land redistribution.. The report alludes to this in Annex 2 paragraph XXIII on Land redistribution, which states:

¹⁶⁸ Such a mechanism can be guided by the Report of the select committee on the issue of land ownership along the ten-mile coastal strip of Kenya, government printer, 1978.

“There should be a fully implemented policy on maximum land holdings where land is not being developed or where it is being hoarded and used for speculation...”

There’s a failure to address population growth as against the question of land redistribution. The government should provide a single, flexible redistribution mechanism, which can embrace the wide variety of land needs of all eligible applicants. Land redistribution is basically intended to assist the urban and rural poor, farm workers, labour tenants, squatters, women and emergent street hawkers and families in our urban centres who need land to survive.

4.5. CONCLUSION.¹⁶⁹

From the discussion and the issues raised in this research paper, much can be concluded but the issues raised herein would more aptly serve as the basis for further research and debate. The principle observation however is that land policy and law should at all times reflect and support the broad national goals of a country and by extension its international commitments. These include economic goals such as poverty reduction, social goals such as equity and gender equality, good governance such as participation of marginalised groups in the implementation and decision-making on issues related to land. The ‘Njonjo Commission report is quite useful in offering fairly far reaching proposals that should form a sound basis for formulating a national land policy especially at this point in time when the country is anticipating a new constitutional order. The government must thus ensure that urgent mechanisms are put in place to expedite and guarantee further public debate and participation on this issue to ensure that it embodies the emergent democratic principles and practices.

The formulation of a sound land policy framework is one of the Kenya’s pre-conditions

for the attainment of peace. This framework must detail ways of ensuring equitable access to land by all as a pre-condition to peace, reconciliation and stability without which economic growth and secure livelihoods cannot be achieved. The formulation of a sound national land policy framework has to be hallmarked by its ability to facilitate the realization of social justice and equity. The latest move by the government to this end, is the constitution of another Presidential Commission on Land¹⁷⁰ chaired by Paul Nding'u and which is aimed at inquiring into the allocation to private individuals or corporations, of public lands dedicated or received for a public purpose. The Commission also has as its terms of reference the mandate to prepare a list of all lands unlawfully or irregularly allocated specifying particulars of the lands and of the persons to whom they were allocated, the date of allocation, particulars of all subsequent dealings in the lands concerned and their current ownership and development status. The Commission is at the end of its sitting sessions supposed to come up with legal and administrative measures for the restoration of such lands to the proper title or purpose. For now we can only adopt a wait and see attitude and hope that rationality will reign in the final resolution of this Commission and that this resolutions will find expression in the government policies and actions.

¹⁶⁹ Reference has been made to the Kenya Lands Alliance critique of the 'Njonjo Commission' report appearing in the Sunday nation: May 25, 2003.

¹⁷⁰ Refer to The Kenya Times edition, Tuesday, July 1st 2003

APPENDIX 1

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