

**REGISTRATION OF TITLE TO LAND: A CRITIQUE OF THE LAND
REGISTRATION ACT NO.3 OF 2012**

**A Dissertation Submitted in Partial Fulfillment of the Requirements for the Award of the
Degree of Master of Laws (LL.M) of the University of Nairobi**

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DECLARATION

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

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DEDICATION

This dissertation is dedicated to my husband Richard for his loving support and encouragement.

To my sons Ryan, Ray and Ronnie “your love is sufficient”

To my Parents Joyce and Charles Maina “your dreams to provide equal chances to all your children have made me the woman I am”

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I recognize my workmates and girlfriends Mwikali, Carol and Betty “when I started this journey, we made a vow not to drop out; your challenge has seen me through. It’s now your turn to meet your part of the deal.”

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Land Act, Act No.6 of 2012.

Land Adjudication Act, Cap. 284

Land Consolidation Act, Cap. 283

Land Registration Act, Act No. 3 of 2012.

Land Titles Act, Cap. 282, Laws of Kenya (Repealed)

National Land Commission Act, No. 5 of 2012

Registered Land Act Cap 300, Laws of Kenya (Repealed)

Registration of Titles Act Cap 281, Laws of Kenya (Repealed)

Trust Land Act, Cap. 288.

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CHAPTER ONE

INTRODUCTION TO THE STUDY

1.1 Introduction

Before the enactment of the Land Registration Act 2012 (LRA), the registration of title to land in Kenya was characterized by multiple statutes, namely, the Government Lands Act (GLA),¹ Land Titles Act (LTA),² Registration of Titles Act (RTA)³ and Registered Land Act (RLA).⁴ This led to a complex registration regime often leading to complex conveyancing practices, ineffective practices, duplicity of titles and fraudulent dealings. The LTA and the GLA were a deed registration system and were characterized with many problems including the tattered and ineligible registers, missing records and a complex registration regime. The RTA and RLA were also faced with problems such as the duplicity of titles, fraudulent titles and multiple boundary disputes in respect of the RLA due to the general boundaries.

In an attempt to address these challenges in land and title registration, the *Land Registration Act, 2012* (LRA) was enacted to revise, consolidate and rationalize the registration of titles to land, to give effect to the principles and objects of devolved government in land registration, and for connected purposes. The intention is to provide a simplified, secure and harmonized registration regime. This study argues that whereas the LRA may have succeeded in harmonizing registration statutes by recognition of the registers and titles under the repealed statutes, one of the questions that arises is whether this harmonization has enhanced efficiency, transparency and accountability in land and title registration in Kenya.

By reviewing relevant literature, laws and policies on land, this study will explore and investigate the Land Registration Act 2012 to ascertain whether it has achieved the goal of being

¹ Cap. 280, Laws of Kenya (Repealed).

² Cap. 282, Laws of Kenya (Repealed).

³ Cap. 281, Laws of Kenya (Repealed).

⁴ Cap. 300, Laws of Kenya (Repealed).

the unifying registration regime and ensuring that we have an efficient, secure and simple system of registration of title to land in Kenya. The study will also propose and recommend legislative and policy measures and amendments in the Act that are necessary to ensure that Kenya has a transparent and cost-effective registration system in line with the Constitution.⁵ This is important in light of the myriad of problems that have bedeviled title and land registration in Kenya. The methodological approach adopted in this study will be review of relevant literature on land, laws and policies touching on land in Kenya and best practices from other jurisdictions. The qualitative data gathered will then be critically assessed, analyzed and evaluated within the context of the research objectives of this study.

1.2 Background to the Problem

Registration of title to land is said to originate at the advent of commoditization of property by man.⁶ That when individuals started to make claims on property it became necessary to formulate a mechanism to keep property records. A distinction has been made between land registration and registration of title. Land Registration is “the documentary manifestation of land as a commodity in the world of commerce. It performs the overall function of providing information regarding the quantum of rights in land and the transferability of the same in the production and exchange process.”⁷ On the other hand registration of title is described as, “the maintenance of authoritative records, kept in a public office, of rights to clearly defined units of land as vested for the time being in some particular person or body, and of limitations if any to which these rights are subject.”⁸ Land registration therefore seeks to record interests in land to make it easy to transact in land like any other commodity while registration of title is recording the proprietorship or ownership of a person to a parcel of land. The difference between the two is that land registration does not confer ownership of the land registered while registration of title to the land confers ownership to the person whose name is entered in the register.

⁵ See generally, Article 60 of the Constitution of Kenya 2010.

⁶ S.C. Wanjala, Problems of Land Registration and Titling in Kenya: Administrative and Political Pitfalls and Their Possible Solutions in S.C Wanjala (ed) *Essays on Land Law: The Reform Debate in Kenya*, (Faculty of Law, University of Nairobi, Nairobi 2000) p. 84.

⁷ Ibid.

⁸ Ibid, p.85.

Land registration and registration of title were concepts alien to the people of Kenya. Before the advent of colonialism, land was owned communally by various tribes or communities. The chiefs or elders in the community determined how individuals used the community land. The land was used for various purposes such as construction of homestead, farming, grazing land and religious place of worship. Often this land was used as a community or by a particular clan or family as determined by the elders. The community protected their territory from other communities often through use of force and when defeated they moved to establish their territory elsewhere. The onset of colonialism saw the introduction of various statutes to govern land administration and registration in the country. Indeed, it has been contended that the real reason for introduction of land registration by colonialists was to alienate people from their customary land and secure land for the settlers who would engage in economically profitable farming practices to boost the colony's income. Since the British considered the customary tenure arrangements practiced by the majority of Africans to be inconsistent with development and modernization, they established a tenure system which only accorded recognition to land rights secured by individual freehold title. Further, customary tenure involved a complex system of nested and overlapping individual and group rights derived from kinship relationships that did not lend itself to concepts of absolute individual ownership and as a result, most customary land was left unregistered and vulnerable to appropriation and transfer to settlers.⁹

The onset of colonialism saw the introduction of western notions of property ownership. Consequently, this led to the introduction of various statutes to govern land administration and registration in the country. The historical analysis of land registration shall be discussed further in Chapter Two.

⁹ See P. Veit, "History of Land Conflicts In Kenya" - Focus on Land in Africa Brief, March 2011, p.p.2-4, available at www.focusonland.com/download/52076c59cca75/ [Accessed on 7 April,2014]

1.3 Statement of the Problem

Existing laws and policies on land and title registration in Kenya today recognize the need for harmonization of registration statutes so as to enhance efficiency, transparency and accountability in land registration and title registration. This would in turn make the registration of rights and interests to land simple, secure and efficient.

With this in mind, the LRA has been enacted to harmonize the registration statutes and to provide for title registration. However, land registration has for long been governed by a myriad of statutes that did not provide a simple, secure and efficient registration system. The Land Registration Act of 2012 has sought to harmonize all the previous land registration statutes notwithstanding the challenges bedeviling their registration frameworks. Provisions dealing with registration of title in the previous land laws have been transitioned. This means that the LRA has failed or may not offer simple, secure and efficient registration system for registration of rights and interests in land. It is for this reason that the study examines the provisions of the LRA so as to come up with proposals of making the registration system more simple, secure and efficient.

1.4 Justification of the Study

The passing and implementation of the Land Registration Act, 2012 was aimed at addressing the problem of registration of land that had emanated from the myriad of registration statutes that existed before. However, the LRA has not succeeded in dealing with the problems facing land registration in Kenya. The research seeks to identify the lacunas that exist in the law and ways in which those gaps can be addressed. This study is significant as it seeks to provide a solution to the problem of title registration in Kenya based on best practices and experiences from elsewhere and how they can be relevant and applicable in the Kenyan context. It is believed that this study will assist policy makers and the relevant government departments in coming up with policies that will inform the legal framework to resolve this particular problem.

1.5 Conceptual Framework

Land is a form of property. Ownership to land is conferred by registration of title. As such a registration system must offer, *inter alia*, adequate security against the rights of third parties. The LRA is thus largely informed by the property theory so as to offer security to property rights holders. According to this theory property rights have social, legal, political and economic justifications. A law on land registration ought therefore to be simple and efficient in securing property rights to citizens. According to the property rights theory, property rights need to be defined and correctly allocated to generate wealth.¹⁰ Property rights theory demands that the definition and allocation of proprietary rights has to be done on a scale and at a level sufficient to ensure that the entity best placed to manage the resources has complete control and eliminates the possibility of contradictory rules being applied to one resource.¹¹ Under the previous land law regime, there was the challenge of duplicity of titles or allocation of several titles over one parcel of land in Kenya. This was as a result of a registration system that was inefficient and that failed to allocate property rights efficiently. The LRA has sought to transition a number of provisions of the repealed laws which means that there will be inefficiencies and complications in the allocation of property rights in land. This study argues that a title registration regime that is simple, secure and effective will ensure a protection of individual rights over land hence leading to economic development.

According to Mahoney property rights are social institutions that define or delimit the range of privileges granted to individuals of specific resources, such as parcels of land or water. As such private ownership of these resources may involve a variety of property rights, including the right to exclude non-owners from access, the right to appropriate the stream of economic rents from use of and investments in the resource, and the rights to sell or otherwise transfer the resource to others.¹² Property rights deal with value-enhancing relationships regarding resources such as land, such that a property law system operates to both protect and curtail the exercise of rights by

¹⁰J.T. Mahoney, *Economic Foundations of Strategy*, (Thousand Oaks, 2005), available at http://www.sagepub.com/upm-data/5030_Mahoney_Chapter_3.pdf [Accessed on 7 April,2014].

¹¹ P. Kameri-Mbote, *Property Rights and Biodiversity Management in Kenya*, (ACTS Press, 2002), p.3-6.

¹² J.T. Mahoney, *Economic Foundations of Strategy*.

holders so as to ensure an environment in which the rights of property owners and the public interest are safeguarded.¹³ This will be important in discussing the provisions of the LRA in showing the extent to which the registration of title system in Kenya offers security against interlopers and in assessing its efficiency.

Property rights provide the basic economic incentive system that shapes resource allocation. The important criteria for efficiency of property rights include universality-all scarce resources are owned by someone; exclusivity-property rights are exclusive rights; and transferability-to ensure that resources can be allocated from low to high yield uses.¹⁴ Property rights play an economizing function. Property laws do set down clear regulations for people to follow and rules for them to respect. However and as already stated they are built on social understanding. Property laws such as land laws should therefore not lose touch with reality especially where many people hold land customarily.¹⁵ This is the reason why a registration system should be simple to ensure its availability to the poor people. It should also offer security so that those whose land is not registered can have the confidence of registering their land.

Property is also a legal relationship where the enforcement of property rights offers security of title to the land owner. This guarantees the right to sell, exclude, possess, right to appropriate the right to use and dispose of property by will.¹⁶ Registration of a parcel of land confers on the registered person absolute ownership over the land. This confers on the registered owner all the legal entitlements to the land and the rights to enforce those rights in courts.

Although, the LRA is premised on the property rights theory it seeks to apply and transition a number of aspects touching on title registration from the repealed laws. One of these aspects is title registration of land which reviewed literature shows is a concept that fails to take into

¹³ J. Kieyah & P. Kameri-Mbote, "Securing Property Rights in Land In Kenya: Formal versus Informal," in Christopher Adam *et. al.*, (eds), *Kenya Policies for Prosperity*, (Oxford University Press, 2010), 319-321.

¹⁴ J.T. Mahoney, *Economic Foundations of Strategy*, p. 109.

¹⁵ J. Blocher, "Building on Custom: Land Tenure Policy and Economic Development in Ghana," *Yale Human Rights & Development Journal Vol. IX*, (2006), 171.

¹⁶ P. Kameri-Mbote et al, *Ours by Right: Law, Politics and Realities of Community Property in Kenya*, (Strathmore University Press, 2013), 34-36.

consideration the attributes of land as a social, legal, political and economic good. Title registration of land may thus not be in line with the property rights theory. This means that incidences of corruption, irregular allocation of land and double registration of titles are prone to occur under the LRA.

1.6 Literature Review

The registration of title has been a subject of many discussions and its importance can never be more emphasized. There is a glut of literature dealing with the existence of multiple land registration statutes in Kenya and the related problems.

1.6.1 Title Registration

Under common law title denotes the right of an owner to assert his estate in land against strangers.¹⁷ To have a title to an estate means to be entitled to exercise or enjoy various rights or incidents associated with ownership of that estate. Title to freehold or leasehold estate gives the registered proprietor powers to exercise his possession rights against the whole world and the power or right to use, exploit or dispossess the land.

Mukesh Eswaran and Hugh M. Neary¹⁸ push forward the argument that the sense of ownership of property is hardwired into the human psyche and precedes and underlies the advent of formal legal institutions. Further, they attempt to explain how the possessor's sense of "mine" and the non-possessor's sense of "yours" result in the possessor being willing to expend more effort defending his claim relative to the non-possessor in a contest between them over the object. They argue for enforceability of property rights as one of the ways of securing them thus necessitating the entry of legal and institutional framework into play. This work is important in explaining the importance of legal institutions in securing property rights of private persons since one of the ways that such rights can be secured and guaranteed is through registration of titles to particular property.

¹⁷ Tom Ojienda, *Conveyancing Laws Principles and Practice* (Law Africa, 2008), p.186.

¹⁸ M. Eswaran & H. M. Neary, 'An Economic Theory of the Evolutionary Origin of Property Rights' University of British Columbia, available at www.economics.ubc.ca/faculty-and-staff/mukesh-eswaran/ [Accessed on 8 April,2014].

Registration of title is defined as “the maintenance of authoritative records, kept in a public office, of rights to clearly defined units of land as vested for the time being in some particular person or body, and of limitations if any to which these rights are subject.”¹⁹ The origin of title registration is traceable to the Torrens system registration scheme introduced in Australia in 1858.²⁰ The Torrens system of registration is based on three principles.

According to the *Mirror Principle* a register of title is intended to operate as a mirror reflecting accurately and incontrovertibly the totality of rights and liabilities which at any given time affect the land falling within its coverage. The second principle is the *curtain principle*. It is to the effect that trusts relating to registered land are kept off the title so that any person dealing with the proprietor are safe in the assurance that the interest behind any trust will be overreached and shifted on the capital proceeds of disposition. The third principle is the *insurance principle*. It provides that the state shall guarantee the accuracy of the registered title, in that an indemnity payable from public funds if a registered proprietor is deprived of his title or is prejudiced by a correction of any mistake in the register.²¹

The register of any particular estate is intended to reflect the full range of rights and burdens which affect land. It should provide a total picture of the property at any given time in that a prospective purchaser should at any given time be able to examine the register and get the exact nature of interest or encumbrances existing over the property he wishes to buy. The three principles shall guide this research as it tries to recommend a proper way of achieving a simple, effective and secure title registration regime. Since the LRA is a title registration system these principles are applicable to it.

¹⁹ S.C. Wanjala, Problems of Land Registration and Titling in Kenya: Administrative and Political Pitfalls and Their Possible Solutions in S.C Wanjala (ed) *Essays on Land Law: The Reform Debate in Kenya*, (Faculty of Law, University of Nairobi, Nairobi 2000) p.85.

²⁰ Tom Ojienda, *Conveyancing Laws Principles and Practice* (Law Africa, 2008) p.187.

²¹ *Ibid*,p.189

1.6.2 Goals of Registration in Land

Gray and Gray²² indicated that the purpose of registration of title is to achieve greater simplicity and certainty of title to land. That registration should confer on a registered proprietor an indefeasible title to a specified parcel of land and dispense with any need on the part of persons dealing with him to investigate further his rights. Gray and Gray captured the main aim of any registration system. In our jurisdiction, the property market has been riddled with many instances of fraud, double titling and litigation which would be prevented by having a secure registration of title regime.

P. L. Onalo has given the aims of registration as achieving security of tenure, conclusiveness of the register, reducing litigation and administration of a loan system.²³ Security of tenure, he says gives one a right to be indemnified from the government. That a purchaser of land from a proprietor on the register should have the commercial confidence in the transaction unbothered by the deficiency in the title not recorded in the register. He opines that a register should be conclusive to an extent that no claim which is inconsistent with a registered title can be enforced against the owner of the interest. Reduction of litigation will be achieved when the registered title is properly surveyed and the area and boundaries clearly indicated.

Onalo must have had the many boundary disputes in mind which have arisen from the registration of title under the RLA issued on reliance on general boundaries. He concludes that the principle of security of title makes borrowing easy as a lender feels secure in relying on such a title as security of money secured. This is particularly an important aspect especially as the financial institutions fund many of the developments in the housing estate. The need to secure their interest has been of outmost importance given the fear of demolitions experienced at the Syokimau area of Mavoko municipality and other properties demolished on road reserves. An institution which funded these developments must have suffered enormous loss.

²²K.Gray and S.F.Gray, *Elements of Land Law* (Butterworths,2001)p.976.

²³ P. L. Onalo *Land Law and Conveyancing in Kenya* (Law Africa, 2008) p. 178.

T. O. Ojienda agrees with Onalo on the aims of registration. He gives the ingredients of a good registration system as accuracy, simplicity, cheapness and ubiquity.²⁴ A registration system will be accurate and reliable if proper survey is done, the area determined and boundaries delineated. Simplicity denotes a system of registration that is easy to understand and apply and the same he says should be cheap to be within reach of an average land owner. Ubiquity, Ojienda explains is the establishment of numerous land registries all over the country to ensure that many land owners register their land.

Dale highlights some deficiencies of title registration which are apposite to this study. These include multiple ownership particularly in rural areas where children inherit from their parents and with no separate titles for each; customary tenure; incompleteness of the registers in all systems of registration of titles and strata titles particularly in the ownership of separate identifiable volumes of space within a building and ownership of common parts. There is also multiplicity of parcels due to subdivision, mini subdivisions and fragmentation after inheritance; inconsistency of records; rapid urban expansion and poor monitoring of land transactions. According to Dale the above problems arise land registration is “title based” which does not take into consideration the attributes of land.²⁵

The commission of inquiry recognized that disputes arise over registered land because of the failure of the system to clearly record or effectively transit property rights into contractual relations.²⁶ It recommended that this could be rectified by constantly updating land registry records. It is arguable that while the commission captured the problem experience in property transactions; the solution lies in establishment of a secure title regime. Further there is need to ensure that all registered land have proper survey attributes with clear delineations in order to reduce cases of boundary disputes. A mere harmonization of land laws shall not solve the problems associated with registration regime. Each statute has had its own faults which must be

²⁴ T.Ojienda, *Conveyancing Laws Principles and Practice* (Law Africa, 2008), p.105.

²⁵ P. F. Dale, *Guidelines for the Introduction of Land Registration with Special Reference to Anglophone Countries of East, Central and Southern Africa*, (1990,), p.6.

²⁶ Njonjo Commission Report, p.81.

relooked and attempts made to solve them if a secure and efficient title registration regime is to be attained.

1.6.3 Harmonisation of Land Registration Systems

Malcolm Park, Jude Wallace and Ian Williamson have argued that harmonisation of laws is about removing inconsistencies. According to them, harmonising encompasses a degree of compatibility and commonality (or uniformity) of law across the state and territory borders, and either be used to mean a single national uniform law (with a single national consistent interpretation of that law) or different but coherent laws throughout the land.²⁷ The bottom line is that harmonising seeks similarity without absolute uniformity. For purposes of this study, harmonisation is contemplated as the removal of inconsistencies in law and moving towards achieving a single national uniform law, with a single national consistent interpretation of that law as far as land registration is concerned. Malcolm Park, *et al* demonstrate that what is most important in harmonisation of laws is ensuring that there is uniformity of some sort either in substantive laws or the procedures followed in the application of the laws so as to achieve the objectives of registration. According to these writers, harmonisation should result in one register whose purpose is to investigate and ascertain the legal rights or obligations associated with any particular land parcel or lot, one need only inspect the register. Such an investigator “need not and indeed, must not concern themselves” with interests not disclosed on the register.²⁸

Indeed, the principle of overriding interests²⁹ has been criticized as one that has led to the loss of the ideal fundamental principle of a complete and comprehensive register, espoused by the originators of land title registration. The ideal espoused by the originators of land title registration was that of a complete and comprehensive central public register, administered by a centralised public authority and available for public inspection so that community confidence could repose in the register and its integrity. This has been attributed to the fact that the Parliaments by passing the various land title registration statutes have participated in land

²⁷ M. Park, *et al.*, ‘Orchestrating a harmonious system’ *Victorian Law Institute Journal*, vol 83(5) (2009), pp. 50-53.

²⁸ *Ibid*, p. 8

²⁹ See sec. 28 of LRA 2012.

registration by enacting express provisions providing for exceptions to the fundamental principle. In addition, the courts, when interpreting these statutes, have held that they contain implied exceptions to the fundamental principle of a comprehensive and conclusive register.³⁰

1.6.4 Best practices

The Study uses Ontario and Austria as case studies as they have enacted and applied legislation providing for a simple, secure and efficient registration regime. The two case studies provide useful lessons worth considering and applying as benchmarks for Kenya. Ontario has been selected because it was the first jurisdiction in the world to provide electronic registration and secondly, because the Ontario Land Registry Offices currently operate successfully under two systems: the Registry system and the Land Titles system. This presents a study worth considering observing that despite the dualism of the land system, Ontario successfully digitalized their registry. Austria has been used as it has successfully implemented e-governance of its land administration infrastructure, and may thus offer useful lessons in digitizing the land registry records in Kenya

This study differs from the existing literature as it examines the provisions of the LRA as the law seeking to harmonize land registration statutes. This is a new statute enacted under the Constitution of Kenya 2010 and the National Land Policy. As such, the LRA is analyzed in this study within the context of new principles of land administration which require, *inter alia*, that land administration be transparent and cost-effective.

1.7 Objectives of the Research

The objectives of the study are:

1. To critically evaluate the Land Registration Act No. 3 of 2012.
2. To examine the adequacy of the Land Registration Act 2012 in providing a simple, efficient, secure, transparent and accountable registration regime.

³⁰ M. Park, *et al.*, 'Orchestrating a harmonious system' *Victorian Law Institute Journal*, vol 83(5) (2009), pp. 7-9.

3. To propose appropriate recommendations to the policy, legal and institutional framework dealing with land registration.

1.8 Hypotheses

The following hypotheses will guide this study:-

- The LRA has harmonized the land registration statutes in Kenya, but has failed to offer a secure and efficient title registration regime.
- The provisions in the LRA relating to the conversion of titles held under the repealed land laws are not clear and may lead to the continued operation of the repealed statutes indefinitely.

1.9 Research Questions

The questions the research wishes to address are:-

1. What were the purposes for enacting the Land Registration Act?
2. Why has the Land Registration Act No. 3 of 2012 not achieved the purposes for which it was enacted?
3. How can the Land Registration Act be improved and strengthened to meet its objects?

1.10 Research Methodology

The research methodology applied in this research is the review of literature dealing with land and land registration. It will also employ the use of historical analysis and comparative analysis. Historical analysis of the land registration in Kenya has been used to understand the development of the law, how it has influenced the current law, the challenges faced and thereafter make recommendations.

Comparative analysis has been used to study best practices in other jurisdictions with a view of recommending what can be adopted in our legal system.

1.10.1 Historical analysis

Historical analysis is a methodological approach that employs use of primary historical documents in service of theory development and testing.³¹ James Mahoney argues that founders of modern social science, from Adam Smith to Alexis de Tocqueville to Karl Marx have pursued comparative historical analysis as a central mode of investigation.³² Historical analysis will be used as a method of discovery from records and accounts of what happened in the past. George Santayana proclaimed that those who cannot remember the past are condemned to repeat it. It is by analysis of the historical development of land registration in Kenya that we will be able to understand the existing legal framework. The paper presents a historical approach to land registration in Kenya. The history is traced from the pre-independence period, post - independence period to post – constitution of Kenya period. The existing legal framework in all these period shall be studied with a view of understanding the Land Registration Act and its challenges and thereafter make recommendations.

In tracing the history, study will use both primary and secondary sources of data. Primary data include the policies such as the National Land Policy, statutes (both the repealed and new statutes), government documents and relevant treaties/conventions/protocols. Primary sources will be useful to this study as they outline the policy, legal and institutional architecture governing land in Kenya. Treaties/conventions/protocols and other documents from other jurisdictions will be useful in offering best practices to improve on land registration in Kenya. Primary sources such as the Constitution, statutes and policies will be obtained by accessing and analyzing them. Other relevant government documents and commission reports touching on land will be obtained from the Ministry of Lands.

Secondary sources include the internet and online libraries, journal articles, newspapers and other media reports, conference papers and textbooks. Secondary sources are useful in their own right as they give insights on the need to have a land registration regime that is efficient,

³¹ C. Thies, A Pragmatic Guide to Qualitative Historical Analysis in the Study of International Relations(international Studies perspective(2002)3,p.351-372

³² J.Mahoney and D. Rueschemeyer, Comparative historical analysis, Achievements and Agendas(available in www.bilder.buecher.de last accessed on 29.10.2014)

transparent and accountable and that offers simplicity and security of title. Scholarly journals and books will be accessed by visiting various libraries such as the University of Nairobi, Ministry of Lands Library, online access through Journal Storage (JSTOR), Lexis-nexis library among others.

1.10.2 Comparative Research

The research shall further adopted a Comparative Research Methodology. David Collier argues that comparison is a fundamental tool of analysis³³. It sharpens the power of description and plays central roles in concept formation by bringing into focus suggestive similarities and contrast among cases. Comparative method refers to the methodological issues that arise in the systematic analysis of a small number of cases.³⁴ Arend Lijpharts in his article Comparative Politics and Comparative methods defines comparative method as the analysis of a small number of cases, entailing at least two observations. The merit of this method, he argues, is that given inevitable scarcity of time, energy and financial resources, the intensive analysis of a few cases will be more promising than the superficial statistical analysis of many cases.³⁵ This study uses the comparative method by studying what exists in other jurisdictions with a view of recommendation of the best practices that can be adopted under the Land Registration Act. In chapter four of the study, the Austrian Cadastral System and the Land Registration in Ontario are used as a study of the best practices because of the success in those jurisdictions.

1.11 Dissertation Structure

Chapter One

This chapter contains the structure and contents of the research. It states out the research questions, objectives, hypothesis, literature review, theoretical and conceptual framework as well

³³ D. Collier, *the Comparative Method*(available in www.polisci.berkeley.edu last accessed on 29.10.2014)

³⁴ Ibid

³⁵ A.Lijphart, Comparative Politics and Comparative Method: *The American Political Science Review*,vo.65,No.3(Sep., 1971) ,pp682 – 693, *American Political Science Association* (available in www.dcpis.upf.edu accessed on 29.10.14)

as the methodology. It introduces the research problem that Land Registration Act has not provided a simple secure and efficient registration of Title.

Chapter Two

This chapter will deal with historical perspective of Registration of Title to land in Kenya. It will entail a look at the previous registration statutes, the challenges faced or the failures encountered with a view of suggesting clear ways of dealing with those challenges under the LRA. It is by the study of the history of registration in Kenya that we will be able to understand the present and make recommendations.

Chapter Three

This chapter will involve a critical analysis of the provisions of the LRA. The aim is to examine the effectiveness of the LRA in meeting its objectives as well as the constitutional objective of a simplified and efficient registration system and identify any existing challenges and loopholes.

Chapter Four

This chapter explores best practices for land registration as far as simplicity, security and efficiency is concerned. Ontario and Austria have been selected as case studies as they have enacted and applied legislation providing for a simple, secure and efficient registration regime. The best practices in these regimes will then be used to recommend a model that can be applied in Kenya.

Chapter Five

This chapter will contain the findings of the study. It will make recommendations as to the way forward for reform to ensure that the registration process is simple, secure and efficient.

Chapter Six

This chapter contains the conclusions drawn from the study.

CHAPTER TWO

HISTORICAL DEVELOPMENT OF LAND REGISTRATION IN KENYA

2.1 Introduction

The history of land law in Kenya dates back to the pre-colonial days. However, land registration and titling began with the coming of colonialists at the end of the 19th Century. To understand land registration in the proper context, the Chapter traces the evolution of land registration in three phases: pre-colonial, colonial, and post-colonial and under the Constitution of Kenya 2010. As already pointed out, the concepts of land titling and registration were alien to the people of Kenya and were imported from the English land law. It is therefore not really possible to understand the current land registration law in Kenya without some knowledge of how the same was transplanted from England to Kenya. At the outset, however, it should be noted that although Kenya attempted to develop its own law on land registration, it was largely informed by the English land law. Land ownership in Africa is conceived differently when to the English jurisdiction and the Colonialists attempted to change this through changing the African concept of land ownership. This difference in perception can clearly be explained within a historical context. The Chapter examines evolution of land registration in Kenya so as to give a contextual background of the registration regime that has been in existence and its impact on new laws including the *Land Registration Act 2012*. This is vital as we interrogate whether the LRA will address land registration problems in this country.

2.2 Formal Registration and Titling of Land in Kenya

Before the advent of colonialism in Kenya land management was governed under customary laws. Ownership to land was vested in the community. No single person could claim ownership to land.³⁶ This changed with the arrival of the British in Kenya. The British viewed the customary tenure arrangements practiced by the majority of Africans as inconsistent with development and modernization. They thus sought to establish a tenure system which only accorded recognition to land rights secured by individual freehold title. In addition, since customary tenure involved a complex system of nested, overlapping individual and group interests derived from kinship relationships that did not lend itself to concepts of absolute

³⁶ H.W.O. Okoth-Ogendo, *Tenants of the Crown: Evolution of Agrarian Law & Institutions in Kenya*, (ACTS Press, Nairobi, 1991), 7-19.

individual ownership. As a result the colonialists viewed most customary land which was left unregistered and vulnerable as capable of appropriation and transfer to settlers.³⁷ The colonial government viewed African customary land tenure as an impediment to greater agricultural production and proper land use practices.³⁸ To achieve this, they had to come up with a way of alienating land from Africans and securing it for the settlers who would engage in economically profitable farming practices to boost the colony's income. This saw the introduction of various statutes to govern land administration and registration in the country.

2.2.1 Development of Land Registration Systems

Two systems of land registration have developed over time: registration of deeds and registration of title.³⁹

2.2.1.1 Registration of Deeds

Registration of deeds was the first to develop and involved the registration or recording of documents affecting interests in land.⁴⁰ The Registry of Deeds system was introduced in England in the year 1708.⁴¹ This system was in several European countries to prevent double selling of land.⁴² A deed registration system meant that the deed itself, being a document which described an isolated transaction, was registered. However, the deed was not in itself proof of the legal rights of the involved parties and, consequently, it was not evidence of its legality. Thus, before any dealing can be safely effectuated, the ostensible owner must trace his ownership back

³⁷ See P. Veit, "History of Land Conflicts In Kenya" available at www.focusonland.com/download/52076c59cca75/ (accessed on 7/04/2014)

³⁸ J. Kieyah & R. K. Nyaga, "Land Reform and Poverty in Kenya," *GDN Working Paper Series*, Working Paper No. 17, September 2009, p. 5.

³⁹ J. Zevenbergen, "Systems of Land Registration: Aspects and Effects" available at <http://www.ncgeo.nl/phocadownload/51Zevenbergen.pdf>, (accessed on 15/04/2014).

⁴⁰ T. Hanstad, "Designing Land Registration Systems for Developing Countries," *American University International Law Review* 13, No. 3 (1998): 647-703, p. 650.

⁴¹ M. Beglan, "The Registry of Deeds – records to trace your family history," available at <http://www.eneclann.ie/NLI-Lectures/MaryBeglan.pdf>, (accessed on 20/04/2014)

⁴² *Ibid.*

to a good root of title.⁴³ The deeds-registration system was hailed as having had the advantage of providing a maximum degree of elasticity, as almost every conceivable right or claim to a right in land could be registered thus achieving public notice.⁴⁴ However, the system was associated with the disadvantage that no inquiry was made into the authenticity of the deed either as to form or as to content. It was left to the prospective purchaser of land to investigate all deeds in the chain of title back to the grant before concluding his purchase.⁴⁵ Other weaknesses with the deed system were that, lands were not properly surveyed and demarcated, and inaccurate plans or maps often created conflicts among land owners. Moreover, registration was based on the deed and not on the land leading to multiple registration of the same piece of land as there was no system to detect multiple registrations in the registration process.⁴⁶

2.2.1.2 Registration of Title/Torrens System

This system was first introduced in Australia, in 1858, by Sir Robert Torrens who was the Register General of the Province of South Australia. He believed that a land register should show the actual state of ownership, rather than mere evidence of ownership.⁴⁷ Shortly after Torrens introduced the concept of title registration in Australia, a similar system developed in England, a modified version of the Torrens system.⁴⁸ Under title registration, the title or right was created and could act as proof of ownership. This system ensures security of title under a system of State guarantee. The register itself provides proof of title to the land.

The Torrens system is said to encompass three principles which are: The mirror principle under which the register of title is a mirror reflecting accurately and completely the current facts

⁴³ J. Zevenbergen, "Systems of Land Registration: Aspects and Effects," available at <http://www.ncgeo.nl/phocadownload/51Zevenbergen.pdf>, (accessed on 15/04/2014).

⁴⁴ Available at <http://www.TeAra.govt.nz/en/1966/property-law-of-real>, (accessed on 15/04/2014)

⁴⁵ *Ibid.*

⁴⁶ R. Sittie, 'Land Title Registration: The Ghanaian Experience', available at https://www.fig.net/pub/fig2006/papers/ps07/ps07_15_sittie_0848.pdf, (accessed on 15/04/2014).

⁴⁷ J. Zevenbergen, "Systems of Land Registration: Aspects and Effects," available at <http://www.ncgeo.nl/phocadownload/51Zevenbergen.pdf>, (accessed on 15/04/2014).

⁴⁸ T. Hanstad, "Designing Land Registration Systems for Developing Countries" *American University International Law Review* 13, no. 3 (1998): 647-703, page 650.

that are material to title. With certain inevitable exceptions [such as overriding interests] the title is free from all adverse burdens, rights and qualifications unless they are mentioned in the register. Under the curtain principle, the register is regarded as the sole source of information and intending purchasers need not concern themselves with trusts and equities which lie behind the curtain. According to the insurance principle, if the register does not give the correct reflection of the title and a flaw appears, anyone who thereby suffers loss must be indemnified by the government, as if the reflection were a true one.⁴⁹

Registration of title was preferable to recording of deeds, since the former aimed at presenting the prospective purchaser or mortgagee the net result of all the previous dealings with the property, while the latter presented the dealings themselves before such prospective purchaser who was left to investigate for himself. In registration of title system, the register is a conclusive evidence of previous dealings over the land, while in registration of deeds only the figures were given and the party in interest was left to work out for the final answer to himself and at his own risk.⁵⁰ According to Rebecca Sittie title registration serves two purposes: it gives certainty and facilitates proof of title; and renders dealings in land safe, simple, cheap and prevents fraud on purchasers and mortgagees.⁵¹

2.3 Pre-Independence Period

English land laws were introduced in Kenya through the colonization process. In Kenya colonialism is traceable back to the Berlin Conference of 1885 which set the motion for the partitioning of Africa.⁵² To further their interests in East Africa, the colonial powers needed to acquire effective control over the region. They needed to acquire title to land and the natural resources in the region.⁵³ Although the declaration of Kenya as a protectorate in 1895 was sought

⁴⁹ *Ibid.*

⁵⁰ Available at https://www.academia.edu/1251655/Pena_on_Registration_of_Land_Titles_and_Deeds, (accessed on 15/04/2014)

⁵¹ R. Sittie, "Land Title Registration: The Ghanaian Experience," available at https://www.fig.net/pub/fig2006/papers/ps07/ps07_15_sittie_0848.pdf, (accessed on 15/04/2014).

⁵² H. Mungeam, *British Rule in Kenya, 1895-1912*, (Clarendon, Oxford, 1966), 7-ff.

⁵³ H.W.O. Okoth-Ogendo, *Tenants of the Crown: Evolution of Agrarian Law & Institutions in Kenya*, (ACTS

to achieve this objective, it was not sufficient to confer legal jurisdiction to alienate land. This is because by an opinion of the Law Officers of the Crown in 1833, protectorate status did not confer “radical title” to the land in the protected territory on the protecting power.⁵⁴ This meant that the colonial authorities had limited powers to deal with land within a ‘foreign territory.’

In 1899 the legal impediments of the 1833 opinion were overcome. The law officers informed the Foreign Office that the Foreign Jurisdiction Act 1890 gave Her Majesty a power of control and disposition over waste and unoccupied land in protectorates where there was no settled form of government and where land had not been appropriated either to the local sovereign or to individuals. In such cases, Her Majesty would declare such lands to be Crown lands or make grants of them to individuals in fee or for any term.⁵⁵ This was attained through the promulgation of the *East African Land Regulations of 1897*, which were used to alienate land from the natives to allocate to white settlers.⁵⁶

In 1897, the Commissioner for the Protectorate, using the *Land Acquisition Act of India* (1894)⁵⁷, which was extended to Kenya, appropriated all lands situated within one-mile on either side of the Kenya-Uganda railway for the construction of the railway. In addition, the Act was used to compulsorily acquire land for other ‘public purposes’ such as government buildings.⁵⁸

The application of the *Land Acquisition Act*, 1894 came with problems. According to Namita Wahi the ever-expanding definition of “public purpose” for which land could be forcibly acquired, the misuse of the “urgency” clause, massive displacement of poor peasants and traditional communities with inadequate or no compensation, and delays in completion of acquisition procedures, were principally responsible for the injustices caused by acquisition

Press, 1991), 11.

⁵⁴ *Ibid.*

⁵⁵ See Foreign Office Confidential Papers (FOCP) 7403 No.101, as quoted in Okoth-Ogendo (n1)11.

⁵⁶ *Ibid.*

⁵⁷ The Land Acquisition Act, 1894 (Act No. I of 1894).

⁵⁸ P. Syagga, “Public Land, Historical Land Injustices and the new Constitution,” available at <http://www.sidint.net/docs/WP9.pdf>, (accessed on 14/04/2014).

under the 1894 Act.⁵⁹ The Colonial Government could acquire land for any aim they deemed a “public purpose”. The Government apparently misused the urgency clause⁶⁰ under the 1894 Act for ordinary acquisitions, in order to bypass the procedures prescribed under the Act. By defining “persons interested” as those having an interest in the land, including tenancy and easement rights, as opposed to actual title, and “affected family” as those dependent on the land for their livelihood, the Act created conducive environment for dispossession of the native Kenyans of their land. The other problem with the 1894 Act related to the procedure involved in land acquisition. This was criticized by the government for delays in acquisition, and by the people, for their lack of participation in the government’s decision to take over their land, as well as delays in the determination and payment of compensation.⁶¹ This Act applied in Kenya until the year 1968 when Kenya finally enacted the *Land Acquisition Act*.⁶²

The first local land legislation was the East African (Lands) Order-in-Council, 1901. This Ordinance conferred on the Commissioner of the Protectorate power to dispose of all public lands on such terms and conditions as he might think fit, subject only to any directions which the colonial Secretary of State might give.⁶³ The Order-in-Council was later expanded and re-enacted in the form of the Crown Lands Ordinances of 1902 and 1915.

In 1902, the Crown Lands Ordinance was enacted and it provided for an expanded concept of crown lands than the 1901 Ordinance, as it conferred upon the protectorate administrator’s enormous powers with respect to what land they could lawfully dispose of within the protectorate.⁶⁴ The Ordinance met the demands of settlers who wanted secure title, including freeholds or long leases and not rights of occupancy. The Commissioner could sell freehold estates in land, but regard had to be had to the rights and requirements of the natives in dealing

⁵⁹ N. Wahi, ‘Compromise over land takeover’ The New Indian Express 11.09, 2013, available at <http://www.cmi.no/publications/publication/?5007=compromise-over-land-takeover> (accessed on 25/04/2014)

⁶⁰ Section 17, the Land Acquisition Act, 1894.

⁶¹ Wahi (n26).

⁶² Cap 295, Laws of Kenya.

⁶³ Okoth-Ogendo (n1), 12.

⁶⁴ *Ibid*, 14.

with crown land. However, natives' rights were merely occupancy rights and where land was no longer occupied, it could be sold or leased as if it were "waste and unoccupied land" and there was no requirement of seeking the consent of any tribal chief before disposition.

Both the 1902 and 1915 Ordinances defined "crown land" to mean and include "*all public lands within the East African Protectorate which for the time being are subject to the control of His Majesty's Protectorate, and all lands which have been or may hereafter be acquired by His Majesty under the Land Acquisition Act, 1894, or otherwise howsoever.*" Natives were never compensated for any land taken away through the above means of dispossession. The radical title to land shifted from the indigenous inhabitants to the imperial Government. This position was reaffirmed in 1915 by an opinion delivered by the then Chief Justice to the effect that whatever rights the indigenous inhabitants may have had to the land had been extinguished by the colonial legislation leaving them as mere tenants at the will of the crown of the land actually occupied.⁶⁵ The end result of this was that the natives were restricted to the native reserves. However, in 1938, radical title to land reserved for African occupation was severed from the colonial sovereign and transferred to a Trust Board, set out specifically for that purpose. Nevertheless, radical title to areas not so reserved, classified as 'Crown Lands,' remained in the colonial sovereign irrespective of the nature of the title granted to the landholders.⁶⁶

2.3.1 The Registration of Documents Ordinance, 1901

The *Registration of Documents Ordinance* came into effect in 1901. It was intended to create a register of documents in order to prevent fraudulent claims for compensation by squatters, mainly at the Coast, claiming to have been wrongly dispossessed by the Government.⁶⁷ Under this Act any document could be registered at the option of the owner, although at the time

⁶⁵ See *Isaka Wainaina and Anor vs. Murito wa Indagara and others* (1922-23) 9(2) KLR, 102.

⁶⁶ Government of Kenya, *Report on the Commission of Inquiry into Land Law Systems in Kenya on Principles of a National Land Policy Framework, Constitutional Position of Land and New Institutional Framework for Land Administration* (Government Printer Nairobi, 2002) p.39. The report is commonly referred to as the *Njonjo Commission report*.

⁶⁷ United Nations Information Centre for Human Settlement, *Land Information Services in Kenya* (UNHABITAT, 2001), p.6.

of its enactment the most important documents that were registered were grants of land from the Government. It was a simple system of registration for isolated transactions without any form of reference or tracking the registered transaction. The legislation was purely based on registration of deeds system, thereby effectively defeating any future claims of ownership by the locals. The legislation was critically defective in that it described land by reference to trees, valleys, rivers and springs.⁶⁸ This law is still in existence and has since been revised.⁶⁹ It is a law providing for the registration of a number of documents. All documents conferring, or purporting to confer, declare, limit or extinguish any right, title or interest, whether vested or contingent to, in or over immovable property (other than such documents as may be of a testamentary nature) and vakallas are to be registered as prescribed in the Act.⁷⁰ Any other document may be registered, at the option of the person holding the same provided that a registrar may refuse to register any such document, for reasons to be stated by him in writing.⁷¹

2.3.2 The Crown Lands Ordinance No. 21 of 1902

The Ordinance vested in the Commissioner of the Protectorate power to sell freeholds in crown land within the protectorate to any purchaser in lots not exceeding 1,000 acres (400 hectares). Any empty land or any land vacated by a native could be sold or rented to Europeans, and land had to be developed or else forfeited. The protectorate administration gave no cognizance to customary tenure systems, and by 1914 nearly 5 million acres (2 million hectares) of land had been taken away from Kenyan Africans.⁷²

⁶⁸ *Ibid.*

⁶⁹ Registration of Documents Act, Cap. 285 (Revised 2012).

⁷⁰ *Ibid*, Section 4.

⁷¹ *Ibid*, Section 5.

⁷² United Nations Information Centre for Human Settlement, *Land Information Services in Kenya* (2001), p.6.

2.3.3 The Land Titles Ordinance (1908)

This Ordinance was introduced into the country to address the shortcomings of the RDA. It was to deal with land registration at the coast.⁷³ At the time the ten-mile Coastal strip was owned by the Sultan of Zanzibar but subject to the rights of the inhabitants. As such there was uncertainty of individual titles and land rights had to be adjudicated to ascertain individual titles. Any land transaction by way of investments was not possible due to this uncertainty. There was thus a need for the introduction of a registration system.⁷⁴ An office of the Recorder of Titles was set up and a Land Titles Register. The Ordinance also established a Land Registration Court.⁷⁵ It required any private claimant (those with certificate of ownership issued by the Sultan) to register their interests within six calendar months. Those who registered their claims were issued with certificate of ownership, certificate of mortgage or certificate of leasehold depending on the interest established. Any unregistered land within the stipulated period was declared Crown land.⁷⁶ The Sultan was instead paid compensation. The same would be governed by the *Crown Lands Ordinance*, No. 21 of 1902. Radical title to land recognized as privately held under the Land Titles Ordinance was, apparently held by individuals identified under the legislation while the rest was appropriated to the sovereign.⁷⁷

The procedure adopted in the Land Titles Ordinance for adjudicating private rights was borrowed from Ceylon, while the office of Recorder of Titles was borrowed from Tasmania. It is important to note that the Land Titles Ordinance was a procedural law while the substantive law was to be found in the Indian Transfer Property Act (ITPA) and this also applied to the GLA. It is reported that the adjudication of claims under the 1908 Ordinance (was) the primary cause of landlessness by indigenous people in the ten-mile coastal.⁷⁸

⁷³ See generally K. Kanyinga, "Struggles of Access to land. The 'Squatter Question' in Coastal Kenya' Danish Institute for International Studies," *CDR Working Paper 98.7, June 1998*. See also M. Mghanga, *Usipoziba Ufa Utajenga Ukuta: Land, Elections, And Conflicts In Kenya's Coast Province*, (Heinrich BöllStiftung, 2010).

⁷⁴ P.L. Onalo, *Land Law and Conveyancing in Kenya*, (Law Africa), pp. 175-176.

⁷⁵ *Ibid.*

⁷⁶ Tom Ojienda, *Conveyancing Laws Principles and Practice* (Law Africa, 2008), p.22.

⁷⁷ *Njonjo Commission Report*, p. 39.

⁷⁸ *Ibid*, p. 22.

2.3.4 The Crown Land Ordinance, 1915

The 1902 Ordinance was repealed and replaced by the Crown Land Ordinance of 1915 that declared all land within the protectorate as Crown Land, whether or not such land was occupied by the natives or reserved for native occupation. The effect was that Africans became tenants of the Crown, with no more than temporary occupation rights to land.⁷⁹ The land reserved for use by the Africans could also at any time be expropriated and alienated to the settlers. The ordinance empowered the Commissioner of the Protectorate to grant land to the settlers for leases of up to 999 years. The impact of such legislation was dispossessing the native African owners of their inherent right to their land. The Commissioner could offer certificates of occupancy valid for 99 and 999 years to Europeans wishing to take up land at a consideration of pepper-corn. Due to the formality of the process as well as the Colonialists' desire to have the land engaged in economically productive activities, Africans never obtained the legal registration or titling of their land. The 1915 Ordinance adopted the registration model applied in the Land Titles Ordinance. It brought an advanced system of registration of deeds and the provision of accurate survey and deed plans.⁸⁰

When the country attained independence, the 1915 Ordinance became the Government Lands Act, Chapter 280 of the laws of Kenya. The registration under the GLA was a deed registration.⁸¹ This meant that the documents given were for mere proof of registration and not ownership of the piece of land so registered. Proof of title had to be done afresh. GLA was meant to make further and better provision for regulating the leasing and other disposal of Government lands, and for other purposes.⁸² The Act granted the President enormous powers regarding dealings with the Government land,⁸³ something that later exposed such land to major acts of

⁷⁹ *Ibid*, p.6.

⁸⁰ Onalo (n 41), 176.

⁸¹ Section 11, Government Lands Act, Cap. 280.

⁸² *Ibid*, Preamble.

⁸³ *Ibid*, Section 3.

corruption, with irregular allocation and titling of the same to private persons.⁸⁴ The GLA remained operational until the passing of the LRA although the records under the GLA are yet to be converted to the LRA.

2.3.5 The Registration of Titles Act, Cap 281

The *Registration of Titles Act*⁸⁵ (RTA) was first passed as an ordinance in 1919 to provide for the transfer of land by registration of titles.⁸⁶ It was the first to introduce a form of title registration in the country. It was based on the Torrens system of registration. Under the Act the following are registrable: freeholds, leaseholds, powers of attorney, wills, building plans, the area of any building let as a shop, office or flat and the architect's plan.⁸⁷ A registered proprietor was issued with a grant or certificate of title signed by the registrar and a copy thereof kept in the register. A separate register is kept for each property and any entry on the register was also entered on the original title. The RTA was also based on fixed survey boundaries reducing litigation in terms of boundary disputes. The system guaranteed security of tenure and a certificate issued by a registrar was taken as conclusive evidence of ownership and the government indemnified anyone suffering loss due to inaccuracy of the register.

Section 3 of the Act provided that the registration provisions of the Land Titles Act would cease to apply in respect of all lands comprised in any certificate of title (other than a certificate of interest) coming under the provisions of the Act, or issued by the Land Registration Court after the commencement of the Act. The Act provided that land which was alienated or agreed to be alienated in fee or for years by or on behalf of the Government before the commencement of the Act, and had been surveyed and land in respect of which a certificate of

⁸⁴See generally Government of Kenya, *Report on the Commission of Inquiry into Land Law Systems in Kenya on Principles of a National Land Policy Framework, Constitutional Position of Land and New Institutional Framework for Land Administration* (Government Printer Nairobi, 2002); See also Government of Kenya, Report of the Commission of Inquiry into the Illegal/Irregular allocation of public land, June 2004.

⁸⁵ 1920, Cap. 281, Laws of Kenya.

⁸⁶ *Ibid*, Preamble.

⁸⁷ P.L. Onalo, *Land Law and Conveyancing in Kenya*, (Law Africa), p.187.

title (other than a certificate of interest) had been issued by the Land Registration Court, could be brought under the operation of the Act on an application.⁸⁸

The Act also allowed the Registrar-General upon registering a certificate of title, endorsing and signing upon the last in date of the documents registered under the Registration of Documents Act, the Land Titles Act or the Government Lands Act to cancel and dispose of such prior title.⁸⁹ The Registrar-General was to keep a book, to be called the record book, in which a record of all deeds and documents produced and used in support of each application was kept.⁹⁰ However, when land had been brought under this Act, the register kept under the *Government Lands Act*, the *Land Titles Act* or the *Registration of Documents Act*, was to be closed so far as concerned that land, and there would be no further registration in respect thereof in those registers.⁹¹ A certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission would be taken courts as conclusive evidence that the person named therein is proprietor of the land. The proprietor had absolute and indefeasible title subject to the encumbrances; easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor would not be subject to challenge, except on the ground of fraud or misrepresentation to which he was proved to be a party.⁹² The registrar of each registration district was to keep a register, called the register of titles.⁹³ The Act declared that no instrument, until registered in the manner described, would be effectual to pass any land or any interest therein, or render the land liable as security for the payment of money.⁹⁴

While the procedural law was contained in the RTA, where there was a conversion, the GLA still applied especially in relation to matters that occurred before the property was

⁸⁸ Section 6, Registration of Titles Act, Cap. 21.

⁸⁹ *Ibid*, Section 16(1).

⁹⁰ *Ibid*, Section 18(1).

⁹¹ *Ibid*, Section 19(1).

⁹² *Ibid*, Section 23(1).

⁹³ *Ibid*, Section 25.

⁹⁴ *Ibid*, Section 32(1).

transferred to the RTA regime. The substantive law was still to be found in the ITPA. If the RTA and ITPA were silent on a given matter related to the land, the common law would be applied. The Act was associated with widespread landlessness, deterioration of the quality of land due to fragmentation, overstocking, soil erosion and the disintegration of social and cultural institutions in the reserves. The Register under the RTA has been transited into the LRA and shall be deemed to be a register under the Act.⁹⁵

2.4 Post-Independence Period

2.4.1 The Registered Land Act, Cap. 300

The Act sought to unify the different systems of land registration in Kenya. That is, land titles privately held under *Government Land Act*, *Land Title Act (LTA)* and *Registered Title Act (RTA)* were to be converted and transferred to new register in compliance with RLA. Secondly, it formalized African land tenure system through the processes of adjudication, consolidation and registration. It was also intended to register land owned by Africans in the native reserves which had gone through adjudication and consolidation process. In essence it sought to extinguish customary tenure and replace it with individual and exclusive rights in land.

Moreover, it was meant to be a comprehensive substantive and procedural law on land. Upon the first registration of any land under the Act, the ITPA would cease to apply to that land, except in relation to any dealing entered into before the date of first registration.⁹⁶ Unless the registers under the other Statutes are being converted, registration under the Act is preceded by adjudication process. A land certificate under the Act is only prima facie evidence of title, and if one has been issued it must be produced to the registrar on every change of ownership when it is destroyed by him and another one issued.⁹⁷ It gave absolute protection to the first registration of land, even if such registration may have been fraudulently obtained.⁹⁸ A first registration cannot be challenged in any court of law. This provision has caused irreparable damage to individuals,

⁹⁵Section 105, Land Registration Act, Act No.3 of 2012.

⁹⁶ Section 164, Registered Land Act, Cap. 300.

⁹⁷ *Ibid*, Section 33.

⁹⁸ *Ibid*, 143(1) & (5).

families and at times whole communities.⁹⁹ Moreover, it was impossible to challenge a first registration where the registered trustee proprietor is a trustee under section 126(1) of the Act which prohibits the entry of particulars of any trust in the register.¹⁰⁰

Despite it being passed in 1963 it continued to operate side by side with the other statutes often leading to duplicity of titles and fraudulent transactions. The RLA simplified the registration of title regime. However, it had its own challenges. First, administration costs for the registration system were quite high. This meant that registration and conversion of all registered land under other statutes would take much longer.¹⁰¹ Secondly, it led to emergence of boundary disputes due to the fact that titles could be issued under this Act with unfixed boundaries.¹⁰² Although, there is State insurance in case of loss arising from a reliance on the register, the RLA register only recorded the state of the register at the time of issuance of the title. Under the RTA, the register contained the history of the transactions affecting the land.¹⁰³ This meant that under the RTA there is more transparency in land registration compared to RLA.

The weakness of individual title was that it resulted in subdivision of small portions of land in various smaller fragments with poor control and regulations from government. This gave opportunity to *inter alia* corrupt land dealings. The system failed to correct the injustices of dispossessed land right owner's claim to land due to the legal assumption that the registered occupants of the adjudicated, registered and titled parcels of land were the true owners. In essence, therefore, the introduction of the colonial laws saw the birth of a duality of tenure systems in Kenya where there were systems of land tenure based on principles of English property law on the one hand and a largely neglected regime of customary property law on the other hand.¹⁰⁴

⁹⁹ Njonjo Commission Report, p.82. See decisions in *Sela Obiero v. Orego Opiyo & others* (High Court Civil Case No. 44 of 1970); *Gatimu Kinguru v. Muya Gathangi* [1976]KLR 265.

¹⁰⁰ *Ibid.*

¹⁰¹ Onalo (n41), 217.

¹⁰² Section 22(1), Registered Land Act, Cap. 300.

¹⁰³ *Ibid.*, Section 144.

¹⁰⁴ Republic of Kenya *Sessional Paper No. 3 of 2009 on National Land Policy* (Government Printers, Nairobi, 2009), p.8.

2.4.2 Land (Group Representatives) Act, Cap 287

This Act is still in force. This law was passed with an aim to provide for the incorporation of representatives of groups who had been recorded as owners of land under the *Land Adjudication Act*. It sought to address some of the challenges with the Registered Land Act. For example, it caters for the registration of group ranches where a group of people holding shared interests in a common grazing area would have their names entered into a register of members, constituting a Group Ranch.¹⁰⁵ They would then adopt a constitution and elect between three and ten people to serve as the group representatives. Those elected apply to the Registrar of Group Representatives for incorporation. They acquire the legal authority to hold title to the land and enter into transactions on behalf of its members. The group also elects a committee which is responsible for the day-to-day running of the ranch, including setting livestock quotas for each member.¹⁰⁶ The Act provided for appointment of a Registrar who would be charged with ensuring existence of a register called the register of group representatives, and to be entered in it all the matters required by this Act to be so entered.¹⁰⁷ Registration system under the Act has failed because of disregard of the views of local communities and the group representatives lacking the backing of traditional leaders. This has led to the disregard of group rules.¹⁰⁸

2.4.3 Trust Land Act, Cap 288.

Trust lands had come about as a result of the high level of landlessness and hopeless squatter situation resulting from the Crowns Land Ordinance and the Government Land Act towards 1930. The East African Royal Commission (1925) and the Carter Commission (1933) had recommended the creation of Trust Lands exclusively for the use of Africans as far as ownership was concerned, but the authority of use was still vested in the local authorities or

¹⁰⁵ C.N. Musembi & P. Kameri-Mbote P, "Mobility, Marginality and Tenure Transformation in Kenya: Explorations of Community Property Rights in Law and Practice," *Nomadic Peoples Vol. 17 (1), (2013)*, p.10.

¹⁰⁶ *Ibid.*

¹⁰⁷ Section 4(1), Land (Group Representatives) Act, Cap. 287.

¹⁰⁸ Kameri-Mbote *et al*, *Ours by Right: Law, Politics and Realities of Community Property in Kenya*, (Strathmore University Press, 2013), p.45.

county councils.¹⁰⁹ At independence, radical title to land occupied by Africans was also transferred to county councils who took the place of Trust Board, and the land was to be known as Trust Lands, governed by *Trust Land Act*, Cap. 288. The tenure regime applicable to trust lands should be the African customary law of local communities.¹¹⁰ However, under the trust land concept, county councils who are the trustees of Trust land have in many cases disposed of trust land irregularly and illegally to the detriment of local communities.¹¹¹ Disposition of trust lands to individuals and the government was sanctioned by sections 116 and 118 of the repealed Constitution.¹¹² Instead of African customary law applying to trust land, there was the emergence of a complex and multiple systems of tenure and registration regimes often leading to complex conveyancing practices, ineffective practices, duplicity of titles and fraudulent dealings.¹¹³ The Act is still in force although the pending Community Land Bill 2013 seeks to repeal it, if passed.

2.4.4 Land Consolidation Act, Cap. 283

This Act was enacted to provide for the ascertainment of rights and interests and for the consolidation of land in the former native lands; for registration of title to, and of transactions and devolutions affecting such land and other land in the native lands. The process of land adjudication is long and cumbersome, and at times entails abandonment of development on one's land. Consolidation requires the support of land owners, who must be made to understand the purpose and their previous interests over the land have to be balanced. They must not only be compensated in aggregate acreage, but also by allocation of land which is as fertile as the one relinquished.¹¹⁴

¹⁰⁹ G. O. Ogalo, 'GPS in Cadastres: A Case Study of Kenya,' available at https://www.fig.net/news/fig_2002/congress_prize_ogalo.pdf, (accessed on 27/04/2014).

¹¹⁰ Section 69, Trust Land Act, Cap. 288.

¹¹¹ Sessional Paper No. 3 (n1) 11-12.

¹¹² See also Section 13, Trust Land Act.

¹¹³ See for example, *Kinyanga and others v. Isiolo County Council and others* [2006] 1KLR (E and L) 229.

¹¹⁴ Onalo (n41), 50.

2.4.5 Land Adjudication Act, Cap. 284

This Act was enacted to provide for a system of land adjudication of titles in the trust lands where land consolidation was not necessary. The Minister for Lands and Settlement had discretion to determine when a particular area would be opportune for ascertainment of the rights and interests of the inhabitants with a view to registration of title. Process could begin with the recording of existing rights under ‘Record of Existing Rights.’ There would then be an exhaustive arbitration process after which an ‘Adjudication Register’ would be opened. As rights are adjudicated, the land is then demarcated. After adjudication and demarcation, titles could then be issued under the Registered Land Act.¹¹⁵

2.4.6 The Land Acquisition Act, Cap 295

This Act of Parliament was enacted to make provision for the compulsory acquisition of land for the public benefit. Where land was acquired compulsorily under the law, the Act required full compensation to be paid promptly to all persons interested in the land.¹¹⁶ The Commissioner of Lands was to appoint a date, not earlier than thirty days and not later than twelve months after the publication of the notice of intention to acquire land, for the holding of an inquiry for the hearing of claims to compensation by persons interested in the land to be so acquired.¹¹⁷ After such acquisition, the documents of title were to be delivered at the Registrar.¹¹⁸

Noteworthy is the fact that the genuineness of the title to land was not one of the factors to be considered in awarding compensation, which had the effect of creating loopholes for corrupt dealings as well as connivance for purposes of compensation.¹¹⁹ The Act was finally repealed by the Land Act 2012.

¹¹⁵ *Ibid.*

¹¹⁶ Section 8, Cap 295.

¹¹⁷ *Ibid.*, Section 9.

¹¹⁸ *Ibid.*, Section 20.

¹¹⁹ *Ibid.*, Schedule to the Act.

2.5 Redressing the Wrongs

In an attempt to address these problems, two Commissions of inquiry were set up by the Government. The first one, popularly known as the Njonjo Commission (*Commission of Inquiry into Land Law Systems in Kenya on Principles of a National Land Policy Framework, Constitutional Position of Land and New Institutional Framework for Land Administration*, 2002) was tasked with *inter alia* undertaking a broad review of land issues in Kenya and to recommend the main principles of a land policy framework which would foster an economically efficient, socially equitable and environmentally sustainable land tenure and land use system; and undertaking a legal analysis of the legal and institutional framework of land tenure and land use in Kenya and to recommend a programme or programmes of legislation that would give effect to such policies.

The second Commission was the Commission of Inquiry into the Illegal/Irregular allocation of public land (June 2004) (Ndungu Commission) which was tasked with examining in detail, the phenomenon of illegal and irregular allocation of public land in Kenya. They both came up their reports at the end of their work, which reports have been quoted herein. For instance, the Commission of Inquiry into the Illegal/Irregular allocation of public land found many instances in which trust land had been allocated contrary to the Constitution, the Trust Land Act and the Land Adjudication Act. County councils and the Commissioner of Lands apparently colluded to illegally allocate trust land to individuals and companies.¹²⁰ The Ndungu Commission indeed called for establishment of a Land Titles Tribunal to embark on the process of revoking and rectifying titles, due to the massive plunder of public land. It identified and recommended cancellation of two types of wrongfully issued titles namely: “illegal” titles and “irregular” titles. An illegal land title is one issued for a piece of land which is not legally available for allocation. Irregular land title, according to the Ndung’u Commission, was issued where an irregular allocation takes place where land that is legally available for allocation is allotted in circumstances where the requisite standard operating or administrative procedures have been flouted. The titles to such land were not void if all legal formalities have been complied with. Irregular titles could be rectified by undertaking the administrative steps which

¹²⁰Commission of Inquiry into the Illegal/Irregular allocation of public land (June 2004) (Ndungu Commission)

had not been previously observed. Thus, according to the Commission, irregular issuance of titles was mainly procedural. The main procedures for the issuance of titles were contained in the *Government Lands Act*. The Commission concluded that in all the above cases, the titles issued were illegal and void, and therefore incapable of conferring a right in the land in question. However, the Commission noted that the sanctity of title posed an exceptional challenge to the recovery and revocation of titles to land illegally acquired public land. It observed, “*this extreme notion of the sanctity of title has fuelled illegal and irregular allocations of public land in Kenya.*”¹²¹ Notably, both Reports called for harmonization of the land legislation in Kenya to streamline the issuance of titles and land management in Kenya.

2.5.1 Sessional Paper No 3 of 2009 on National Land Policy

In 2009, the Government of Kenya, through the Ministry of lands, developed a *Sessional Paper No 3 of 2009 on National Land Policy* in an attempt to address the problem of multiplicity of laws on land and title registration.¹²² The Policy pointed out that the existence of many statutes needed harmonization in order to ease the process of registration of land rights, facilitate easy and fast access to land registration information, enhance efficiency, transparency and accountability in land registration. It recommended that there was a need to enact one Act to harmonize the registration statutes.¹²³ The National Policy recognized that there was need to have one unified system that will simplify and provide one platform for registration of title in Kenya.

The Sessional Paper No. 3 of 2009 also recommended the formulation of a National Land Use Policy and provided broad principles and guidelines on land use management issues. It is noteworthy that this Policy was formulated before the passage of the current Constitution of Kenya 2010.

¹²¹ Report of the Ndung’u Commission, p.16.

¹²² *Ibid*, Chapter 2.

¹²³ *Ibid*, p. 37.

2.6 Post-Constitution of Kenya 2010 Period

2.6.1 The Constitution of Kenya, 2010

The Constitution of Kenya 2010 guarantees the protection of the right to property.¹²⁴ The State is prohibited from depriving a person of property of any description, or of any interest in, or right over property of any description.¹²⁵ Protection of the right to property would then require that land registration systems being efficient, transparent and accountable to prevent fraud in land registration. It provides for the principles of land policy which include *inter alia*: equitable access to land; security of land rights; sustainable and productive management of land resources; transparent and cost effective administration of land; sound conservation and protection of ecologically sensitive areas; elimination of gender discrimination in law, customs and practices related to land and property in land; and encouragement of communities to settle land disputes through recognised local community initiatives consistent with the Constitution.¹²⁶ The principles are to be implemented through a national land policy developed and reviewed regularly by the national government and through legislation.¹²⁷ All land in Kenya is vested on the people collectively as a nation, as communities and as individuals.¹²⁸ Land is thus classified as public, community or private.¹²⁹ A person who is not a citizen may hold land on the basis of leasehold tenure only, and any such lease must not exceed ninety-nine years.¹³⁰

The Constitution also establishes the National Land Commission which is mandated to: *inter alia*: to manage public land on behalf of the national and county governments; to recommend a national land policy to the national government; to advise the national government

¹²⁴ Article 40, Constitution of Kenya, 2010.

¹²⁵ *Ibid*, Article 40(3).

¹²⁶ *Ibid*, Article 60(1).

¹²⁷ *Ibid*, Article 60(2).

¹²⁸ *Ibid*, Article 61(1).

¹²⁹ *Ibid*, Article 61(2).

¹³⁰ *Ibid*, Article 65(1).

on a comprehensive programme for the registration of title in land throughout Kenya; and to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress; to encourage the application of traditional dispute resolution mechanisms in land conflicts.¹³¹

Parliament is mandated with the task of revising, consolidating and rationalizing existing land laws and revising sectoral land use laws in accordance with the principles set out in Article 60(1). It is also to enact legislation prescribing minimum and maximum land holding acreages in respect of private land; regulating conversion of land from one category to another; regulating the recognition and protection of matrimonial property; to protect, conserve and provide access to all public land; to enable the review of all grants or dispositions of public land to establish their propriety or legality; to protect the dependants of deceased persons holding interests in any land, including the interests of spouses in actual occupation of land; and to provide for any other matter necessary to give effect to the provisions of Chapter five of the Constitution.¹³² All the foregoing provisions are a step in the right direction in addressing the problems with land registration and titling in Kenya. It is noteworthy that the principles of land policy as well as the other constitutional provisions have already been put down in new land legislation. These include the Land Act 2012, Land Registration Act 2012 and National Land Commission Act.

2.6.2 Land Act, 2012

In order to deal with substantive matters of land law, the Land Act, 2012 was enacted and it sought to consolidate Kenya's substantive law, earlier found in different pieces of legislation namely the *Indian Transfer of Property Act 1882*, the *Government Lands Act* and the *Registered Land Act*. It repealed the *Wayleaves Act Cap 292* and the *Land Acquisition Act Cap 295*. It applies to public land, private land and parts of Community Land as Cabinet Secretary may specify. Forms of land tenure under the Act include freehold, leasehold, such forms of partial interest as defined by law including easements, and customary tenure where consistent with Constitution.¹³³ The Act provides for various types of land tenure.¹³⁴ Under the Act, title to land

¹³¹ *Ibid*, Article 67.

¹³² *Ibid*, Article 68.

¹³³ Section 5, Land Act 2012.

may be acquired through allocation, land adjudication process, compulsory acquisition, prescription, settlement programs, transmissions, transfers, long term leases exceeding 21 years created out of private land and any other method that may be prescribed by an Act of Parliament.¹³⁵ Further, the Act regulates conversion of land from one category to another. Public land may be converted to private land and vice versa. However, any significant transaction to convert public land to private land requires parliamentary and county approval as the case may be.¹³⁶

2.6.3 Land Registration Act, 2012¹³⁷

The Act seeks to revise, consolidate and rationalize the registration of titles to land, to give effect to the principles and objects of devolved government in land registration, and for connected purposes.¹³⁸ It applies to the registration of interests in public land as declared by Article 62 of the Constitution; all private land as declared in Article 64 of the Constitution and registration and recording of community interests in land.¹³⁹ The National Land Commission has powers to constitute an area or areas of land to be a land registration unit and may at any time vary the limits of any such units.¹⁴⁰ Every registration unit is to be divided into registration sections, identified by distinctive names, and may be further divided into blocks with distinctive numbers or letters or combinations of numbers and letters.¹⁴¹ Parcels in each registration section or block are to be numbered consecutively, and the name of the registration section, the number and letter of the block if any, and the number of the parcel together will be a sufficient reference

¹³⁴ *Ibid*, Section 7.

¹³⁵ *Ibid*.

¹³⁶ *Ibid*, Section 9(3).

¹³⁷ Act No. 3 of 2012.

¹³⁸ *Ibid*, Preamble to the Act.

¹³⁹ *Ibid*, Section 3.

¹⁴⁰ *Ibid*, Section 6(1).

¹⁴¹ *Ibid*, Section 6(2).

to any parcel.¹⁴² Land registration units are to be established at county level and at such other levels to ensure reasonable access to land administration and registration services.¹⁴³ In each registration unit a land registry is to be maintained in which a land register, cadastral map, parcel files, any plans, presentation book, an index and a register and a file of powers of attorney shall be kept.¹⁴⁴ Any Titles that were previously registered under the RLA, GLA, RTA or the LTA all of which were repealed by this new law are to be transited to the LRA.¹⁴⁵ The registration regime introduced under this Act does not deviate much from that under the Registration of Titles Act and Registered Land Act. In fact, most of the provisions in this Act are a copy and paste of the repealed laws. Land registration under the repealed laws has been riddled with numerous challenges as discussed above. One therefore, expects that the Land Registration Act will introduce a simple, efficient and transparent. This study argues that this is not the case.

The Fifth Schedule to the Constitution envisages that the law on public and private land be enacted within 18 months and that on community land within 5 years. As yet, the Community land law is not in place. What is there is only the Community Land Bill, 2013. Some scholars have argued that the decision to have the law on community land enacted separately from the Land Act and the Land Registration Act (2012) suggests that community land tenure is inferior to the other tenure systems.¹⁴⁶ It is also stated that references to community land in the Land Act, Land Registration Act and National Land Commission Act, without the content of community land in place is premature, and that such laws are not comprehensive in so far as they do not deal with community land.

2.7 Conclusion

This chapter has successfully traced the history of land registration in Kenya and identified the various challenges experienced under the application of the various statutes governing land registration and titling in Kenya. The introduction of the *Land Registration Act*

¹⁴² *Ibid*, Section 6(3).

¹⁴³ *Ibid*, Section 6(6).

¹⁴⁴ *Ibid*, Section 7(1).

¹⁴⁵ *Ibid*, Section 105.

¹⁴⁶ Musembi & Kameri-Mbote (n72), 23.

2012 as the single law to guide the registration of title to land in Kenya and to replace the various statutes like the *Land Titles Act* Cap 282 previously applicable to the land within the ten mile Coastal strip and the *Registration of Titles Act* Cap 281, earlier regulating properties surveyed under precise boundaries, the *Registered Land Act* Cap 300 formerly applicable to most rural properties surveyed under general boundaries and some few urban properties surveyed under the fixed boundary provisions of the Act, the *Indian Transfer of Property Act* 1882 and the *Government Lands Act* Cap 280, in Kenya has proved not to be as effective as was contemplated. Even after its introduction the weaknesses identified under the earlier regime on registration remain unresolved due to challenges in the implementation of the new law and other technical factors. Registration of title to land in Kenya earlier done and Title deeds issued under the former regime continue to be valid notwithstanding the new laws. The application of this law sought to achieve a uniform land registration system and issuance of titles under a uniform regime.

The next chapter looks at the *Land Registration Act 2012* with the aim of examining its effectiveness in achieving its objective of revising, consolidating and rationalizing the registration of titles to land, to give effect to the principles and objects of devolved government in land registration.

CHAPTER THREE
REGISTRATION OF TITLE TO LAND: A CRITIQUE OF THE LAND
REGISTRATION ACT 2012

3.0 Introduction

This chapter involves a critical analysis of the provisions of the *Land Registration Act 2012* (LRA) to assess whether it has achieved the goal of harmonization and consolidation of land registration regimes.¹⁴⁷ The Chapter also identifies any existing challenges in registration and loopholes in the law. As already pointed out in Chapter One, before the enactment of the Land Registration Act 2012 (LRA) the registration of title to land in Kenya was characterized by multiple statutes resulting in a complex registration regime whose consequences were complex conveyancing practices, ineffective practices, duplicity of titles and fraudulent dealings. This chapter will show that whereas the LRA may have succeeded in harmonizing registration statutes by recognizing the registers and titles under the repealed statutes, harmonization has not enhanced efficiency, transparency and accountability in land and title registration in Kenya.

3.1 The Land Registration Act, 2012- An Overview of the Provisions and Scope of Application of the Act

In an attempt to address the foregoing challenges, the LRA was enacted as a procedural law that deals with land registration. The Act applies to the registration of interests in all public land as declared by Article 62 of the Constitution; registration of interests in all private land as declared by Article 64 of the Constitution; and registration and recording of community interests in land.¹⁴⁸ However, the Act does not prohibit or otherwise affect the system of registration under any law relating to mining, petroleum, geo-thermal energy or any other rights over land and land-based resources in respect of public land.¹⁴⁹ The Act is to serve as the main land registration law in the country except as otherwise provided in the Act, no other written law, practice or procedure relating to land shall *apply to land registered or deemed to be registered* under it so

¹⁴⁷Act No. 3 of 2012, Laws of Kenya.

¹⁴⁸Sec. 3, Act No. 3 of 2012.

¹⁴⁹*Ibid*, Sec. 4.

far as it is inconsistent with this Act.¹⁵⁰ Section 109 of the Act states that the written laws set out in the Schedule are repealed, and these are: The *Indian Transfer of Property Act* 1882; The *Government Lands Act*, (Cap 280); The *Registration of Titles Act*, (Cap 281) The *Land Titles Act*, (Chapter 282); and the *Registered Land Act*, (Cap. 300).

Regarding organisation and administration of land registration in the country, the Act provides for the establishment of a Land Register, Land Registries and Offices.¹⁵¹ The Act provides for establishment of registration units by the National Land Commission in consultation with national and county governments.¹⁵² The land registration units are to be established at county level and at such other levels to ensure reasonable access to land administration and registration services.¹⁵³ In addition, in each registration unit a land registry is to be maintained which is to be guided by the principles of devolution set out in Articles 174 and 175 of the Constitution.¹⁵⁴ Whereas the establishment of the Land registration units is the mandate of the Commission, the appointment of the Chief Land Registrar and other Registrars is the mandate of the Public Service Commission. The Act further provides that the Cabinet Secretary shall make regulations for implementation of the Act. This has occasioned a conflict between the Commission and the Cabinet Secretary as shall be discussed later in this chapter.

It is also noteworthy that the Act states that subject to the legislation on community land made pursuant to Article 63 of the Constitution, there is to be maintained in each registration unit, a community land register in which shall be kept: a cadastral map showing the extent of the community land and identified areas of common interest; the name of the community identified in accordance with Article 63(1) of the Constitution and any other law relating to community land; a register of members of the community; the user of the land; the identity of those members

¹⁵⁰*Ibid*, Sec. 5.

¹⁵¹*Ibid*, Part II (Sections 6-23).

¹⁵²*Ibid*, Sec. 6.

¹⁵³*Ibid*, Sec. 6(6).

¹⁵⁴*Ibid*, Sec. 7.

registered as group representatives; the names and identity of the members of the group; and any other requirement as shall be required under the law relating to community land.¹⁵⁵

The Registrar is to issue a certificate of title or certificate of lease, and may not register any instrument purporting to dispose of rights or interest in community land except in accordance with the law relating to community land. The provisions in this section are not applicable to unregistered community land held in trust by county governments on behalf of communities under Article 63(3) of the Constitution.

The Registrar is to maintain the register and any document required to be kept under this Act in a secure, accessible and reliable format including: publications, or any matter written, expressed, or inscribed on any substance by means of letters, figures or marks, or by more than one of those means, that may be used for the purpose of recording that matter; electronic files; and an integrated land resource register.¹⁵⁶

Subject to the Constitution and any other law regarding freedom of and access to information, the Registrar must make information in the register accessible to the public by electronic means or any other means as the Chief Land Registrar may reasonably prescribe.¹⁵⁷ The Act provides that a register maintained under any of the repealed Acts shall, on the commencement of this Act, be deemed to be the land register for the corresponding registration unit established under this Act.¹⁵⁸

The Act also provides transitional provisions in relation to title documents. On the effective date,¹⁵⁹ if the title to land is comprised in a grant or certificate of title registered under

¹⁵⁵ *Ibid*, Sec. 8(1).

¹⁵⁶ *Ibid*, Sec. 9(1).

¹⁵⁷ *Ibid*, Sec. 10; See Article 35, Constitution of Kenya 2010.

¹⁵⁸ *Ibid*, Sec. 104(1).

¹⁵⁹ *Ibid*, Sec. 106(1) of the Act provides that on the effective date, the repealed Acts shall cease to apply to a parcel of land to which this Act applies. Further, subsection (2) thereof states that nothing in this Act shall affect the rights, liabilities and remedies of the parties under any mortgage, charge, memorandum of equitable mortgage, memorandum of charge by deposit of title or lease that, immediately before the registration under this Act of the land affected, was registered under any of the repealed Acts. Subsection (3) goes further to state that for the avoidance of doubt: (a) any rights, liabilities and remedies shall be exercisable and enforceable in accordance with the law that was applicable to the parcel immediately before the registration of the land under this Act; and (b) the memorandum of equitable mortgage or memorandum of charge by deposit of title may be discharged by the execution of a discharge in the form prescribed under the Act under which the memorandum was first registered.

the RLA, that grant or certificate of title shall be deemed to be a certificate of title or certificate of lease under the LRA.¹⁶⁰ The folio of the register of titles kept under the repealed Act shall be deemed to be the register under the Act. However, the Registrar may at any time prepare a register, showing all subsisting particulars contained in or endorsed on the folio of the register of titles and substitute such register for such folio and issue to the proprietor a certificate of title or certificate of lease, as the case may be, in the prescribed form. While this is lauded for ensuring continuity in land transactions, a challenge is posed by the fact that a time limit has not been provided on when all these registers shall be transitioned to the new Act. Without setting a time limit there is a possibility that all these registers shall operate side by side indefinitely.

If the title to the parcel is comprised in a grant or certificate of title registered under the repealed *Registration of Titles Act*, that grant or certificate of title shall be deemed to be a certificate of title or certificate of lease under the LRA. The folio of the register of titles kept under section 7 of the repealed *Registration of Titles Act* shall be deemed to be the register under the LRA.¹⁶¹ Where the title to the parcel is comprised in a register kept under the repealed *Government Lands Act* or the repealed *Land Titles Act*, the Registrar is required as soon as conveniently possible, to cause the title to be examined prepare a register showing all subsisting particulars affecting the parcel which are capable of registration under the Act, serve on the proprietor and on the proprietor of any lease or charge, a notice of intention to register and issue the proprietor, upon request, a certificate of title or certificate of lease in the prescribed form. Questions have arisen as to why the instruments held under the Land Titles Act and The Government Land Act are not accorded automatic conversion. This has posed a challenge on the holders of these instruments where the lending institutions have declined to accept them as security for loans.

The Act provides that the registration of a person as the proprietor of land is to vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto. Further, such registration shall vest in that person the leasehold interest

¹⁶⁰*Ibid*, section 105 (1) (a)

¹⁶¹*Ibid*, section 105 (b). Provided that the Registrar may at any time prepare a register, in the prescribed form, showing all subsisting particulars contained in or endorsed on the folio of the register of titles kept as aforesaid and substitute such register for such folio and issue to the proprietor a certificate of title or certificate of lease, as the case may be, in the prescribed form.

described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.¹⁶²

Under the Act, such rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in the Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject: to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; to such liabilities, rights and interests as affect the same and are declared by section 28¹⁶³ not to require noting on the register, unless the contrary is expressed in the register.

The Act states that every proprietor, at the time of acquiring any land, lease or charge, is deemed to have had notice of every entry in the register relating to the land, lease or charge and subsisting at the time of acquisition.¹⁶⁴

3.1.2 Certificate of Title or Lease

The Registrar may, if requested by a proprietor of land or a lease where no certificate of title or certificate of lease has been issued, issue to him or her a certificate of title or a certificate of lease, as the case may be, in the prescribed form showing, if so required by the proprietor, all subsisting entries in the register affecting that land or lease.¹⁶⁵

¹⁶²*Ibid*, Sec. 24.

¹⁶³*Ibid*, Sec. 28: Unless the contrary is expressed in the register, all registered land to be subject to the following overriding interests: spousal rights over matrimonial property; trusts including customary trusts ; rights of way, rights of water and profits subsisting at the time of first registration under this Act; natural rights of light, air, water and support; rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law; leases or agreements for leases for a term not exceeding two years, periodic tenancies and indeterminate tenancies; charges for unpaid rates and other funds which, without reference to registration under this Act, are expressly declared by any written law to be a charge upon land; rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription; electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any written law; and any other rights provided under any written law.

¹⁶⁴*Ibid*, Sec. 29.

¹⁶⁵*Ibid*, Sec. 30(1).

However, it is only one certificate of title or certificate of lease that is to be issued in respect of each parcel or lease. Further, no certificate of title or certificate of lease is to be issued unless the lease is for a certain period exceeding twenty-five years. The certificate of title or certificate of lease issued pursuant to the provisions of the Act is prima facie evidence of the matters shown in the certificate, and the land or lease must be subject to all entries in the register. Where there are more than one proprietor, unless they are tenants in common, the proprietors are to agree among themselves on who among them is to receive the certificate of title or the certificate of lease. If they fail to agree, the certificate of title or the certificate of lease must be filed in the registry. The date of issue of a certificate of title or certificate of lease must be noted in the register.

Also noteworthy are the provisions that if a certificate of title or a certificate of lease has been issued, then, unless it is filed in the registry or the Registrar dispenses with its production, it must be produced on the registration of any dealing with the land or lease to which it relates, and, if the certificate of title or the certificate of lease shows all subsisting entries in the register, a note of the registration shall be made on the certificate of title or the certificate of lease.¹⁶⁶ Where the disposition is a transfer, the certificate must, when produced, be cancelled, and in that case, a new certificate may be issued to the new proprietor, and where the disposition is a charge, the certificate must be delivered to the chargee.

Regarding lost or destroyed certificates and registers, section 33(1) of the Act provides that where a certificate of title or certificate of lease is lost or destroyed, the proprietor may apply to the Registrar for the issuance of a duplicate certificate of title or certificate of lease, and must produce evidence to satisfy the Registrar of the loss or destruction of the previous certificate of title or certificate of lease.

According to section 35(1), every document purporting to be signed by a Registrar shall be presumed to have been so signed in all proceedings, unless the contrary is proved. Further, every copy of or extract from a document certified by the Registrar to be a true copy or extract is to be received as prima facie evidence of the contents of the document in all proceedings.

¹⁶⁶*Ibid*, Sec. 31(1).

With regard to dispositions and dealings affecting land, the Act provides that a lease, charge or interest in land shall not be disposed of or dealt with except in accordance with the Act, and any attempt to dispose of any lease, charge or interest in land otherwise than in accordance with the Act or any other law, shall not, extinguish, transfer, vary or affect any right or interest in that land, or in the land, lease or charge.¹⁶⁷

Regarding registration of leases, section 54(1) of the Act provides that upon the registration of a lease containing an agreement, express or implied, by the lessee that the lessee shall not transfer, sub-let, charge or part with possession of any of the leased land leased without the written consent of the lessor, the agreement shall be noted in the register of the lease, and no dealing with the lease shall be registered until the consent of the lessor, verified in accordance with this Act has been produced to the Registrar. Further, the Act provides that if a lease contains a condition, express or implied, by the lessee that the lessee shall not transfer, sub-let, charge or charge or part with the possession of the land leased or any part of it without the written consent of the lessor, and the dealings with the lease shall not be registered unless: the consent of the lessor has been produced to, and authenticated to the satisfaction of the Registrar and the Registrar shall not register any instrument purporting to transfer or create any interest in that land, and a land rent clearance certificate and the consent to the lease, certifying that no rent is owing to the Commission in respect of the land, or that the land is freehold, has been produced to the Registrar.¹⁶⁸

Regarding charges, the Act states that a proprietor may by an instrument, in the prescribed form, charge any land or lease to secure the payment of an existing, future or a contingent debt, other money or money's worth, or the fulfillment of a condition and, unless the charge's remedies have been by instrument, expressly excluded, the instrument shall, contain a special acknowledgement that the chargor understands the effect of that section, and the acknowledgement shall be signed by the chargor or, where the chargor is a corporation, the persons attesting the affixation of the common seal. Such a charge shall be completed by its

¹⁶⁷*Ibid*, Sec. 36(1).

¹⁶⁸*Ibid*, Sec. 55.

registration as an encumbrance and the registration of the person in whose favour it is created as its proprietor and by filing the instrument.¹⁶⁹

The Act also provides that the court may make an order (referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, or generally until a further order, the registration of any dealing with any land, lease or charge.¹⁷⁰ So long as an inhibition remains registered, any instrument that is inconsistent with the inhibition cannot not be registered.¹⁷¹

The Act allows a person who: claims the right, whether contractual or otherwise, to obtain an interest in any land, lease or charge, capable of creation by an instrument registrable under the Act; is entitled to a licence; or has presented a bankruptcy petition against the proprietor of any registered land, lease or charge, to lodge a caution with the Registrar forbidding the registration of dispositions of the land, lease or charge concerned and the making of entries affecting the land lease or charge.¹⁷² Such a caution may either: forbid the registration of dispositions and the making of entries; or forbid the registration of dispositions and the making of entries to the extent expressed in the caution.¹⁷³ However, the Registrar must give notice, in writing, of a caution to the proprietor whose land, lease or charge is affected by the caution.¹⁷⁴

For the prevention of any fraud or improper dealing or for any other sufficient cause, the Act provides that the Registrar may, either with or without the application of any person interested in the land, lease or charge, and after directing such inquiries to be made and notices to be served and hearing such persons as the Registrar considers fit, make an order (hereinafter referred to as a restriction) prohibiting or restricting dealings with any particular land, lease or charge.¹⁷⁵

¹⁶⁹*Ibid*, Sec. 56.

¹⁷⁰*Ibid*, Sec. 68(1).

¹⁷¹*Ibid*, Sec. 69.

¹⁷²*Ibid*, Sec. 71(1).

¹⁷³*Ibid*, Sec. 71(2).

¹⁷⁴*Ibid*, Sec. 72(1).

¹⁷⁵ Sec. 76(1).

The Act empowers the Registrar to rectify the register or any instrument presented for registration in the following cases: in formal matters and in the case of errors or omissions not materially affecting the interests of any proprietor; in any case and at any time with the consent of all affected parties; or if upon resurvey, a dimension or area shown in the register is found to be incorrect, in such case the Registrar shall first give notice in writing to all persons with an interest in the rectification of the parcel.¹⁷⁶ Further, the Act provides that notwithstanding subsection (1), the Registrar may rectify or direct the rectification of a register or document where the document in question has been obtained by fraud.¹⁷⁷

Such rectification may be by order of Court, whereby subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.¹⁷⁸ However, the register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.¹⁷⁹

The Environment and Land Court established by the *Environment and Land Court Act, 2011*¹⁸⁰ has jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act.¹⁸¹

Under the Act, a person who, *inter alia*, fraudulently procures: the registration or issue of any certificate of ownership, or any other document or instrument relating to the land; the making of an entry or the endorsement of a matter on a document or instrument referred to in subparagraph (i); or the cancellation or amendment of the documents, instruments, entries or

¹⁷⁶ Sec. 79(1).

¹⁷⁷ Sec. 79(2).

¹⁷⁸ Sec. 80(1).

¹⁷⁹ Sec. 80(2).

¹⁸⁰ No. 19 of 2011.

¹⁸¹ Sec. 101.

endorsements referred to in this paragraph, commits an offence and is liable on conviction to a fine not exceeding five million shillings or imprisonment for a term not exceeding five years or to both such fine and imprisonment.¹⁸²

3.2 Challenges Facing Implementation of the Land Registration Act, 2012

There are generally three main components that are essential for good land administration and these include: Framework of land and real property laws that regulate the rights promoting transparency and trust; Effective Public Institutions responsible for effective procedures and processes; and Information systems that delivers quality information, generally accessible and guaranteed by the state.¹⁸³

Going by the provisions of sections 104-108 of the LRA on transition of title documents registered under the repealed laws, it is arguable that this statute has not laid out clear cut guidelines about transition from the repealed laws. The title deeds previously issued under RLA, RTA, LTA or GLA are to be treated slightly differently under the current regime. It is noteworthy that while any title document issued under RLA and RTA continue to be valid,¹⁸⁴ titles issued under LTA and GLA have to be examined and registered afresh under the new laws, as soon as conveniently possible.¹⁸⁵ It is important to note that one of the functions of the National Land Commission as envisaged under Article 67(2)(e)¹⁸⁶ of the Constitution of Kenya 2010 is to initiate investigations, on its own initiative or on complaint, into present or historical injustices, and recommend appropriate redress. The Constitution does not specify whether such injustices (which presumably would include obtaining land through fraud, misrepresentation or other corrupt ways) concern private, public or community land. It is therefore a matter of concern for the LRA to assume that all private land (or essentially land held under RLA and RTA) was obtained and registered legally, unlike any land held under LTA and

¹⁸² Sec. 103(1).

¹⁸³ See Bo Lauri, 'The Swedish Land Information System as means for trust and efficiency for citizens and business', 2010. Available at <http://www.unece.org/fileadmin/DAM/hlm/wpla/workshops/baku2010/lauri.sweden.pdf> [Accessed on 7/08/2014].

¹⁸⁴ Sec. 105(1) (a) (b).

¹⁸⁵ Sec. 105(1) (c).

¹⁸⁶ See also sec. 5(1) (e), National Land Commission Act, No. 5 of 2012, Laws of Kenya.

GLA, whose documents must be subjected to examination to establish their validity before fresh registration. It is yet to be seen how this will play out in light of the fact that a certificate of title issued under section 26(1) is prima facie evidence that the land owner is the absolute and indefeasible owner.

The question that lingers is whether titles under RLA and RTA are exempted. The implication is that holders of title documents under the RLA and RTA are to benefit from automatic conversion by operation of law. The LRA is not very clear on how the transactions carried out before the title deeds are examined and registered afresh would be treated. Section 107(1) of the Act states that unless the contrary is specifically provided for in the Act, any right, interest, title, power, or obligation acquired, accrued, established, coming into force or exercisable before the commencement of the Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act. Further, subsection (2) thereof is to the effect that unless the contrary is specifically provided for in the Act or the circumstances are such that the contrary must be presumed to be the case, where any step has been taken to create, acquire, assign, transfer, or otherwise execute a disposition, any such transaction shall be continued in accordance with the law applicable to it immediately prior to the commencement of this Act. Section 107(4) of LRA states that an instrument executed before the commencement of this Act whereby any disposition permitted under this Act is completed may be presented for registration in the prescribed register and" (a) the question whether any instrument so presented is to be registered shall be determined by the Registrar by reference to the law in force at the time of its execution; and (b) subject to the provisions of paragraph (a), the provisions of this Act shall apply to that instrument as if it had been executed after the commencement of this Act. This is especially in the face of section 5 thereof which states that except as otherwise provided in the Act, no other written law, practice or procedure relating to land shall apply to land registered or *deemed to be registered under this Act* so far as it is inconsistent with this Act.

Noteworthy is the assertion that transitional provisions and savings clauses are supposed to make it possible for a law to take effect with minimal disruption of services and confusion regarding liabilities. Lack of adequate savings or transitional provisions in a law can result in confusion and delay in implementation, generate litigation, and/or cause reversion to the status

quo. It has also been argued that by preserving too much from the previous legal regime, such clauses can also cause confusion and overlap, and limit the reach of the new law(s).¹⁸⁷

Also important to this scenario is section 36(1) thereof which states that a lease, charge or interest in land shall not be disposed of or dealt with except in accordance with this Act, and any attempt to dispose of any lease, charge or interest in land otherwise than in accordance with this Act or any other law, shall not, extinguish, transfer, vary or affect any right or interest in that land, or in the land, lease or charge. Subsection (2) thereof goes further to state that nothing in this section shall be construed as preventing any *unregistered instrument* from operating as a contract. The discretionary powers given to the Registrars to determine whether to register the same with reference to the law in force at the time of execution, or to register the document as if it had been executed after the commencement of the LRA are likely to be abused, thus enabling persons holding such documents of title to engage in corrupt dealings thereby propagating the very evils that LRA sought to eliminate even as they purportedly wait for fresh examination and fresh registration. Discrimination in exercise of such discretionary powers cannot be completely ruled out. It is uncertain how the Government will deal with such inconsistencies and improper land practices under the new regime and eventuality or effect of any such dealings especially with section 53¹⁸⁸ of LRA in mind.

3.2.1 Land Information Systems

It is to be recalled that one of the challenges facing the former land registration regime was the multiplicity of registers that were uncoordinated. Although the LRA contemplates a situation where the land registers will be digitalized,¹⁸⁹ it is still an uphill task considering that the registers based on the repealed laws' regime still exist and it is also not clear, at least practically,

¹⁸⁷ USAID Kenya, 'Analysis of Kenya's Land Act, Land Registration Act, and National Land Commission Act of 2012: Kenya's Secure Project,' (USAID-Kenya, 2012), p.18.

¹⁸⁸ Section 53(1)-If a person acquires or receives land in respect of which the court could make an order for restoration or for the payment of reasonable compensation, the court shall not make that order against that person if that person proves that the land was— (a) acquired or received in good faith and without knowledge of the fact that it has been the subject of a disposition to which this part applies, or (b) acquired or received through a person who acquired or received it in the circumstances set out in paragraph (a). (2) Reference to knowledge in this section shall include actual, constructive and imputed knowledge.

¹⁸⁹ Sec 9.

the time up to which they are to be referred to.¹⁹⁰ Computerization of land records is supposed to achieve *inter alia*: Providing computerized copies of the Record of Rights(ROR) to the Land owners at nominal rates on demand; Ensuring speed, accuracy, transparency and dispute resolution; Information empowerment of land owners; Providing fast and efficient retrieval of information for decision making; Achieving low cost and easily reproducible basic land record data for reliable and durable preservation; Value addition and modernization in Land Administration.¹⁹¹ As long as the RLA has not provided for timelines within which this should be done, the problems of the former regime are bound to continue.

It has been noted that volumes of land related information exist and continue being generated in Kenya, with large volumes of the same being generated at the grassroots level.¹⁹²

It is certainly clear that the previous situation where the various laws relating to land registration (and thus numerous registers) made it hard for the lay person and even lawyers to efficiently access the legal information relating to land registration in particular and land administration in general is yet to be overcome owing to the uncertainty surrounding the time within which consolidation of the registers on land registration under the LRA will be accomplished.

Moreover, the fact that the Act in section 8(1) seems to provide for a community land register in respect of community land, may lead to the illegal registration of community land. This is because the law relating to community land as envisaged in the Constitution is yet to be enacted meaning that the Land (Group Representatives) Act and Trust Land Act continues to apply to community land. This creates a scenario whereby community land will continue to be allocated to private individuals since the substantive law on community land is yet to be enacted. The creation of a community land register in Section 8(1) of the LRA is thus suspect and may

¹⁹⁰ Section 36(4) of LRA states that subject to Article 67(2)(c) of the Constitution, the Cabinet Secretary shall make regulations prescribing the time within which instruments presented for registration must be registered and providing for the supervision of the registration process to achieve the objectives of efficiency, transparency and good governance. Article 67(2)(c) provides that one of the functions of the National Land Commission shall be to advise the national government on a comprehensive programme for the registration of title in land throughout Kenya. It is however important to state that as at the writing of this thesis, these regulations are not yet in place.

¹⁹¹ 'Computerization of Land Records', Government of India, Ministry of Rural Development, Department of Land Resources, New Delhi, India.

¹⁹² United Nations Centre for Human Settlements, 'Land Information Service in Kenya,' (UN-HABITAT, Nairobi, 2001).

continue the multiplicity of land registers to the detriment of community land. One can reasonably argue therefore that the Act does not proffer simplicity, security and efficiency in the registration of rights and interests in land. The Act therefore perpetuates confusion and ambiguity that has bedeviled land registration systems in Kenya leading to fraud, bribery and insecurity of land tenure systems.

3.2.2 Boundaries and Maps in the Land Reform Programmes

The Registered Land Act, Cap 300 provided for the preparation of a registry index map in which all pieces of land were to be shown and numbered. Each piece of land had to have a parcel card showing details of size, ownership and encumbrances.¹⁹³

It is to be noted that the 2002 Njonjo Commission Report¹⁹⁴ in its recommendations called for land reforms so as to address historical injustices in the country.

Section 8(1) of LRA states that subject to the legislation on community land made pursuant to Article 63 of the Constitution, there shall be maintained in each registration unit, a community land register in which shall be kept *inter alia*: a cadastral map showing the extent of the community land and identified areas of common interest; and the name of the community identified in accordance with Article 63(1)¹⁹⁵ of the Constitution and any other law relating to community land.

It has been documented that over the years, conflict and competing claims over land have led to the internal displacement of many Kenyan citizens, with displaced communities occupying territory and working land for which they have no title deeds, but which they have come to consider their own.¹⁹⁶ There are also instances where pastoralist communities have clashed on

¹⁹³ SS 10 & 11, Cap 300, Laws of Kenya.

¹⁹⁴ Report of the Commission of Inquiry into the Land Law System of Kenya on Principles of a National Land Policy Framework, Constitutional Position of Land and New Institutional Framework for Land Administration (Njonjo Report).

¹⁹⁵ Article 63(1), “Community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest.”

¹⁹⁶ Kenya, ‘An Alternative Report to the UN Committee on Economic, Social and Cultural Rights’, *The Lie of the Land: Addressing the Economic, Social and Cultural Root Causes of Torture and Other Forms of Violence in Kenya*. Prepared by the World Organisation Against Torture, the Centre for Minority Rights Development and the International Commission of Jurists Kenya in the Context of “Preventing Torture and Other Forms of Violence by Acting on their Economic, Social and Cultural Root Causes”. Switzerland, 2008.

grounds of “encroachment by outsiders into their territory”. This is a recipe for violence especially where some group of people have largely lived with others in an area as to qualify being classified as a community at least in terms of ‘common interest’. The LRA, to this extent is not very useful in addressing the imminent issues of community land registration considering that the issue goes beyond community land registration and touches on the issue of ‘historical land injustice’.

3.2.3 Overlap of Powers

It has been rightly argued that one of the greatest challenges to effective transition lies in the application of powers and functions vested in the Commission under the National Land Commission Act and the Land Act against those vested in the Cabinet Secretary.¹⁹⁷

Drafters of the national land policy conceptualized a reasonably independent National Land Commission with, among others, powers to establish and maintain a register of all public, private and community land in Kenya. The residual Ministry of Lands was to be left in charge of political leadership, policy formulation, resource mobilization and monitoring. Technical service delivery was to be under the National Land Commission.¹⁹⁸ However, the final text of the laws did not provide for this. Many technical service delivery functions, including the maintenance of the land register, hence the land registries, have been vested in the Cabinet Secretary. Besides overseeing the land registries, the Ministry also retained the broad functions of surveying and planning. The Commission will therefore only manage public land and is also charged with the duties of settlement of persons earlier undertaken by the Lands Ministry through the Department of Land Adjudication and Settlement.¹⁹⁹

This “blurred” separation of powers is seen as one posing the greatest threat to an effective transition to the envisaged new institutional arrangement in Kenya’s land

¹⁹⁷ Mwachane, ‘Kenya’s Land Reforms On Course: New Land Laws Now In Place’, 3rd July 2012, page 4. Available at <http://ibrahimmwachane.com/index.php/frontpage/entry/kenyas-land-reforms-on-course-new-land-laws-now-in-place?format=pdf> [Accessed on 13/08/2014].

¹⁹⁸ Ibid.

¹⁹⁹ Ibid.

administration system.²⁰⁰ This has led to the application to the Supreme Court by the Commission for an advisory opinion on their mandate.²⁰¹

3.2.4 Role of the Court/Conflicting provisions

Land and Environmental Courts are special courts which hear cases that relate to various issues touching on environment and land, including property registration and planning. The *Environment and Land Court Act, 2011*²⁰² was passed in 2011 with the aim of giving effect to Article 162(2) (b) of the Constitution; to establish a superior court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land, and to make provision for its jurisdiction functions and powers, and for connected purposes.²⁰³ It took the place of the Land and Environment Law Division of the High Court which had been established administratively by the Chief Justice.

Section 101 of LRA provides that the Environment and Land Court has jurisdiction to hear and determine disputes, actions and proceedings concerning land thereunder.

The 2002 Njonjo Commission Report²⁰⁴, in its public hearings noted a number of issues raised by the general public on the need for change in land administration. One of the issues that came across as a challenge to land registration systems was that section 143(1) of the now repealed *Registered Land Act*, Cap 300 had been abused to deprive people of their property.²⁰⁵ This provision was to the effect that Subject to subsection (2) thereof, the court had the power to order rectification of the register by directing that any registration be cancelled or amended where it was satisfied that any registration (other than a first registration) had been obtained, made or omitted by fraud or mistake. However, subsection (2) provided that the register could

²⁰⁰ Ibid.

²⁰¹ Advisory Opinion No.2 of 2014 An application by The National Land Commission for an Advisory Opinion Under Article 163(6) of the Constitution of Kenya.

²⁰² No. 19 of 2011, Laws of Kenya.

²⁰³ Preamble.

²⁰⁴ Report of the Commission of Inquiry into the Land Law System of Kenya on Principles of a National Land Policy Framework, Constitutional Position of Land and New Institutional Framework for Land Administration (Njonjo Report)

²⁰⁵ Njonjo Report, p.144.

not be rectified so as to affect the title of a proprietor who was in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification was being sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default. This provision, it was argued, promoted illegal and irregular allocation of land. The provision was retained under section 80 of the LRA 2012 with the same wording. This may be construed as an attempt to uphold sanctity of title.²⁰⁶ It is not very clear from the Act how this will be handled since section 79(1) of LRA provides that the Registrar may rectify the register or any instrument presented for registration in the following cases: in formal matters and in the case of errors or omissions not materially affecting the interests of any proprietor; in any case and at any time with the consent of all affected parties; or if upon resurvey, a dimension or area shown in the register is found to be incorrect, in such case the Registrar shall first give notice in writing to all persons with an interest in the rectification of the parcel. Subsection (2) thereof goes on to state that notwithstanding subsection (1), the Registrar may rectify or direct the rectification of a register or document where the document in question has been obtained by fraud.

Under LRA, the National Land Commission (NLC) may by regulations prescribe the guidelines that the Registrar shall follow before rectifying or directing rectification under subsection (2) and without prejudice to the generality of the foregoing, the regulations may provide for—the process of investigation including notification of affected parties; hearing of the matters raised; and the criteria to be followed in coming up with the decision.²⁰⁷

One of the functions of the NLC as contemplated under Article 67 of the Constitution of Kenya 2010 and the National Land Commission Act is to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress.²⁰⁸

The above provisions raise a number of issues. Who has the ultimate power to order cancellation of a title, or rectification of a register? Is it the Registrar, the Court or following the

²⁰⁶ Sections. 24, 25, 26, Land Registration Act.

²⁰⁷ Sec. 79(4).

²⁰⁸ Article 67(2) (e), Constitution of Kenya 2010.

recommendations of the NLC, especially considering that the role of the NLC in land administration matters has been relegated to an advisory one? What happens to the so called historical injustices where there are 'genuine' cases of irregular allocation of land especially ones falling under section 80(2) of RLA?²⁰⁹ If the Court decides to exercise its powers under section 80(1) of LRA, can one rely on the Registrar to overrule the Court's decision and exercise their powers under section 79? In another scenario, what would happen if one is dissatisfied with the decision of the Registrar and rushes to Court invoking section 86(1) of LRA which is to the effect that if any question arises with regard to the exercise of any power or the performance of any duty conferred or imposed on the Registrar by this Act, the Registrar or any aggrieved person shall state a case for the opinion of the Court, and thereupon the Court shall give its opinion, which shall be binding upon the parties. Is the Environment and Land Court's jurisdiction in land matters inherent and absolute?

Elsewhere, it has been argued that the courts have mistakenly imported traditional general land law principles into the title registration statutes. Another has complained that the unwarranted importation of these principles has created uncertainty and complexities in a system designed to provide predictability and simplicity and which is still capable of doing so if only the courts would give a fair reading to the words of the statutes and not insist on subjecting the statutes to general law principles.²¹⁰ These very issues are among those sought to be addressed by harmonising.

3.2.5 Registration of Customary Land Rights

The Njonjo Commission Report, in relation to land ownership, recommended that where possible, communal titles to land held under customary law should be encouraged. Further, the Report also recommended that Coast land ownership problems should be investigated and resolved in accordance with traditional land practices.²¹¹ It is noteworthy that Article 63(1) of the

²⁰⁹ A case in hand is the Athi River District land allocation which was investigated and documented in the *Report of the Task Force on Irregular Appropriation of Public Land and the Squatter Problem in Athi River District*, November, 2011.

²¹⁰ M. Park, *et al.*, 'Orchestrating a harmonious system' *Victorian Law Institute Journal*, vol 83(5) (2009), pp 50-53.

²¹¹ Njonjo Report, 2002, page 149.

Constitution of Kenya 2010 recognises community land. The LRA 2012 also recognises customary land ownership and provides that one of the overriding interests affecting registered land is trusts including customary trusts. Section 28 of the LRA states that unless the contrary is expressed in the register, all registered land is to be subject to any overriding interests such as *inter alia* trusts including customary trusts. The effect of this on the legal regime in Kenya may create tension between customary land law rights as against individual land rights over the same piece of land. There may arise confusion in an attempt to identify such customary trusts considering that their particulars are not to be entered in the register.²¹² It is therefore arguable that it not easy to ascertain the same as resort would have to be made to the particular customary law under which the trust exists. This propagates the same problem as one under the repealed Registered Land Act which provided under section 11 (3) that for the purposes of this Act, a right of occupation under African customary law recorded in the adjudication register shall be deemed to be a tenancy from year to year. This created insecurity in customary land tenure. This is especially so considering that customary law is by nature “procedural” and not codified. It does not define each person’s rights, but the procedures by which access to resources is obtained.²¹³

This new regime under the LRA is thus clearly unable to separate customary law from land ownership and address the challenges therein. Indeed, this is further evident from the provisions of section 93(1) of LRA which is to the effect that subject to the law on matrimonial property, if a spouse obtains land for the co-ownership and use of both spouses or, all the spouses—there shall be a presumption that the spouses shall hold the land as joint tenants unless *inter alia* a provision in the certificate of ownership or the certificate of customary ownership clearly states that one spouse is taking the land in, his or her own name only, or that the spouses are taking the land as joint tenants, and the Registrar shall register the spouses as joint tenants.

²¹² Sec. 66, LRA.

²¹³ P. L. Delville, ‘Harmonising Formal Law and Customary Land Rights in French-Speaking West Africa,’ available at <http://pubs.iied.org/pdfs/7405IIED.pdf> [Accessed on 28/09/2014].

3.3 Conclusion

The Land Registration Act of 2012 which sought to harmonize all the previous land registration statutes has arguably failed to offer a solution to simplicity, security and efficiency of rights and interests in land. There is therefore a need to come up with proposals of making the registration system simple, secure and efficient so as to ensure that it achieves the registration of land objectives as envisaged in the Constitution. Chapter 4 looks at best practices from other jurisdictions on ways of making of land registration regime simple, secure and efficient.

CHAPTER FOUR

4.0 COMPARATIVE STUDY ON MODELS OF CADASTRE AND LAND REGISTRATION

4.1 Introduction

This chapter explores best practices in land registration as far as simplicity, security and efficiency is concerned. The study uses Ontario and Austria as case studies as they have enacted and applied legislation providing for a simple, secure and efficient registration regime. The two case studies provide useful lessons worth considering and applying as benchmarks for Kenya. Ontario has been selected because it was the first jurisdiction in the world to provide electronic registration and secondly, because the Ontario Land Registry Offices currently operate successfully under two systems: the Registry system and the Land Titles system. This presents a study worth considering observing that despite the dualism of the land system, Ontario successfully digitalized their registry. Austria has been used as it has successfully implemented e-governance of its land administration infrastructure, and may thus offer useful lessons in digitizing the land registry records in Kenya. Consequently, this chapter is useful for purposes of identifying the best practices from the select comparative countries and particularly their core cadastral components.

4.2 The Austrian Model of Cadastre and Land Registration

The Austrian system of land cadastre and property registration is hailed as a success story in modern e-government, with the basic elements being the distribution of responsibilities, data collection, updating and the financial aspects of the Austrian system. Land administration system in Austria consists of both land register and cadastre. The cadastre is mainly concerned with information about the number, site, area and land use of real estate and the main authority overseeing this is the Cadastral office.²¹⁴

4.2.1 The Cadastral System in Austria

A cadastre is defined as a methodically arranged public inventory of data concerning properties within a certain country or district, based on a survey of their boundaries. Such

²¹⁴ J. Zevenbergen, 'A Systems Approach to Land Registration and Cadastre,' *Nordic Journal of Surveying and Real Estate Research*, VOL 1, (2004), pp. 11-12.

properties are systematically identified by means of some separate designation, and the outlines or boundaries of the property and the parcel identifier are normally shown on large scale maps which, together with registers, may show for each separate property the nature, size, value and legal rights associated with the parcel.²¹⁵

In Austria, the cadastral history dates as far back as 1817. From this time to 1865 the so called Original Map "Urmappe" was produced mainly to enable the state to collect a fair tax related to agricultural real estates. The following years showed that local corrections and maintenance were necessary. Since 1887 this maintenance was done due to a special law which was set to guarantee the quality of the map. The quality of the measurements was closely related to the accuracy of the state of the art. So the cadastral map started to become more and more inhomogeneous. Before 1932 the maintenance plans had been produced due to the Law "Evidenzhaltungsgesetz". They were bases and showed mainly distances as numerical information, no graphical documentation of border marks were necessary and a consideration/discussion of the former border situation was not requested.²¹⁶

From 1932 till 1969 surveys were carried out due to official instructions for Surveyors. This law required a geodetic measuring of borders and identical points and a documentation of the situation in a plan. It was obligatory to classify boundary marks in the plan. And on site there had to be a public discussion of the boundaries together with the neighbours. In 1969 the new and actual surveying law was introduced. Since that time the cadastral map were converted from their former scale of 1:2880 to metrical Cadastral Map in scales of typical 1:1000 -1: 000. Within this process some of the inconsistencies of former maintenance could be removed. Partly quite good integration of technical information from division plans led to a great improvement but unfortunately only partly as quality differs considerable from one local surveying agency to the other. Since 1989 the conversion only is done in the digital cadastral map where also orthophoto maps were used to reduce the inhomogeneous quality. Since a couple of years the digital

²¹⁵ *Ibid.*

²¹⁶ Federal Office of Metrology and Surveying, 'The Historic Cadastre 1817 – 1861,' available at http://www.eurocadastre.org/pdf/Rome_december08/presentations/1_austrian_system.pdf, (accessed on 14/08/2014).

cadastral map is available for all of Austria. Unfortunately also the big chance for an overall homogenization was not realized due to need of speed and lack of money. This new 1969 law also had some major changes for the production of the plans for the chartered engineers and even defined a new legal quality for parcels which has been surveyed due to the new regulations. The results of the discussion which has to be done on site has to be written down and every neighbor has to sign a form of agreement with the presented boundary. So a boundary surveyed after this procedure has a very high relevance in any further discussion about their geometry, which is even explicitly written to this surveying law 1969.²¹⁷

It has been argued that one of the main reasons for the success of the Austrian Cadastre is the clear distribution of duties for cadastral issues, with the law of 1968 giving a wide and clear statement for the outsourcing of the cadastral work related to property surveys. One of the secrets of the most economical system is the self-regulating organisations with well defined responsibilities, governing the private industry in land surveying. A strict code of conduct with very tight regulations is the basis for a well-functioning system. Outsourcing is seen as advantageous in that it enables the government to reduce costs for a specific cadastre and land registration system and load the burden of costs to those subjects and persons who really own land as to avoid having each citizen contributing with his tax-payers money for things which are of any interest to them as they don't have land property.

The private industry is organized under a single chamber organization with 4 non-overlapping district chambers throughout the country. The authorization of performing cadastral and land registration surveys is given by the Ministry of economic affairs upon request of the self-regulating chamber organisation. The Austrian system is the most economic system where the role of the government is monitoring and setting standards of the data. Again, data management and data handling through internet access is the responsibility of the government. The principles that undergird the cadastre system include: public access of public register; nation-wide availability of cadastre information; competence of the cadastral offices; registration of all changes registered since 1883; existence of archives for surveying documents; existence of

²¹⁷ *Ibid.*

digital cadastral map, register of parcels, and surveying documents.²¹⁸ Cadastre information is 100% in digital form and can be accessed via a specific portal by anyone who wishes to do so.²¹⁹

(a) Duties of the state

The law defined very clearly that the federal agency for surveying has only the responsibility to produce a reliable geodetic base network to guarantee the reproduction of surveying results within a clearly defined reference framework and to maintain the cadastral map as homogenous as possible based on the information of actual cadastral documents from the private engineers and to do the administration of this cadastral documents.²²⁰

(b) Legal requirements for cadastral surveying

In Austria, only authorized persons produce surveying documents for registration in the cadastre and in the land register and these include: the Cadastral authority itself (Cadastral offices); Private licensed surveyors; a few governmental authorities; and the provincial agrarian authority.²²¹ The involvement of private sector in land administration is a best practice seen as creating efficiency in land transactions and is being encouraged in most developed jurisdictions. However, the State retains the overall responsibility over the integrity of the land administration system.

(c) Separate Recognition of Customary Rights

Until 1992, management of Crown land and its conversion to private ownership ignored native title; then the High Court in its landmark decision, *Mabo v Queensland*, held that the Crown obtained ultimate or radical title to all land in 1788 burdened by the rights and interests in land occupied by indigenous inhabitants. The Federal Government in response passed the *Native*

²¹⁸ Federal Office of Metrology and Surveying, 'The Historic Cadastre 1817 – 1861,' page 8. Available at http://www.eurocadastre.org/pdf/Rome_december08/presentations/1_austrian_system.pdf [Accessed on 14/08/2014].

²¹⁹ *Ibid*, p. 9.

²²⁰ *Ibid*.

²²¹ *Ibid*.

Title Act 1993 to validate grants, private freehold titles and other acts of the Crown which extinguished native title, and to create a system for handling native title claims in future.²²²

(d) Duties of the Chartered Surveying Engineer

The chartered private engineer has the privilege to produce authoritative documents which has to be evaluated in the same way as if a state officer would have authorized them. This possibility is related to the special chartered status which has its roots back as far as 1860 when the Austrian monarch decided to introduce this special status for certain entrepreneurs which is somewhere between a private company which has to live from its project related earnings and a state agency which can produce authoritative documents. So the chartered surveying engineers do the daily work in the cadastre. They work for private and official customers on a fee related basis. Nearly every survey related to boundaries in Austria is carried out by them. All subdivision plans and most of the boundary disputes are within their sole responsibility. These documents have to be accepted and registered by federal offices after formal check, as if they would have been produced by themselves.²²³

4.2.2 Lessons from the Austrian Land Administration System

Land administration in Austria is based on more than 200 years of continuous improvement, often prompted by the changing needs of society. In addition, technological developments have led to process innovation. Innovation is an indispensable ingredient for an efficient and sustainable use of land. However, innovation in land administration requires a lot of resources and may thus meet resistance from certain quarters.

Cadastral system in Austria depicts a good example of how land administration can develop in line with international trends. Cadastral surveys have developed from verbal description of boundaries to accurately defined (surveyed) boundary points. Organic Cadastre develops from accurately defined (surveyed) ownership / interest to “organic natural environment by enabling fuzzy and dynamic boundary definitions”. In Object-oriented Cadastre there is development from documentation of parcels to documentation of real estates (including

²²² *Ibid.*

²²³ *Ibid.*

buildings, apartments). In multi-Dimensional Cadastre there is modelling in 2-3-4 dimensions. In Real-Time Cadastre there is a shift from sporadic to real time updates while with e-Government the shift is from office hours to 24/7 availability.²²⁴

There would therefore be need for cadastre as part of the national infrastructure through e-government. Adoption of new technologies / approaches for data acquisition, merge of all institutions dealing with cadastral issues such as military mapping, cadastral and geodetic surveying is also considered as a best practice in land administration. The Austrian land administration also illustrates the benefits that can be derived from standardization of processes and products. This results in a shift of mind-set in communication. Digitization of processes in land registries also bridges the traditional institutional barriers and may encourage cross-organisational processes as an alternative to organizational changes.²²⁵

4.3 Land Registration in Ontario

Ontario has been hailed as a state with one of the most advanced systems of land registration in the world.²²⁶ Ontario has two systems under which title to land is recorded, and these are the “Registry System” which is governed by the *Registry Act* and the “Land Titles System” which is governed by the *Land Titles Act*.²²⁷ The Registry system and the Land Titles system differ in that the former is a registry of documents and the latter is a register of titles. The registry system is an older system which mostly shows the documents affecting title to property, and therefore, it is not conclusive evidence of the interest described in the particular instrument. Each instrument must be examined to determine its legal effect.²²⁸ The land titles system affirms title to the property and, as such, prohibits the registration of a transfer from a person who is not

²²⁴ Available at http://www.fig.net/pub/fig2011/ppt/ts07a/ts07a_muggenhuber_navratil_et_al_5112_ppt.pdf, (accessed on 08/08/2014).

²²⁵ *Ibid.*

²²⁶ Chapter 30, “Real Estate: Land registration in Ontario,” *Law Society of Upper Canada*, pp. 453-455.

²²⁷ *Ibid.*

²²⁸ Pursuant to s. 74 of the *Registry Act*, registration of an instrument constitutes notice of the said instrument. The lawyer must review the instrument to determine its legal effect.

a registered owner. The *Land Registration Reform Act (LRRA)*, introduced most changes to the land registration system including automation, and it applies to both systems.

In Ontario, there are 54 Land Registry Offices which register, store and manage documents affecting title to real property in the province. Ontario was the first jurisdiction in the world to provide electronic registration. Despite its modern features, Ontario Land Registry Offices currently operates under two systems: the Registry system and the Land Titles system pursuant to the *Land Title Act* R.S.O. 1990 c. L.5, and the *Registry Act* R.S.O. 1990, c. R.20.²²⁹

The Land Titles system is a Torrens system governed by the Land Titles Act, which records the interests that affect a particular piece of land. Former interests which are no longer active, however, are cancelled and deleted. As a result, the registered owner and charges affecting a particular piece of land are immediately apparent when title is searched. The Registry system is an older, established in 1795 pursuant to the Registry Act, which provides a means for recording documents that evidence title interests. It does not provide a definitive statement with respect to ownership or title, but rather, represents an inventory of instruments that notify the public of interests claimed in land.²³⁰

The original system of registering interests in land under the *Registry Act* (Ontario) dates from the late 1700s. In this system, registration of title or ownership in real property in Ontario is based on a registry system (the "Registry System") whereby all land registration documents are submitted to the Land Registrar and are recorded, in the order they were submitted, on the abstract for the geographic area they affect within a provincial Land Registry Office ("LRO") jurisdiction (usually a county or region within Ontario).²³¹

In this system, the Province has custody of all original titles, document and plans and has the legal responsibility for security of all title information. The LRO that accepts the submitted documents does not guarantee the affect of such documents or title to properties. As a result, in order to arrive at a current determination of title to property in the Registry System, land

²²⁹M. Sims, "Registration Systems: Back to Basics," available at http://www.millerthomson.com/assets/files/article_attachments/Registration_Systems_Back_to_Basics.pdf, (accessed on 12/08/2014).

²³⁰ *Ibid.*

²³¹ Chapter 30, "Real Estate: Land registration in Ontario," *Law Society of Upper Canada, Op. cit.*

registration documents must be searched to trace the history of prior transactions affecting the property. For determination of title, by law, all such documents registered in the Registry System during the 40 years preceding the date of a search must be examined. This procedure can be costly and time consuming if many documents have been registered during this period.²³²

A second system of registering interests in land is the land titles system (the "Land Titles System"). In the Land Titles System, the Province has custody of all original titles, documents and plans and has the legal responsibility for the validity and security of all registered land title information. Once the property has been registered and certified, the Province guarantees the title to, and interests in, property. Since this record is updated each time a land registration document is registered, only a search of the current register of interests (and not all documents registered during the 40 preceding years) is required in order to ascertain title. By the 1980s, approximately half of the properties in Ontario were recorded under the Land Titles System, and at such time the Province decided to convert all remaining properties in the Registry System to the Land Titles System. As of March 2011, approximately 99.9% of properties in Ontario were recorded under the Land Titles System. The register is computerized and accessed electronically. Through legislation, Ontario has eliminated the paper option and now all financing statements are required to be in the electronic format approved by the registrar.²³³ Ontario stopped issuing title certificates in the 1970s under its title registration systems because these certificates are seen increasingly to be a risk if lost and unnecessary in practice.²³⁴

4.4 Conclusion and Way Forward

Given the complexity of the issues involved in designing investments in land administration systems differ widely, depending on each country's resource endowments and level of economic development, and such investments need to be tailored to suit the prevailing legal and institutional framework and the technical capacity for implementation. The argument is that when designing interventions in this area, there is need to have a clear vision of the long-

²³² *Ibid.*

²³³ *Ibid.*

²³⁴ LC Paper No. CB (1)1464/02-03(05), available at <http://www.legco.gov.hk/yr02-03/english/bc/bc03/papers/bc030423cb1-1464-5e.pdf>, (accessed on 12/08/2014).

term goals, to use this to make the appropriate decisions and to ensure that whatever measures are undertaken are cost-effective.²³⁵ However, the bottom line is that it is easier to address the technicalities when the end is foreseeable, which end is achieving a workable simple, secure and efficient registration regime.

Land registration laws should be able to achieve the following: define different forms of land tenure; distinguish between real and personal property (immovable and movable property); distinguish between ownership, possession and use of land; indicate registrable rights less than ownership (such as a mortgage); define how rights can mature; establish, within the public sector, an independent, self financing Land Registry institution with clear statutory powers; establish administrative systems for land transfer and mortgage registration; ensure quick and simple creation of mortgages and distraint; co-ordinate legislation relating to urban planning, land use and the recording of information on the land register; ensure that rights registered are guaranteed by the State; ensure clarity of Ministerial responsibility and authority; and specify the administrative role of the agencies responsible for national mapping, land valuation and land use.²³⁶ Globally, focus has been shifted to achieving *inter alia*, easy access to land, security of land tenure, establishment and operation of efficient land markets, formalization of property rights, incorporating customary and informal settlement areas, development of land information systems (LIS).²³⁷

The primary motivation for land administration systems should thus be the facilitation of transparent and efficient land markets. This has led to accelerated first-time registration of land rights and systematic capture of related records which provide the security and confidence essential to operation of the land market.²³⁸ As seen from the two case studies, most developed

²³⁵ T. Burns, *et al.*, 'Land Administration Reform: Indicators of Success, Future Challenges,' Land Admin Reform Final Draft May2007, Available at <http://www.doc88.com/p-917851193287.html>, (accessed on 15/08/2014).

²³⁶ United Nations Economic Commission for Europe, Working Party on Land Administration, 'Social and Economic Benefits of Good Land Administration' (2nd Ed., 2005). Page 14. HM Land Registry, London, Available at <http://www.oicrf.org/pdf.asp?ID=8295>, (accessed on 15/08/2014).

²³⁷ A.M. Tuladhar, 'Reengineering Cadastre and Land Registration Systems and Business Opportunities', FIG Working Week, 2003, Paris, France, April 13-17, 2003, Available at www.eurocadastre.org/pdf/tuladharm.pdf, (accessed on 16/08/2014).

²³⁸ T. Burns, *et. al.*, (November, 2006), 'Land Administration Reform: Indicators of Success, Future Challenges,' *Op. cit*, p.10.

systems of land administration are now emphasizing on core cadastral components that go beyond a focus on land markets. The trend towards integration of cadastral and registration of data is largely due to developments in information communication technology and growth in land information systems.²³⁹

In most jurisdictions, with developed land administration systems, programs of data conversion are being implemented to store and maintain land parcel details (both text and graphics) in digital format. Titles are also being routinely stored in digital format and in most jurisdictions laws have been enacted to give evidential weight to digital media and to allow for the electronic submission of electronic data in court.²⁴⁰

There is also a trend towards increased remote data access which enables the registration of transactions and dealings. This has facilitated the work of accredited real estate agents such as lawyers and surveyors and assists in maintenance of the primary registries and map bases. An example of this development is the Land online electronic conveyancy system in New Zealand, where changes in the register are implemented by private lawyers acting for the parties in a land transaction.²⁴¹ Such arrangements increases efficiency and remove opportunities for corruption in the land registries and also shorten transaction times.

The other trend in developed jurisdictions is the increased involvement of the private sector in elements of the process. This is essential and necessary in increasing input from land registries. For example, the role of the private sector in data capture that is cadastral surveys and transactions (lawyers, surveyors and real estate agents) has been reinforced, but responsibility for overall administration and management of the land system and integrity of core data has generally remained as the role of the State.

In Kenya there will be need to eliminate the paper option in issuing titles and all transactions in land should be done in electronic format to create efficiency and remove opportunities for bribery and corruption. This should be the way forward since the electronic evidence is now admissible in court in Kenya. And just as Ontario did, Kenya should stop

²³⁹ *Ibid*, pp. 10-11.

²⁴⁰ *Ibid*. The Kenyan Evidence Act, Cap. 80 allows for admissibility of electronic evidence see sections 65(6) and 106A & B.

²⁴¹ *Ibid*.

issuing title certificates under its title registration systems because these certificates are seen increasingly to be a risk if lost and unnecessary in practice.

In the end, the success of land registration system depends on society's confidence with it. Does it ensure tenure security? Is it simple, efficient and inexpensive? The society must support the land registration system. The public must use and rely on the information from the system. On the other hand, the registration must be tuned towards the needs and interests of the right holders. The registration procedures must thus be cheap, efficient and not bureaucratic. There is need to rethink about the concept of overriding interests, as it may erode confidence in the register. Some have argued that overriding interests are implied exceptions to the fundamental principle of a comprehensive and conclusive register.²⁴²

²⁴² M. Park, *et al.*, 'Orchestrating a harmonious system' *Victorian Law Institute Journal*, vol 83(5) (2009), pp. 7-9.

CHAPTER FIVE

5.0 RECOMMENDATIONS

5.1 Introduction

This chapter makes recommendations as to the way forward for reforms to ensure that the registration process is simple, secure and efficient. It also proposes and recommends legislative and policy measures and amendments in the Act that are necessary to ensure that Kenya has a transparent and cost-effective registration system in line with the Constitution 2010. It also draws from the best practices from other jurisdictions around the World.

The *Land Registration Act, 2012* (LRA) was enacted to revise, consolidate and rationalize the registration of titles to land, to give effect to the principles and objects of devolved government in land registration, and for connected purposes, with the intention of providing a simplified, secure and harmonized registration regime.

Through the review of relevant literature, laws and policies on land, this study has explored and investigated the *Land Registration Act 2012* to ascertain whether it has achieved the goal of being the unifying registration regime and ensuring that we have an efficient, secure and simple system of registration of title to land in Kenya. This study has argued that whereas the LRA may have succeeded in harmonizing registration statutes by recognition of the registers and titles under the repealed statutes, one of the questions that arises is whether this harmonization has enhanced efficiency, transparency and accountability in land and title registration in Kenya.

The research questions as set out in chapter one of the research paper are: What is the existing legal framework for land registration in Kenya? Has the *Land Registration Act 2012* ensured a simple, efficient and secure land registration system? And, what recommendations need to be made to the policy, legal and institutional framework dealing with land registration? Chapter two of the study has looked at the past and existing framework for land registration in Kenya identifying the main challenges that sought to be dealt with through the new legislation aligned with the current Constitution of Kenya 2010, including the LRA.

Chapter three has dealt with the question whether the *Land Registration Act 2012* has succeeded in ensuring a simple, efficient and secure land registration system in Kenya, through highlighting the main provisions of the Act. A critical analysis of the provisions of the LRA has

been done to examine the effectiveness of the LRA in meeting its stated goals as well as the constitutional objective of a simplified and efficient registration system and identify any existing challenges and loopholes. Chapter Four was a comparative study of registration systems in other countries and best practices that Kenya can adopt to make the registration system simple, efficient and secure.

5.2 Recommendations

The objectives of this study were: to critically evaluate the *Land Registration Act 2012*²⁴³; to examine the adequacy of the *Land Registration Act 2012* in providing a simple, efficient and secure registration regime; and to propose appropriate recommendations to the policy, legal and institutional framework dealing with land registration. This section makes recommendations regarding best practices for land registration as far as simplicity, security and efficiency are concerned. These best practices could be adopted in Kenya.

5.2.1 Institutional Framework

It has been argued that decentralisation is key to land administration implementation in most countries. All land records are usually kept at the local land office level including cadastral maps, land registration documentation and land tax records.²⁴⁴ It has been asserted a key aspect of decentralisation or deconcentration is that there must be a central authority to establish policies, ensure quality of services, provide or coordinate training, to limit corruption and implement a personnel policy (particularly with regard to circulating senior staff). Further, the central authority must have a funding base to ensure that the policies adopted at a local level will support state or national objectives. In those cases where total responsibility is given to a local level (including the financial responsibility), there is an inevitable tension with national objectives. Such an approach means that the establishment of a national focus for land administration, including the creation of a spatial data infrastructure, will be very difficult, if not impossible. The local authority inevitably works to its own agenda with little regard for national policies. Such an approach has particularly negative consequences for the achievement of

²⁴³ Act No. 3 of 2012.

²⁴⁴ I.P. Williamson, 'Best Practices For Land Administration Systems In Developing Countries', *Land Administration Guidelines – Ian Williamson* - 5 August, 2000, p.11.

national sustainable development objectives.²⁴⁵ LRA provides that the land registration units shall be established at county level and at such other levels to ensure reasonable access to land administration and registration services.²⁴⁶ It is noteworthy that the functions of the Chief Land Registrar, County Land Registrars or any other land registrars are not clearly defined by the Act as already pointed out.²⁴⁷ The Cabinet Secretary and the national Courts should also have clearly defined roles in land registration matters. This should be dealt with to avoid the potential pitfalls pointed out above. Devolution of responsibility of operations and record keeping to the local level should be accompanied with central guidance, policy direction and quality control.²⁴⁸

At the policy and institutional level, there is also the need to ensure clarity of Ministerial responsibility and authority (especially Ministry of lands) and other relevant statutory organs (National Land Commission); and specify the administrative role of the agencies responsible for national mapping, land valuation and land use. A simple, efficient and secure land administration system cannot be realized if the responsible institutions are always bickering in public. This destroys public confidence in the system and creates room for corruption and other illegal deals.

5.2.2 Customary Land Rights

As already noted in Chapter Three, the Act recognises customary land rights and even goes as far as mentioning certificate of customary ownership of land which it however fails to mention how it is to be established. LRA fails to adequately address the question of customary land rights and how they are to be formally recognised and registered. The problems associated with unregistered customary land rights therefore persist in areas where a good number of people hold land under this tenure.

It has been rightly argued that Indigenous rights are often very different from “western” private or individual rights. Typically they cannot be adjudicated and mapped using the same approaches and techniques. Indigenous peoples often have different spatial concepts from Western society. It is inappropriate to assume a contemporary cartographic knowledge by

²⁴⁵ *Ibid.*

²⁴⁶ Section 6(6), Act No. 3 of 2012.

²⁴⁷ *Ibid.*, sec. 14.

²⁴⁸ P. Williamson, ‘Best Practices For Land Administration Systems In Developing Countries’, *op. cit.*

indigenous peoples.²⁴⁹ The adjudication and administration of customary, indigenous, traditional or tribal lands usually requires the establishment of a specialist government organisation such as a Department or Board of Indigenous Lands, together with a judicial tribunal to oversee the adjudication of such lands and to resolve disputes.²⁵⁰ Kenya could consider this practice under the LRA. This is further informed by the fact that the Community Land Bill is yet to be enacted into law creating a confusing scenario where transactions over community land could be taking place illegally.

5.2.3 National Land Information Systems

Article 35 of the Constitution of Kenya guarantees the right of every person to information. Information is critical in making important decisions. Indeed, it has been argued that the value of land registration systems has expanded from being primarily a mechanism to quiet titles, reduce disputes and support efficient land markets, to being an important source of land information essential for the support of good governance and sustainable development.²⁵¹ As seen in Austria and Ontario, automated land titling and digital cadastral systems greatly enhance information management in land administration and registration. LRA contemplates a situation where there will be digitalization of land registration in Kenya, and this should be encouraged, supported and promoted by the Government. The computerization should however be achieved through collaboration with the private sector due to the technical requirements that come with it. The national government should retain the overall responsibility of maintain the integrity of the land registration systems.

The argument is that the success of a cadastral or land administration system is not dependent on its legal or technical sophistication, but whether it protects land rights adequately and permits those rights to be traded, if appropriate. However, it is essential to protect indigenous land rights and ensure there are fair and equitable systems for leasing indigenous lands efficiently, simply, quickly, securely and at low cost. The system should operate with no

²⁴⁹ *Ibid.*

²⁵⁰ *Ibid.*

²⁵¹ *Ibid*, p.15.

opportunity for political interference, *ad hoc* government decision making or corruption. All processes should be simple and transparent.²⁵²

As pointed out in Chapter Four, the success of the land registration system in Kenya will also depend on society's confidence with it. Kenyans must support the land registration system and have faith in it. This will make them use and rely on the information from the system.. It must ensure tenure security, be simple, efficient and inexpensive. There should be no bureaucracy in the system. In addition, the registration system must be tuned towards the needs and interests of right holders.

Again, as outlined in Chapter Four there will be need to eliminate the paper option in issuing titles, and all transactions in land should be done in electronic format to create efficiency and remove opportunities for bribery and corruption. This should be the way forward since electronic evidence is now admissible in court in Kenya. And just as Ontario did, Kenya should stop issuing title certificates under its title registration systems because these certificates have increased the risk of loss and are unnecessary in practice. Titles should be routinely stored in digital format as electronic submission of electronic data in court is possible.

There is also a trend towards increased remote data access which enables the registration of transactions and dealings. This has facilitated the work of accredited real estate agents such as lawyers and surveyors and assists in maintenance of the primary registries and map bases. Such arrangements increases efficiency and remove opportunities for corruption in the land registries and also shorten transaction times.

5.2.4 Outsourcing in Land Registration

Outsourcing of land registration services has successfully been employed in other jurisdictions such as Austria and Ontario. This is done through involvement of private surveyors, lawyers and other experts. However, outsourcing requires a well established legal and regulatory environment, well established professions and the availability of trained personnel.²⁵³ This is supported by the assertion that irrespective of how good a land registration system is, unless it operates in an environment of professionalism, accountability and good governance, and in an

²⁵² *Ibid*, pp. 15-16.

²⁵³ *Ibid*, p.19.

environment which is accepted by the wider populace, it will not be successful. On the other hand, if government officials are personally liable for errors, then they can become over cautious, with the result that the whole system can slow down dramatically. What is required is an environment of “risk management”. As a result, while government officials need to be well trained and an environment of accountability developed, they should not be personally responsible except in exceptional cases of fraud. Indemnification by the government should be encouraged rather than personal liability. However, if private licensed surveyors undertake cadastral surveys as an example, then they should be legally responsible for their surveys, not the government.²⁵⁴

²⁵⁴ *Ibid*, p.20.

CHAPTER SIX

6.0 CONCLUSION.

Before the enactment of the Land Registration Act 2012, registration of title to land in Kenya was characterized by a multiplicity of statutes. Each of the prevailing statutes had provisions touching on registration. These statutes that did not provide a simple, secure and efficient registration system, with the consequence that there was a complex registration regime often leading to complex conveyancing practices, ineffective practices, duplicity of titles and fraudulent dealings. For example, under the LTA and the GLA there was a deed registration system characterized with many problems including tattered and ineligible registers, missing records and a complex registration regime. Under the RTA and RLA, there were problems of duplicity of titles, fraudulent titles and multiple boundary disputes in respect of the RLA due to the general boundaries.

As a consequence, the Land Registration Act 2012 was enacted to revise, consolidate and rationalize the registration of titles to land, and to give effect to the principles and objects of devolved government in land registration. The LRA was meant to provide a simplified, secure and harmonized registration regime. However, the study notes that whereas the LRA may have succeeded in consolidating the registration statutes by recognizing the registers and titles under the repealed statutes, the consolidation and harmonization has not enhanced efficiency, transparency and accountability in land registration in Kenya. The LRA has transitioned the provisions dealing with registration of title from the Statutes it was meant to harmonise and consolidate. There is thus a continuation of the old, inefficient and complex registration regime that was shrouded with the challenges highlighted above. It is for this reason that the study sought to examine the provisions of the LRA so as to come up with proposals of making the registration system more simple, secure and efficient. The study has also sought to isolate existing lacunas in the law and propose ways of dealing with them.

For purposes of this study, harmonisation of registration laws was conceptualized as the removal of inconsistencies in law and moving towards achieving a single national uniform law, as far as land registration is concerned. According to reviewed literature, harmonization should result in one register whose purpose is to investigate and ascertain the legal rights or obligations associated with any particular land parcel or lot. One need only inspect the register. This is

however not possible under the LRA. The law has not achieved the goal of having a complete and comprehensive central public register, administered by a centralised public authority and available for public inspection so that community confidence could repose in the register and its integrity. Apart from that weakness, and based on best practices from other jurisdictions the study finds that the registration regime in Kenya can benefit in the following ways:

As seen from the Austrian cadastre system, there will be need for clear distribution of duties for cadastral issues. The law should provide for the outsourcing of the cadastral work related to property surveys. One of the secrets of the most economical system is the self-regulating organisations with well defined responsibilities, governing the private industry in land surveying. Outsourcing is seen as advantageous in that it enables the government to reduce costs for a specific cadastre and land registration system and load the burden of costs to those subjects and persons who really own land as to avoid having each citizen contributing with his tax-payers money for things which are of any interest to them as they don't have land property.

In the Kenyan context there will be need for a cadastre as part of the national infrastructure through e-government. Adoption of new technologies / approaches for data acquisition, merge of all institutions dealing with cadastral issues such as military mapping, cadastral and geodetic surveying is also considered as a best practice in land administration. Kenya can also learn from the Austrian land administration system the benefits that can be derived from standardization of processes and products. For instance, there is need for the digitization of processes in land registries so as to bridge the traditional institutional barriers and encourage cross-organisational processes as an alternative to organizational changes.

From the case studies discussed in this work, it is also evident that titles are being routinely stored in digital format and in most jurisdictions laws have been enacted to give evidential weight to digital media and to allow for the electronic submission of electronic data in court. In Ontario, the register is computerized and accessed electronically. Through legislation, Ontario has eliminated the paper option and now all financing statements are required to be in the electronic format approved by the registrar. Ontario stopped issuing title certificates in the 1970s under its title registration systems because these certificates are seen increasingly to be a risk if lost and unnecessary in practice. This should be the way to go to minimize fraud in land registration. Moreover, the law of evidence in Kenya already allows the admission of electronic

evidence.²⁵⁵ There is also need for Kenya to move towards increased remote data access which enables the registration of transactions and dealings in land. This would facilitate the work of accredited real estate agents such as lawyers and surveyors and assist in maintenance of the primary registries and map bases. The other trend in developed jurisdictions is the increased involvement of the private sector in elements of the process. This is essential and necessary in increasing input from land registries. For example, the role of the private sector in data capture that is cadastral surveys and transactions (lawyers, surveyors and real estate agents) has been reinforced, but responsibility for overall administration and management of the land system and integrity of core data has generally remained as the role of the State.

²⁵⁵ The Kenyan Evidence Act, Cap. 80 allows for admissibility of electronic evidence see sections 65(6) and 106A &B.

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