

**THE EFFICACY OF PROPERTY RATING LAWS IN THE COUNTY SYSTEM OF
GOVERNMENT IN KENYA**

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DECLARATION

I, **MUCHIRI ESTHER WANJIRU**, of registration number **G62/79788/2012**, do hereby declare that this is my original work and has not been submitted nor is it pending submission for a degree in any other University or Institution. All sources of information have been acknowledged.

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DEDICATION

I dedicate this work to my husband Mr. N. Otieno and son Keita whose love and faith in me keeps me going.

ACKNOWLEDGEMENT

I have taken so much effort to have this work done. This could not have been possible without the constant support and help of some individuals to whom I extend my sincere thanks.

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CHAPTER ONE

BACKGROUND TO THE STUDY

1.1 INTRODUCTION

Property rating, just like any other form of tax system is a controversial combination of history, experience of the people, economics, politics and the law.¹ In Kenya, just like other developing countries, property rating has been the backbone of most local government finance where it played an increasingly important role in financing local government projects and services.² Accordingly, various tax complexities of rules and principles have been created through retrospective analysis of the application of rating.³ Despite the fact that property rates are regarded as being equitable and efficient means of raising revenue for local authorities, its revenue potential largely untapped.⁴ Kenya as a developing country has adopted property rates taxes as a modest means of raising revenue in its county government system. According to the World Bank and other revenue authorities, various key factors contribute to poor tax performance which include poor compliance with rating laws, administration and tax collection efforts.⁵

¹ Kitchen, Harry(2013) -Property Tax: A Situation Analysis and Overview,ø*A Primer on Property Tax: Administration and Policy*, First Edition. Edited by William J. McCluskey, Gary C. Cornia and Lawrence C. Walters, Blackwell Publishing Ltd, p.1-3.

²Ibid p. 3.

³Waris, Attiya(2007) 'Taxation without Principles: A Historical Analysis of the Kenyan Taxation System,ø*Kenya Law Review*, vol.1, p 274.

⁴Norregaard, John (2000) -Taxing Immovable Property Revenue Potential and Implementation Challenges,ø*IMF Working Paper*, p. 38.

⁵www.ingentaconnect.com/content/bpl/ajes/2000/0000059/0000005/art00098 Nations of East Africa Chapter 16 (accessed on 22/4/ 2013 at 10.45 am).

The right to property is a constitutionally guaranteed right on every Citizen within the Republic of Kenya.⁶ Article 65 provides for landholding by non-citizens. Every person has the right either individually or by association with others to acquire and own property of any description, in any part of Kenya. Under Article 40 (2), the state should never deprive a person of property of any description or interest in or right over property of any description.

Property is defined to include any vested or contingent right to, or interest in or arising from; land, goods or personal property, intellectual property, choses in action, negotiable instruments and money.⁷ Property tax encompasses levies on use, ownership and transfer of property through, usually associated with recurrent taxes on immovable property.⁸ Internationally, it is normally measured gross debt and levied on proprietors or tenants, recurrent taxes on net (of debt) wealth, taxes on estates, inheritances and gifts, financial and capital transaction taxes or transfer of securities and checks or sales of immovable property.⁹ Property rate as a form of property tax is levied on land and its improvements in Kenya.¹⁰ This study specifically deals with property rates as a form of property tax.

In East Africa, and prior to independence, common British colonial heritage was shared between Kenya, Uganda and Tanzania where the legal, political, economic and institutional structure was almost similar.¹¹ After independence, Kenya emerged as a unique economy characterised by a series of macro-economic and structural legal reforms aimed at enhancing a sustainable

⁶The Constitution of Kenya, 2010. Article 40

⁷The Constitution of Kenya, 2010, Article 260.

⁸Cabral, Hoxby, (1999) *The Hated Property Tax: Salience, Tax Rates, and Tax Points*. p. 81.

⁹Ibid p.89.

¹⁰The Rating Act CAP 267, Section 3.

¹¹Kelly, Roy (2000) 'Property Taxation in East Africa: The Tale of Three Reforms,' *HIID Development Discussion Paper No. 753*, p.1.

economic and social development.¹² Development is the multidimensional process that involves reorganization of an entire economic and social system thus institutions, social and administrative structures are completely changed.¹³

This study is founded on the background of the existence of property rating as a role of the rating authorities in post-independence Kenya, where not much in terms of legal framework has been done to enhance better collections of revenue in all successive governments. This study examines the efficacy of property rating as a source of revenue for counties in Kenya. It seeks to establish the weaknesses in the legal and institutional framework and suggests how these can be rectified.

1.2 STATEMENT OF THE PROBLEM

This study aims at providing an understanding on the effects of property rate laws on county revenues to fund various county government projects, and appropriate recommendations as well. This is because, Kenya's Rating Act, Valuation for Rating Act and systems lacks the ability to steer collection of higher property revenues. This is as a result of the inadequacy of these rating laws where the taxing jurisdiction burdens local residents without necessarily providing adequate benefits to them. The Rating Act for example need to expand the various property tax bases available to county government for taxation, it is not clear which Minister in the various functions stipulated for in the Act should be responsible hence creating a research gap.

¹²ibid

¹³Todaro, Michael P. (2006) *Economic Development*, 7th Edition. New York University, p.77.

Although various researches have been done on property rates and local public spending on land values, very little research has been done on property rate laws to ascertain its effects on local revenues to county governments in Kenya. It is not known how property rate laws have impacted on property identification, assessment, valuation, tax payment or enforcement in the County Governments.

Thirdly, while the power to levy property rates is granted to the County Governments, the constitution also gives powers to the National Land Commission to assess tax on land and premiums on immovable property in an area designated by laws. The research gap is how NLC can affect rating by counties.

1.3 LITERATURE REVIEW

The purpose of literature review is to determine what exists in the law regulating property rates in Kenya and other countries. The researcher therefore, seek to establish the extent to which prior studies and research in this area have covered this subject and specifically bring out the findings of the authors on the adequacy of the law in the administration of property rates on the taxpayers. In order to adequately gain insight into what other writers have stated on this subject and to identify the existing gap to be filled, some relevant writings have been reviewed.

Kenya, just like the rest of East Africa countries has a distinct colonial Heritage as well as its distinct property tax structures.¹⁴ Harry Kitchen notes that there is no uniform property rate base or method of assessment in some countries. In Kenya property base entails land only.¹⁵

Taxation on land as Professor Robert Wassmer notes does not discourage development of the land and he notes;

“Mobility has left many urban places with a diminished base on which to raise the local revenue needed to fund urban service demands...concerning my own opinion on the innovative use of urban property taxation, I would like to raise an idea of separate market based assessment of capital and land (with land value assessment based on highest and best use) as Oates and Schwab show, this form of property taxation is essentially neutral”¹⁶

Property tax administration was formerly the role of the local government which played an important role as a source of income. They are considered important and taxed at local levels because;

- a) Real property is immovable hence its unable to shift location in response to tax,
- b) The connection between many of the services typically funded at the local level and the benefit to property values.

¹⁴ Kelly, Roy(2000) -Property Taxation in East Africa: The Tale of Three Reforms,øHIID Development Discussion Paper no. 753. (www.hiid.harvard.edu), p. 38.

¹⁵Kitchen, Harry (2013) -Property Tax: A Situation Analysis and Overview,øA Primer on Property Tax: Administration and Policy, 1st Edn, Edited by William J. McCluskey and Others, Blackwell Publishing Ltd,p.3.

¹⁶Wassmer, Robert W. (1997) ÷Thoughts on Innovative Financing Options for Urban Government,øNational Tax Association, Proceedings of the 90th Annual Conference on Taxation, (1997), at 387-390.The Oates and Schwab Article Referred to by Professor Wassmer is Wallace E. Oates and Robert M. Schwab, The Impact of Urban Land Taxation The Pittsburgh Expirience,øNational Tax Journal, vol.2 no. 1, p.1-21.

On the other hand, the success of devolution in Kenya depends on its design and on the institutional arrangements governing its implementation. Ndulo argues that in order to achieve effective devolution, the national constitution should recognize and provide for devolved government.¹⁷ It should clearly provide for the right and ability of local institutions to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local populace. Barkan and Chege state that few African states have created an appropriate local institutional infrastructure to facilitate citizen participation in development.¹⁸ According to Enemuo, chronic underfunding and misappropriation of revenues have led to the decline and sometimes total collapse of regional governments in Africa. This calls for operationalization of the legal framework and the institutional framework, hence adequate and prior planning and budgeting to avoid the problem of underfunding.¹⁹ Thus, the Constitution of Kenya, 2010 acknowledges the existence of a devolved government system as well as allocating property rates as a role of county government.

Local authorities in Kenya have experienced difficulties in the applying laws in the administration of property rates. Practically speaking, these have hampered the optimization of rating as a major source of revenue for local governments. This is majorly attributed to the technical, social and administrative hitches as well as legal problems existing in as far as valuation of Rating Act and the Rating Act is concerned. These issues concern appraisal, rating,

¹⁷Ndulo, Muna (2006) 'Decentralization: Challenges of Inclusion & Equity in Governance', in Muna Ndulo (ed) *Democratic Reform in Africa: Its Impact on Governance & Poverty Alleviation*, James Currey, Oxford, Ohio University Press, Athens, p.481-488.

¹⁸ Barkan Joel D., Michael Chege (1989) 'Decentralizing the State: District Focus and the Politics of Reallocation in Kenya', *Journal of Modern African Studies*, p. 433.

¹⁹ibid

billing, collection and other administrative duties coupled with policy and institutional issues.²⁰ It is collected on all properties including a 'Contribution in lieu of rates'²¹ where government property is legally liable for property tax equivalent. The assessment basis is area rating or unimproved site value. Area rating has no limit but is done with ministerial approval, and ad valorem of up to uniform 4% with override provision subject ministerial approval.²²

Eliud and Eric have outlined the reason why various policy makers on taxation of land and property have had to grapple with the various inefficiencies.²³ They attribute it to the simultaneous existence of the inequalities in the ownership of land despite the rising shortages and low agricultural productivity.²⁴ Highlights are made as regards arguments against land taxes to include:

- a) They lead to increasing land concentration where the risk is high.
- b) The cost of information are very high in as far as determining the efficiency of property tax collection is concerned on size, value, ownership status, productive capacity etc.
- c) Administering property tax is expensive.

They therefore suggest the need for proper administration of property tax laws for effectiveness of property tax laws be realized.

²⁰ Mccluskey, William J., Riel C.D. Franzen (2005) *Land Value Taxation: An Applied Analysis*, Ashgate Publishing Ltd, USA, p 18.

²¹Section 23 of the Rating Act, cap 267.

²²Mutizwa, Naison and Others (2013) *Property Tax Regimes in East Africa*, The Global Urban Economic Dialogue Series, UN Habitat, p. 14-16

²³Maji, Eliud, Ronge, Eric (2006) *Taxation and Tax Modernization in Kenya*, Institute of Economic Affairs, p. 32.

²⁴Ibid p.33.

Consequently, procedural issues like taxable properties, identifying tax liability, valuation and billing and collection have more often been an issue. Consequently, administering property tax rolls have been tampered with by widespread tax evasion, under assessment of valuation far below market prices and failing lack of proper coordination between rates assessment and the process of collection.²⁵ Fischell (2000) states that, property rate laws are like benefit tax laws because they equal or are approximate to the local services to the extent of promoting such services hence promoting efficient public decisions. This is based on an assumption that local property taxes do in fact finance services that benefit property values.²⁶

Major problems exist in this property tax laws, limiting its ability to generate significant revenue income for local governments.²⁷ There is need to reform property laws in Kenya.²⁸ In many countries, poor tax laws have had a negative impact on their administration hence being an impediment to gaining revenue.²⁹ Key steps involved in the process of taxing properties include;

- a) Identification of the process of properties being taxed,
- b) Preparation of a tax roll (which contains a description of the property and the amount of assessment and responding to assessment appeals,
- c) Issuing tax bills, collecting taxes and dealing with arrears.³⁰

²⁵ibid

²⁶Richard M. Bird and Enid Slack (2004) *International Handbook of Land and Property Taxation*, UK, Edward Elgar Publishing Ltd, p.267.

²⁷Vehorm, Charles L. and Ahmed, Ehtisham (2003) *Tax Administration*, International Monetary Fund (IMF),p. 108

²⁸As set out in Schedule 6 of the Constitution of Kenya, 2010.

²⁹. Bird, Richard M and Enid Slack (2004)*International Handbook of Land and Property Taxation*, UK, Edward Elgar Publishing Ltd, p. 11.

³⁰ Bell, Michael E. And John H. Bowman (2002) *Property Taxes in South Africa*, Lincoln Institute of Land Policy, vol. 14,p. 41.

In the modern society, taxes are based on the concept of no taxation without representation.³¹ The legislature plays a significant role in ensuring that the laws in place do not violate the constitutional rights as either means to confiscate or violate the principles of equality or human dignity. The county assembly is such a legislature thus it is their duty come up with better property tax laws intended to afford the revenue needed to implement the county governments policy and manifesto provided that such laws adhere to the cannons of a good tax system. Accordingly, the possible use of a tract of land derives its worth which must also be consistent with the standard of living as well as the quality of its economic system.³² Other factors to determine the value of land include the abundance of public infrastructure systems like roads, sewerage and foresting, sanitation and environmental protection, and the recognition of land ownership and the legal enforcement of the right to own such property.³³

Legislation reforms on property rating will not only enhance an entirely new fiscal policies and approaches on property rights but also the political role of decentralization and devolution in not only primarily having land tax as a means of raising revenue but as an incentive for productive use of land.³⁴

1.4 OBJECTIVES

1.4.1 MAIN OBJECTIVE

³¹Grey, Thomas C. (1976) *Property and Need: The Welfare State and Theories of Distributive Justice*, 28 STAN. L. REV. 877,881 n. 12 (referring to the slogan used by American Revolutionists to convey their disfavor of property taxes imposed without their consent),p. 581.

³² ibid

³³Sampford, Charles& David Wood(1991) *Tax, Justice and the Priority of Property*, 23 POZNA STUD. IN THE PHIL. OF THE SCI. & THE HUMAN. 181-208 wojcieth Sadurski ed., p. 115.

³⁴Youngman, Joan and Jane Malme (2004) *The Property Tax in a New Environment: Lessons from International Tax Reform Efforts*, Lincoln Institute of Land Policy, Cambridge, p. 2.

The objective is to examine the efficacy of property rating as a source of revenue for county government. It intends to identify gaps in existing laws and institutions and suggest how they can be reformed.

1.4.2SPECIFIC OBJECTIVE

1. This study intends to how property rating can be effective by suggesting reforms to address reforms to address gaps existing in the legal and institutional framework.
2. The research examines how effective property rating laws are as a source of income for county governments. At the end, the study suggests legal and institutional changes that can make the law robust.

1.5RESEARCH QUESTIONS

1. What property rating laws are conducive for county system of government?
2. What property rating laws need to be put in place to enhance county governments' revenue?

1.6HYPOTHESIS

The researcher assumes that efficient property rating laws impacts on the economic growth of county governments.

1.7 JUSTIFICATION OF THE STUDY

Property rating laws in Kenya (Valuation of Rating Act (CAP 266) and Rating Act (CAP 267)) plays a significant role in regulating rating in the county system of government. It is expected that counties should be able to generate as much revenue as possible to fund various government projects. Property rates are such one source of revenue. To date, not much has been done in terms of reforming rating laws in Kenya since independence. This study intends to examine the various effects of these laws to rating as a source of revenue for county government.

1.8 THE SCOPE OF THE STUDY

The study limits itself to the provisions of the constitution, the Rating Act, the Valuation Act, legal precedents and literature on property rating. This study elaborately examines property rights, the legal and institutional framework of property rating.

1.9 METHODOLOGY

Secondary sourcing: The study will be conducted by use of library research and internet searches. This will include the use of information gathered from the available literary materials

like articles, books available at the University of Nairobi Library as well as the Internet. Case law and Statute law from jurisdictions that will also be accessed so as to analyse, contextualize and borrow on best practices on Property tax laws in a devolved government.

1.10CHAPTER BREAKDOWN

This thesis presented in five chapters which are organised as follows;

Chapter one deals with the background and is structured as follows; introduction, background information, literature review, objectives (main and specific), hypothesis, research question, assumptions, justification of the study, chapter breakdown, methodology and conclusion. It lays out the basis of this research by looking at the background of the entire research. It outlines the research problem and its relative importance to property rating.

Chapter two is on the theoretical framework and is structured as follows; introduction, social contract theory, property right theory, the theory of distributive justice and conclusion. Chapter two identifies the various legal theories within which property rating laws are applied and connects it to the research topic, the research problem and property rating in Kenya.

Chapter three outlines the historical perspective of property taxation and rating laws. It includes; introduction, historical perspective of property taxation, property rating and property rating laws in Kenya, its legal regime and conclusion. In chapter three, the history of property rating in

Kenya and other areas is discussed indicating various laws that have been applied over time to date.

Chapter four outlines the comparative analysis of Kenya and South Africa. It begins with application of property rating laws and rating in South Africa. It is composed of introduction, property rate laws application in South Africa, tax bases, assessment, tax rates and comparison. Existing legal systems are analysed and important aspects on comparison highlighted.

Chapter five is composed of conclusion and recommendations. It includes; introduction, legal reforms, institutional reforms and Conclusion. This is the final chapter which states the conclusion and highlights recommendations for county governments in Kenya. The researcher hopes that these recommendations will be of use in the formulation of property rating laws.

CHAPTER TWO

THEORETICAL FRAMEWORK

2.1 INTRODUCTION

Property taxes encompass those taxes levied on real and personal property. In dealing with the conclusion of this paper on the efficacy of property rating laws in the county system of government, various theories have been posited. As stated earlier, the objective of this paper is to ascertain the legal gaps in the law regulating property rating in Kenya and make recommendations as to legal reforms needed in property laws regulating rating.

Various theoretical threads run through the concept of property taxation and in particular the rating laws which shall be looked at.

2.2 SOCIAL CONTRACT THEORY vs. NATURAL LAW THEORISTS

The idea of the social contract in modern form dates back, to Thomas Hobbes, and in today's times to the work of John Rawls.³⁵ What makes particular system of social arrangements legitimate is the object of an agreement with the people who are subject to it. (The public justification's key phrase is, "the object of an agreement" which is ambiguous.) In the case of a literal contract -- say for an exchange of goods -- each of the parties has reason to honour the terms of the contract either in the (bare) fact of having agreed to its terms (under certain circumstances) or in the fact of its terms being the agreed ones. In the case of a social contract in

³⁵Baier, Annette (1988) "Pilgrim's Progress: Review of David Gauthier, *Morals by Agreement*." *Canadian Journal of Philosophy* Vol. 18, No. 2. (June 1988): 315-330, p 36.

the manner of Hobbes or Rawls, every party has reason to honour his/her responsibilities under the terms of the contract -- e.g. to pay taxes, adhering to the laws, taking part in decision-making, etc. -- either on account of his/her agreement to do so, or, perhaps, on account of its being reasonable that s/he does so.³⁶

Hobbes's justification for political obligation is that given that men are naturally rational, yet by choosing to submit to the authority of a sovereign state for harmonious living in the society, they are self-interested, they ensure that it is conducive to their own interests. Thus, Hobbes argues that by imagining men in their natural state, or in other words, the State of Nature social agreement with the governing organs would still exist. In the hypothetical State of Nature according to Hobbes, men are exclusively and naturally self-interested, equal with one another, with limited resources, and yet without power to force men to cooperate.³⁷

In addition to Subjectivism, Hobbes also infers from his mechanistic theory of human nature that humans are necessarily and exclusively self-centred.³⁸ Most men pursue only that which they perceive to be in their own individually considered best interests - they respond mechanistically by being drawn to that which they desire and repelled by that to which is averse.³⁹ This becomes a universal claim which is meant to cover all human actions under all circumstances ó within or out of society, with, where the endpoint and the most generalized of human actions, including the

³⁶ibid

³⁷ibid p. 315-330.

³⁸Hobbes, Thomas. (1985) 1651 *Leviathan*. C.B Macpherson (Editor). London: Penguin Books , p. 36-38.

³⁹Gauthier, David (1990)*Moral Dealing: Contract, Ethics, and Reason*. Cornell: Cornell University Press,p 46-48.

desire for status and power. Most of the things done are motivated by the desire to better human situations, in satisfying most of desires as considered individually considered as possible.⁴⁰

Property plays an essential role in Locke's argument for civil government and the establishing contract. What justifies this is if the Government with a claim to obedience makes rules by consent of the people, in ensuring the protection of their rights. For example, if a king by himself attempted taxation, this would be depriving the people of their rights to property, but for representatives through an elected body to approve of taxes, was simply by an agreement by the people to tax themselves.⁴¹ Committing crimes was a way of warring against the community and its members' rights, and so punishment was seen as self-defence and preservation of those rights. This theory provided a foundation which entirely did away with divine right of kings, or any justification for an absolutist or tyrannical state.⁴²

According to Locke, private property is created when a person mixes his labour with the raw materials of nature.⁴³ For example, in tilling of a piece of land in state of nature, makes it into a piece of farmland, thus producing food, hence allowing one to claim ownership over that piece of land and the food produced upon it.⁴⁴ (John Locke concluded that America never really belonged to the natives who lived there, since they were, in his view, failing to utilize the basic material of nature. In other words, they failed farm it, and so did not have a legitimate claim to it where others would therefore justifiably appropriate it.) The implications of the Law of Nature

⁴⁰ibid

⁴¹Locke's Social Contract Theory, accessed at www.paulrittmann.com/social_contract.pdf (accessed on 28/8/2013 at 10.00am).

⁴²Mike Huben, A non-Libertarians FAQ, Accessed at www.std.com/~mhuben/faq.html (accessed on 26/8/2013 at 10.26 am).

⁴³Locke, John (2003) *Two Treatises of Government and A Letter Concerning Toleration*. Yale University Press, p. 72-74

⁴⁴Ibid p 73

therefore limited how much property one can own. One was not allowed to take so more from nature than they could use. This left others without enough for themselves.⁴⁵ Since nature is given freely to all of mankind by God for its common and useful subsistence, one was required to appropriate his own fair share. The linchpin of Locke's argument for the social contract and civil government is property. This is so because it is the protection of their property, including their property in their own bodies those men seek in their decision to abandon the State of Nature.⁴⁶

A final question concerns the status of those property rights acquired in the state of nature after civil society has come into being. At the very least Locke allows taxation to take place by the consent of the majority rather than requiring unanimous consent. With the government having no right to take property to use for the common good without the consent of the property owner, Nozick takes to be a libertarian. On his interpretation, the most people may only tax at the rate good enough to allow the government to successfully protect property rights.⁴⁷

Rousseau in *The Social Contract* (1762) argues that in the introduction of private property, the earlier conditions of inequality became more pronounced. While others had property, others were forced to work for them, and this led to the development of social classes. Eventually, those who had property noticed that it would be in their interests to create a government that would protect private property from those who did not have it but could see that they might have been able to acquire it by force.⁴⁸ Therefore, government established, through a contract purported to

⁴⁵ibid

⁴⁶Locke, J. (1960) *Two Treatises of Government*. Cambridge: Cambridge University Press, p.21-38.

⁴⁷Tuckness, Alex, (2012) "Locke's Political Philosophy", *The Stanford Encyclopaedia of Philosophy*, Edward N. Zalta (ed.), URL <http://plato.stanford.edu/archives/win2012/entries/locke-political/>>. accessed on 8/9/2014 at 10.40 am.

⁴⁸Brian and Bix (2003) *Jurisprudence: Theory and Context*, 3rd Edn, London: Sweet and Maxwell, p. 198-223.

guarantee equality and protection for all, even though its true purpose was to fossilize the very inequalities that private property had produced. In other words, the social contract, which claimed to be in the interests of everyone equally, was actually in the interests of the few who became richer and stronger as a result of the developments of private property. This was the naturalized social contract, which Rousseau viewed as being responsible for the competition and conflict from which modern society suffers.⁴⁹

John Keynes advocates for state interventions in the process of market economy regulation. This regulation may apply to county governments' regulation on land improvements and market in Kenya. Keynes argued that fast economic development must be based on market expansion and an associated increase in consumption. Where the level of effective demand has been achieved, the state intervention is in place. The assumption is that economic growth is related to monetary savings only in conditions of full employment.⁵⁰ While large amount of savings hinder economic development as they represent a passive constant form of income, hence no investment in various factors of production, surplus savings should be deducted with the help of taxation. This justifies the state intervention with the purpose of subtracting income savings. The neo-classical theory assigns the state the passive role of regulating economic processes where it assumes that taxes should be as minimal as possible while corporations should have exemptions.⁵¹

The power of taxation proceeds from the theory that government existence is a necessity; that it cannot continue without means to pay for its expenditure, and that for these means, it has a right

⁴⁹ ibid

⁵⁰ Karl Marx, *A Contribution to the Critique of Political Economy*, in Eugene Kamenka (Ed) *The Portable Marx*, Penguin Books, London, p.158-161.

⁵¹ Ibid p 38.

to compel all its citizens and property within its limits to contribute. The basis is therefore found in the reciprocal duties of protection and support between the state and its inhabitants. Taxpayers in return, receive protection from the state hence the benefits principle⁵²

In Kenya, the social contract theory is applicable in property rating. This is because there exist a contract between the state and its citizen by the operation and application of the Constitution of Kenya, 2010. This agreement's objective is to bind all citizens by ensuring that no person including those in government is above the law.⁵³ Consequently, the values and principles set out in that agreement presupposes that the state, its officer, and its organs have duty come up with effective, sustainable legislation that enhance equity, equality, transparency, non-discrimination and respecting the rights of Kenyan citizen in the ownership of land and other properties.⁵⁴ Among the principles provided for under the constitution is that county governments must have reliable sources to enable them govern and deliver services effectively.⁵⁵ The citizens on their part have a duty to support county governments in the provision of social services by way adhering property rate laws in place and paying property rates on time. Therefore, this justifies the application of social contract theory to this research.

2.3 PROPERTY RIGHTS THEORY

Property rights are acceptable socially in use to which the holder of them can put the scarce resources of which these rights refer where the bundle of legal rights that accrue to a person may

⁵²Bird, R. M. (1992) *Tax Policy & Economic Development*, The John Hopkins Press, London, p.49.

⁵³The Constitution of Kenya 2010, Article 2

⁵⁴Ibid Article 10, Chapter 4 and Chapter 6.

⁵⁵Ibid Article 175 (b)

or may not do with the recourses he owns, the extent to which he may possess, transform, use, transfer, bequeath, or exclude others from his property.⁵⁶ Private property rights have other attributes in addition to determining the use of a resource (Alchian A.) is the exclusive right to the services of the resource. In Kenya, every person has a right to individually or by association with others to own property of any description and in any part of Kenya.⁵⁷ Subsequently, land should be held, used, and managed in a sustainable, productive, equitable and efficient manner.⁵⁸

Recognizing property rights may be explained as follows: "Without laws defining property rights, only the exercise of force would stop one individual from stealing from another. Without the ability to protect property, individuals would have little incentive to accumulate assets. Needless to say, economic activities would be severely restricted."⁵⁹ Thus, without property rights, there would be no incentive to do work that produces and increases the national income and the welfare of the community.⁶⁰ The primary function of property rights is to act as a guiding incentive to achieve a greater use of the property. Thus, laws which establish rights of persons to this freedom necessitate payment of tax sufficient to cover the cost of funding public projects and public labor if local services are to be obtained.⁶¹

⁵⁶Alexander, *Public Property and Property Rights Theory*, p.2-4 available at www.lse.ac.uk/europeaninstitute/.../ALEXANDROPOULOU.pdf.

⁵⁷The Constitution of Kenya 2010, Article 40.

⁵⁸*Ibid* Article 60 (1).

⁵⁹Adrian J. Sawyer (1999) *Electronic Commerce: International Policy Implications for Revenue Authorities and Governments*, 19 VA. TAX REV. 73, 83-84 (noting that administrative efficiency requires governments and tax administrators to facilitate cost-effective tax collection processes) p. 441-453.

⁶⁰Yoseph Edrey (2007) *Constitutional Review and Tax Law: An Analytical Framework*, Haifa University, vol. 56.5, p.1212.

⁶¹*Ibid* p.6

It is the prohibition of a property right adjustment, the prohibition of the establishment of an ownership title that can thenceforth be exchanged, that precludes the internalization of external costs and benefits.⁶² However, Mill notes that the sense of justice can only be achieved first by thrift to industry and risk taking measures to justly confront property inequalities and secondly, addressing the conflict of interest between the capitalist- owners and the wage- owners which deprived workers of any real personal initiatives of becoming property owners.⁶³ He stated;

owe hold with Bentham, that equality, though not the sole end, is one of the ends of good social arrangements; and that a system of institutions which does not make the scale turn in favour of equality, whenever this can be done without impairing the security of property which is the product and the reward of personal exertion, is essentially a bad government.⁶⁴

Mill appropriates Locke's theory with the doctrine that the institution of property includes the recognition in every person of an exclusive right to property.⁶⁵ Therefore, like Karl Marx, he states that the practical operation of private property institutions could defeat the sole purposes in development and that could fetter working class progress.⁶⁶ Thus, in considering property rights theory, equality and justice in ownership of properties is important.

⁶² Ibid p.7

⁶³ Antony Parel, Thomas Lanagan, *Theories of Property: Aristotle to the Present*, Wilfrid Laurier University Press, Amazon. Com, p.268.

⁶⁴ Antony Parel, Thomas Lanagan, *Theories of Property: Aristotle to the Present*, *øAnalyzing J.A Gray, Mill on Theories on Property*, Wilfrid Laurier University Press, Amazon. Com, p.268.

⁶⁵ Ibid p. 276.

⁶⁶ Ibid p.277.

The symbolic perception that property relations are greatly related to power and authority in society as derived from labour theory has a great effect on taxation on such property for development of infrastructure and other local services.

Above all, it insists on unrestrained rights, not attenuated either by a ban on some uses or by a diversion of the income stream away from the factor owner. The reason appears to be obvious. On the efficiency assumption, there exists a perfect positive correlation between the volumes of property rights assigned to a factor owner and the volume of the income flow he appropriates. If any of them is lowered ó attenuated, the other adapts downwards. If property rights are attenuated, income flows diminish correspondingly. If income flows are diverted from owners to other recipients, use of property rights and factor inputs shrinks.⁶⁷

This allows us to systemize three points that weaken the negativist property rights school stand on the public law rights:

First, the public law shares in the creation, protection and enforcement of property rights. The contractual market derivation of property rights, as opposed to the public law rights, can be accepted as a first approximation and a typical genesis only. Economics teaches us that even within these confines derivation are truly contractual only if the distribution of bargaining power is not skewed. Besides, because of positive transactions costs and many factors not assigned to private persons, negotiations of rights gives way to public law interventions.⁶⁸

⁶⁷Yoseph Edrey(2007) *Constitutional Review and Tax Law: An Analytical Framework*, Haifa University, vol. 56.5, p.1156-1215.

⁶⁸Ibid

Furthermore, while property rights are protected and their observance enforced by civil law instruments and violation prosecuted as criminal act, progressively more liability has been established by public law statutory regulation, so that in the view of some, tort law should be regarded as a stopgap pending future statutory. Finally, the property rights systems as such are protected constitutionally and their observance enforced publicly and by public law instruments and state coercive machinery.⁶⁹

Secondly, public law contribution to the property rights optimalization of allocation.

In many cases both unlawful appropriation and public law rights sub maximize income streams. However, it need not always be the case. We have already met situations in which public law interventions into private property rights improve rather than impair efficiency.⁷⁰ Quite generally, in modern welfare states large parts of income are subject to redistribution on the basis of public law interventions, such as property and income taxation, especially progressive, high social contributions, collective bargaining, price and rent controls, inflationary money creation, forced savings capital formation and so on. While discussions on the relative efficiency merits of these interventions are not yet concluded, and while many of them probably and some certainly stretch too far, it is beyond doubt that with all of them eliminated and with appropriation based on civil law property rights exclusively, efficiency would be hurt considerably.⁷¹

Thirdly, the ideological underpinning that any theory that worships a specific property rights and / or economic ownership structure as the most efficient irrespective of the relevant circumstances

⁶⁹Tully, J. (1980) *A Discourse on Property: John Locke and His Adversaries*. Cambridge: Cambridge University Press, p. 24-39.

⁷⁰ibid

⁷¹Ibid (no.66)

is ideologically biased. In as far as the property rights school insists on exclusively civil law based appropriation, it owes this to its specific liberal ideology. The same applies to any enforced economic ownership structure.⁷²

Property rating lawsø theoretical thresholds are essential for social, political and economic institutions for combating the potential of county government revenues associated with property rates. More commonly, land rates laws offer an extreme case of potential wealth, from effectively adhering to property rating laws resulting to adverse exploitation of land resources.⁷³ Even when some agreement on property rights is possible, its form may deviate sharply from what would seem to be the most desirable arrangement.⁷⁴ Property rights theories can be understood as an attempt to formulate a meaningful utility function with the decision to pay taxes. The citizenry therefore has the ability to make decisions within the legal framework in place and their acceptance of laws to impose and enforce those laws.⁷⁵ The right of ownership is thus exclusive and is restricted only by law.

2.4 THE THEORY OF DISTRIBUTIVE JUSTICE

This theory holds that each society has its laws, institutions and policies which permit different distributions of economic benefits and burdens members of a given society.⁷⁶ This leads legislative economic frameworks which are a result of political processes that constantly change

⁷²Waldron, J. (1988) *The Right to Private Property*. Oxford: Clarendon Press, p. 51-67.

⁷³ibid

⁷⁴Waldron, J. (1979) Enough and as Good Left for Others. *Philosophical Quarterly* 29 (117), p.319-328.

⁷⁵Eirik G. Furubotn and Svetozar Pejovich, "Property Rights and Economic Theory: A Survey of Recent Literature," *Journal of Economic Literature*, vol. 10, no. 4, 1972, p.1138.

⁷⁶Stanford Encyclopedia of Philosophy, (2013) Distributive Justice, First Published sun, sep. 22, 1996; Substantive Revision.

with time. Such frameworks help to further economic distributions resulting to fundamentals effect on the people. Thus, the principles of distributive justice can therefore be best applied in the property rate taxation in the county governments as a means to providing moral guidance for the legal structures and political processes that effect the distribution of economic benefits as enshrined in the fourth schedule in Kenya.⁷⁷

While Kelsen validates law as a norm of action hence its general valid application irrespective of its consequences, important to note is that the state (Kenya) is a synonym for the legal order which exudes taxation as a general norm applicable to all Kenyan citizen per Article 209 of the Constitution of Kenya, 2010.⁷⁸ A duty to pay tax by all Kenyan citizens is a precondition to the operation of legal orders of the legal normative orders.⁷⁹ Sanctions are therefore in order under this theory to persons who fail to comply with the grund norm (the constitutional order) which must be obeyed.⁸⁰ Under this theory, just like it is in practice, to presuppose a basic norm for a particular positive legal order does not involve any moral or other extra legal evaluation of the basic norm's requirement of obedience.⁸¹

Effectiveness as to the regulation of such norm is normally based on power which is only attributed to the process of authorization not necessarily driven by coercion.⁸² The reason for having revenue and tax system in every government is to enhance continuity of its operations

⁷⁷The Constitution of Kenya, 2010, Fourth Schedule, Part 2.

⁷⁸Hans Kelsen, *Allgemeine Staatslehre*, vol. 23 of *Encyclopedia Der. Rechts- Und*, Berlin, 1925.
www.jstor.org/discover/10.2307/21422789?uid (accessed on Monday, 25/3/2013 at 10.08 am).

⁷⁹ Karl Marx, *A Contribution to the Critique of Political Economy*, in Eugene Kamenka (Ed) *The Portable Marx*, Penguin Books, London, p.158-161.

⁸⁰ M.D.A. Freeman (2001) *Lloyd's Introduction to Jurisprudence*, 7th edn, Sweet & Maxwell Ltd, p.1336.

⁸¹Ibid.

⁸² Brian and Bix, (2003) *Jurisprudence: Theory and Context*, 3RD ED., London: Sweet & Maxwell, p. 34.

both of income and expenditure nature in administration and funding as well as in the provision of services to the general populace.⁸³ Taxes must therefore be imposed as provided for within the constitutional framework in order to redistribute wealth, enhance social, political, economic and cultural welfare of the general citizenry in a regulated manner.⁸⁴

Property rating laws as a means to equality are important in the materialization of the concept of distributive justice in the distribution of certain social needs and goods.⁸⁵ Therefore, the right to property becomes an institutional concept which is largely dependent on government allocation of resources.⁸⁶ Thus, Adam Smith's theoretical position in his monograph, *An inquiry into the Nature and causes of the Wealth of Nations* while writing on 'Justice in Taxation' states the main conditions that must be availed to taxation laws which are; equity, determination, convenience and thrift of taxation administration. These conditions should adhere to four maxims which a good tax system must conform to:-

- (a) The subject of every state should contribute towards the support of the government, possibly in proportion to their respective abilities and the revenue they enjoy under the protection of the state.
- (b) The tax every individual should pay must be certain and ought not to be arbitrary.
- (c) Tax ought to be levied at the time, in a manner convenient to the taxpayer.

⁸³ Eshiwani, Arthur A. (2003) The University of Nairobi Law Journal, *A Quest for Simplicity in Individual Taxation- What is the Policy Implications? Some Lessons Learnt from an overview of the 1986 US Tax Regimes*, 'University of Nairobi, p. 131.

⁸⁴ Peter Barrand, Graham Harrison, Stanford Ross, (2004) *Integrated Tax And Social Security Contribution Collections Within a Unified Revenue Administration: The Experience of Central and Eastern European Countries*, IMF Working Paper, December, p.42-73.

⁸⁵ Locke, J. (1690) *Second Treatise of Government*, (Indianapolis, Cambridge: Hackett Publishing Company, Inc 1690), p.74.

⁸⁶ Linda Sugin (2003) 'Theories of Distributive Justice and Limitations on Taxation: What Rawls Demands from Tax Systems', *Symposium- Rawls and the Law: Panel VI: Property, Taxation, and Distributive Justice*, *Fordham Law Review*, vol.72, p.1865-2000.

(d) Tax ought to be contrived to the extent of only having as little as possible.⁸⁷

Given the importance of property rights institutions for efficient resource use, more attention must be paid to their development, and if effective, they should be protected.⁸⁸ There is always tension between the distributional results of a property allocation and the productive benefits of securing property rights. Distributional concerns drive the negotiations for developing and modifying property rights.⁸⁹ Understanding these concerns and their impact on contracting for property rights is necessary in explaining why a society has different kinds of property rights and the obstacles they face in attempts to modify them. High levels of economic welfare cannot be taken for granted.⁹⁰

As property rights are abridged in response to distributional concerns, the range of economic and social opportunities available to the owner is narrowed. The resulting shift in expected returns can lead to different and less valuable resource use with profound economic and social welfare consequences for the entire society.⁹¹ This advances the application of social contract theory and classical taxation theory in property taxation as the keys to further the distribution of social services to a community that adheres to local laws in payment of property rates.

⁸⁷ Adam Smith (1778-79) *An Inquiry Into the Nature and Causes of Wealth of Nations*, 2ND Edn. London: W. Strahan and T. Cadel.

⁸⁸ Waldron 1988, p. 210-211; and Waldron 1979, 319-328, p. 322.

⁸⁹ *ibid*

⁹⁰ It leaves out Locke's use of property in the broader sense that includes human rights to life and liberty. See for discussion Schochet 2000, 365-390.

⁹¹ Ryan 1984; Waldron 1988, 137-252; Freeman 2001, 368-388, p. 114. Freeman Resists Pinning Locke downon.

Little state of revenue for guaranteeing basic needs through redistribution is what Rawls envisioned in his three principles of equal liberties, institutional engagement in ensuring the non-existence of economic inequalities and the difference principle. This propagates that legal, administrative, institutional mechanisms are put in place for property taxation.

Distributive justice theory posits the expectation on the Kenya as a state, the county governments, its organs (legislature, judiciary and the executive) and its institutions to come up with effective laws and enforcement means to raise adequate property rate revenues needed to fund social needs of its citizens. It must be noted that the Kenya's political and social context are essential to determine the direction in legal, institutional and administrative change. The change should include the rules governing the use of property rights in the existing formal uses and informal packages.⁹²

2.4 CONCLUSION

In conclusion, this study adopts the theory of distributive justice. This is because this theory recognizes the need to enhance equality in the just acquisition and distribution of goods and burdens in the ownership of properties. Successful taxation is dependent on the operation of various institutions in society, and in Rawls' imagination any system where minimal taxation might be adequate is important. According to him, an economic system of property owning democracy is where key institutions of society "work to disperse the ownership of wealth and capital, thus preventing certain members of society from controlling the economy. In its ideal

⁹²http://www.lse.ac.uk/europeanInstitute/research/hellenicObservatory/pdf/4th_%20Symposium/PAPERS_PPS/LAW_CITIZENSHIP/ALN_EXANDROPOULOU.pdf (accessed on 20/8/2013 at 10 am.)

form, a property-owning democracy would not produce wide disparities of income and wealth and a few privileged members of society controlling most of the economic and social resources.

In addition, the theory of distributive justice incorporates the legal, social, economic and political distribution of resources (property) in order to reconstruct the understanding of liberal, democratic welfare states which include; civil liberties, opportunities for political participation, social positions and opportunities and economic rewards. These are vital in enhancing efficient application of property rating laws and reforms as well. Again, the theory supports equality and equality in distribution of benefits to the society.

CHAPTER THREE

KENYAN PROPERTY RATING LAWS

3.1 INTRODUCTION

Property rates have been a major source of revenue for most governments since the beginning of civilization. Oliver Wendell Holmes said, "Taxes are what we pay for a civilized society."⁹³ Property tax is a capital tax on property imposed by then an authority within the jurisdiction in which the property is located, based on the estimated value of the property.⁹⁴ To determine it, the government performs an appraisal of the monetary value of the property and tax is assessed in proportion to that value. It is most commonly based on the concept of market value. It is usually but not always a local tax thus it may be paid to national, county or municipal governments. Sometimes, multiple jurisdictions may tax the same property. In Kenya, this is the preserve of the County government.⁹⁵ The four broad types of property are land; improvements of land being immovable man-made structures such as buildings; personal property being movable man-made objects and intangible property. Real property entails a combination of land and improvements.

Property rate has its advantages which include; that it is technically and administratively possible to introduce and maintain in almost any circumstances, it is cheap and easier to administer and easy to collect, it is transparent, very difficult to avoid or evade, it is easy to understand where the public easily understand the concept of market value and therefore there is appreciation the basis of assessment, if designed correctly the tax can be marginally progressive,

⁹³The Introduction is Mostly Derived from FAO Land Tenure Studies, *Rural Property Tax Systems in Central and Eastern Europe*, (2002), Rome, The Food and Agriculture Organization of the United Nations.

<http://www.quotegarden.com/taxes.html>(accessed on 29th July, 2013 at 10.45 am).

⁹⁴ Definition at www.wornetweb.princeton.edu(Accessed on 29th July, 2013 at 10.48 am).

⁹⁵ The Constitution of Kenya, 2010, Article 209 (3) (a)

property tax revenue is predictable and buoyant; thus it is very well suited source of locally generated revenue for local governments.⁹⁶

However, property rate has a disadvantage being that it is not perfect thus unpopular. Furthermore, some of the advantages incorporate hidden disadvantages. There are inconsistencies of assessment, which are inevitable in a valuation list which may consist of thousands or hundreds of thousands of assessments, and those of ability to pay. The transparency of the tax reveals any inconsistencies which may become magnified in public perception.⁹⁷ Other taxes, such as income tax, are very much less consistent in practice but the public only know how the tax should work and not how it is actually applied in practice. Confidentiality hides the actual results.⁹⁸

In a similar way the difficulty of avoiding or evading property rate is unpopular. This is evident in societies where the political class and the rich are accustomed to manipulating the tax system for their own advantage. The most articulate and politically influential may effectively oppose or undermine the equitable operation of the tax at the political level.⁹⁹ The American war of independence was aggravated by the cry of "no taxation without representation" where the representatives of the people were the only considered legal means to enacting laws on taxation.¹⁰⁰ Though, in some circumstances property tax may provide "representation without

⁹⁶ The Introduction is Mostly Derived from FAO Land Tenure Studies, *Rural Property Tax Systems in Central and Eastern Europe*, (2002), Rome, The Food and Agriculture Organization of the United Nations, p. 35.

⁹⁷ Ibid p. 36

⁹⁸ Ibid

⁹⁹ Ibid, p. 44

¹⁰⁰ Edrey, Yoseph (2007) *Constitutional Review and Tax Law: An Analytical Framework*, Harfa University Faculty of Law, Edrey Off to Printer, Vol: 56.5, p. 1192.

taxation" for a larger group of population.¹⁰¹ Universal suffrage means that not every voter will be a property tax payer. In some circumstances non-taxpayers may greatly out-number taxpayers therefore damaging the democratic link between democracy and taxation at the local level. There is no sanction on non-taxpayers voting for high tax policies.¹⁰² The adverse effects of this will be magnified if property rate forms the only part of total local revenue over which the local authority has control. In this case, a modest increase in total revenues may require large increases in individual property rates because of the small number of tax payers.¹⁰³

Building "buoyancy" into property tax is an existing problem.¹⁰⁴ Theoretically, buoyancy is a function of two mechanisms; the first is the revaluation of properties at regular intervals and secondly is the increase in the rates to produce the needed revenue. Both are highly political.¹⁰⁵ Nonetheless resistance to revaluations and the more out of date the list, the greater the resistance contributes to this. The biggest factor behind declining yields for property taxes is the failure to carry out revaluations.¹⁰⁶

Another disadvantage is the implementation difficulty. This includes technical difficulties which can be overcome, the restriction of progress, especially in the early stages of implementation. Such technical factors include, the dependence system dependent upon a pool of technical expertise of with an often increasing shortage to create and maintenance of a valuation roll, and

¹⁰¹ibid

¹⁰² Youngman, Joan and Jane Malme(2004) *The Property Tax in a New Environment: Lessons From International Tax Reform Efforts*, International Studies Program Public Finance Conference on The challenges of Tax Reform in a Global Economy, Lincoln Institute of Land Policy,Cambridge, Massachusetts,p. 1102.

¹⁰³ibid

¹⁰⁴Warris, Attiya (2007) "Taxation Without Principles: A Historical Analysis of the Kenyan Taxation System," *Kenya Law Review*, vol. 1, p.279.

¹⁰⁵ Carlson,Richard Henry (2005) "A Brief History of Property Tax," *Assessment Administration*, IAAO Conference, Massachusetts, p. 97-99.

¹⁰⁶ibid

the establishment and conduction of appeals process where parts of the process can be time-consuming and expensive. For example, compiling a comprehensive list of ratable properties especially where there are a large number of legal status issues or if records are poor managed or incomplete, and inadequate outsourcing services to the private sector. The establishment of a valuation tribunal and administrative and infrastructure support such as dedicated information technology systems for both the valuation and the financial accounting system for the billing, collection, and enforcement procedures also forms part of the technical problems.¹⁰⁷

Further, despite the public's understanding of the concept of market value, there is confusion arising in the relationship between 'rate-able values' and setting the 'rate'. This is because the revaluations take place after a long interval, and where there has been political unwillingness to increase the rate. This often manifests itself in many ill-founded and baseless appeals from various taxpayers.¹⁰⁸

Property rates have various uses as follows;

Property rate is a source of local revenues where they are commonly employed as the main source of locally generated revenue especially because there is no other major source of taxation revenue that is exactly geographically defined. Local revenue may be generated from other sources such as licensing fees but even where alternatives exist it may be easier for a local

¹⁰⁷Ibid 8

¹⁰⁸Kelly, Roy(2000) 'Property Taxation in East Africa: The Tale of Three Reforms', *Development Discussion Papers no.753*, Harvard Institute for International Development, Atlanta, Georgia, Harvard University, p. 13-15.

government to modify the property tax rate than to adjust the any other form of tax, for example.¹⁰⁹

Secondly, property rate plays an important role in enhancing decentralization and the autonomy of local governments. Effective decentralization of government incorporates the power to raise revenue independently in addition to the legal authority allowing local governments to use the funds as they see fit according to the limits of their legal powers. In practice, local government autonomy is always limited. The local governments' duties are almost invariably dependent on central government grants which detract to a greater or lesser extent from their independence. Therefore, increasing independent powers of raising revenues through property taxes thus becomes important.¹¹⁰

Thirdly, property rates offer support for other functions. Valuation lists compiled for local government may be used by other bodies. For instance, water charges are commonly based on the assessed value in the valuation lists. Such procedures are very cost effective and may have a reasonable correlation with water usage in many circumstances.¹¹¹

Fourth, property valuation lists may be used in transitional economies for other purposes. They can be used to establish lease rates on government owned land. Where land markets are not yet developed, mass valuation results can also be used as a basis for establishing market values for properties. In addition, local bodies may have to take over functions previously controlled and

¹⁰⁹ Chapra, M.U, (1976) *The Islamic Welfare State and Its Role in the Economy in Studies in Islamic Economics*, Jeddah: The Islamic Foundation ,p. 33-51

¹¹⁰:ibid

¹¹¹:ibid

administered centrally. They are not able to rely on central government funding and have to raise their own revenue. Depending on the tax rates and cost of collection, valuation lists may provide a fair and cost effective basis for doing so. This is especially true within the Kenyan context with the transition to the devolved units.¹¹²

3.2 HISTORY OF PROPERTY RATES IN KENYA

The pre-colonization period was characterized by diverse tribal based tax systems which were at best extremely rudimentary, simple and operated at a very small scale. They were fairly successful for the economy of the time and suitable in the time frame.¹¹³ Foreign rule as imposed by colonizers introduced taxation in a systematic manner. The Arabs colonizers to East Africa in the 7th century had local hereditary rulers as city states were mini monarchies. They were appointed as rulers by the Sultan of Oman. The coastal region of East Africa was on the basis of Islamic law, and the right of the ruler to tax within bearable limits was upheld.¹¹⁴ Traders were taxed by the application of a capitation tax, a type of a poll tax which was levied on traders and was calculated by a fixed amount for every slave exported from the Sultanate, as well as customs, charged on all goods. The main exports included cloves, ivory and beads.

After the Portuguese had gained control over the East African coast, they entered treaties whose terms included *inter alia*. They exercised control over revenue and customs duties over the region. The Sultan was to be allowed to receive one third of the customs revenue as his personal

¹¹²Ibid (no. 106)

¹¹³Warris, Attiya (2007) -Taxation Without Principles: A Historical Analysis of the Kenyan Taxation System,ø *Kenya Law Review*, vol. 1,p.282.

¹¹⁴ Chapra, M.U, (1976) *The Islamic Welfare State and Its Role in the Economy in Studies in Islamic Economics*, Jeddah: The Islamic Foundation, p. 45.

property.¹¹⁵ However, just like the clergy in Portugal, Christian clergy in East Africa were also exempt from all taxes including customs duty, and this provision remains in force to date.¹¹⁶

The British take over in East Africa in the 19th century conveniently imposed direct tax in Africa as external trade was minimal and customs duties would not raise enough funds for the purposes of the settler administration, protection and benefits. The fiscal colonial policy of self-sufficiency forced colonial states to rely on locally generated tax revenue, thus dependence on settler and indigenous labor for both production and trade increased.¹¹⁷

In Kenya, intensification of the linkages between the settlers and State increased.¹¹⁸ The development of colonial tax policy needed to prop up the colony's own economy by creating foreign markets. In addition, sources of raw materials for its industries enhanced maximum gains with minimum input, to locate and secure the source of the Nile for the purposes of protecting British interests in Egypt.¹¹⁹ European powers of the time had to secure Lake Victoria and its environs, while the Rhodesian philosophy of conquering Africa from the Cape to Cairo as a jewel in the crown of the British to show the world their might had to be upheld. They intended to secure the spice route to Asia and maintain the link with the Indian colony in the wake of the Suez Canal crisis towards the end of the colonial period.

¹¹⁵Strandes, J., (1961) *The Portuguese Period in East Africa*, Nairobi: East African Literature Bureau, p. 67-69.

¹¹⁶ Warris, Attiya, M Kohonen, J Ranguma, and A Mosioma(2009) *Taxation and State Building in Kenya; Enhancing Revenue Capacity to Advance Human Welfare*, Nairobi, Tax Justice Network,p.14-16.

¹¹⁷:*ibid*

¹¹⁸:*ibid*, p 12

¹¹⁹:*ibid*

There was a deliberate policy to colonize Africa by moving gradually from co-existence to control of the territory, obtain cheap African labor that was forced upon the local Africans by moving them away from subsistence living and to spearhead the abolition of slavery.¹²⁰ There were policies that influenced colonial policy and the need to pay for the costs of wars.¹²¹ Thus, soldiers were drawn from the colonies as well as having the population taxed heavily by the colonial authority.¹²²

Demands for reconstruction of the war ravaged European economies influenced the post-Second world war tax policies. The 'civilization' campaign by the British requiring provision of services education and medicine was a fact. The need to pay for these and other government services led to the introduction of taxation and revenue enhancement. This was inseparable from economic change, especially in areas where there had been only a subsistence economy.¹²³ The application of tax law by the British in the colonies resulted in high income and low returns back into the colonial economy. Further, prior to 1885 investment in the British colony, 25 percent higher rate of return than that on domestic investment was imposed.¹²⁴

In East African, British interest began with the drive to abolish slavery. British protection was accorded to the then Sultan Mazrui under conditions that; the chief of Mombasa would be reinstated to his former possessions by Great Britain; the chief of the Mazrui tribe would continue to exercise the sovereignty of the State and would be hereditary in his family; the chief

¹²⁰*Supra* note 7, p 283

¹²¹Dowell, Stephen, (1965) (3rd) *A History of Taxation and Taxes in England*, 4 volumes, London, p. 112-115.

¹²²*Ibid*

¹²³*Supra* note 12

¹²⁴Lance E. Davis and Robert A. (1987) *Huttenback Mammon and the Pursuit of Empire: The Political Economy of British Imperialism*, 1860-1912 Series: Interdisciplinary Perspectives on Modern History Cambridge University Press, p.307.

would reside with an agent of the protecting Government; the two contracting parties would equally divide the customs revenue; trade with the interior would be permitted to British subjects; and the slave trade be abolished at Mombasa. This was the stepping stone for the commencement of taxation in East Africa by the British. At different times and for different purposes, they applied different forms of taxation.¹²⁵

In terms of property, the 1901 Hut Tax Regulation was an attempt at a property tax by taxing only huts that were used for living on the assumption that additional huts for wives and their children increased the family income. The Regulation imposed a tax of one rupee, payable in kind or through labor, upon every native hut in British East Africa. A subsequent amendment to the law allowed the tax to be levied specifically upon the owner of the hut.¹²⁶

Additional, special provisions were added to the Native Hut and Poll Tax Ordinance providing for the distress of property, or three-month imprisonment for non-payment of tax due by 1910. The poll tax official importance was to encourage the young unmarried men to find paid employment on settler farms to meet the new tax obligation and thus entering the monetary economy.¹²⁷ However, the direct taxation of land values in Africa has a close connection to large-scale alienation of land in the settler economy.¹²⁸ Steady settler pressure resulted in a steady increase in the rate of hut tax or poll tax.¹²⁹ However, subsequent African protests and unrest led to a reduction.

¹²⁵Warris, Attiya (2007) 'Taxation Without Principles: A Historical Analysis of the Kenyan Taxation System,' *Kenya Law Review*, vol. 1, p 285.

¹²⁶*Ibid*

¹²⁷*Ibid* p. 290

¹²⁸Okoth- Ogendo, H.W.O. (1991) *Tenants of the Crown: Evolution of Agrarian Law and Institutions in Kenya*, Nairobi: Acts Press, 27.

¹²⁹ From 5 rupees in 1915 to 8 rupees in 1920

The application of tax law in Kenya was deliberately began by the British Crown through the Hut and Poll tax by completely ignoring tax principles because they wanted to force the African population into a capitalist labor market. The major role played in the labor system was a means of indirect coercion as well as a major source of state revenue. The tax weapon had the desired effect in forcing more Africans into wage employment. In reality the hut and poll taxes were crude wealth taxes that also served as a proxy for property rating to rural areas.¹³⁰

Land tax as property tax was imposed by the protectorate government and this justified the preservation of obtaining some share of any future appreciation in the value of the land. This was because much of the land acquired by settlers was not being developed. When the Crown Land Bill was presented in 1908, it became the first legislation to propose the levying of a graduated land tax on individual holdings as a sound basis for land policy in East Africa.¹³¹

The Land Bill defined important aspects of the new system of land taxation. Crown land lease rated at more than Kenya shillings 180 worth of rent would be charged a land tax in addition to such rent, at the rate of six cents for every 75 cents of rent. The bill also provided that whenever any individual or corporation held more than 50,000 acres, the land tax would be increased by four times the amount that would otherwise be payable. Further if corporation or individual held more than 100,000 acres he would be compelled under a penalty of Kenya shillings 325 per day to divest of such surplus land.¹³² However, the Bill was rejected due to strong opposition from the settlers.

¹³⁰ *Supra* note 16

¹³¹ *Ibid.*

¹³² The Crown Land Bill, Section 137 (c)

In 1915, the Crown Lands Ordinance conceded to the settlers' demands by deleting the provisions for land taxation. This helped in shaping current land policy throughout the region where there was emergence of a land market by legalizing the free transfer and mortgaging of land. Land leases within 99 years were to be granted and rent reassessed at one percent and two percent of the unimproved value of the land during the 33rd and 66th year respectively. Throughout East Africa, the colonial government was able to promote a systematic registration of urban lands and privatization of land rights. As a result, there was promotion of commercial agriculture and urbanization that served as the catalyst for defining individual and private family rights to land in more exclusive terms.¹³³

However, the 1915 Land Ordinance failed in one important respect, it did not include any provisions against speculative accumulation of land although occupiers were required to make improvements to the land within a specified period and to maintain such improvements after that.¹³⁴ In 1940, a mining tax on royalties was imposed.

At independence, the constitution supported the colonial authoritarian administrative structure. Kenya had a decentralized and quasi-federal form of government operating under a written constitution based on the Westminster-style of governance. This Westminster model of governance was based on a federal system which entailed a decentralized form of governance with two houses of parliament. However, constitutional amendments after independence abolished the federal system and centralized power extensively creating an imperial presidency.

¹³³Ibid (no. 140)

¹³⁴Frank Cass, (1968) *Kenya from Within: A Short Political History*, London, p. 75

These pre-independence negotiations created a way for the eventual agreement by the British Crown to grant independence peacefully had several conditions. All colonial legislation, international treaties and agreements that the British Crown had undertaken on behalf of the Kenya colony were to be adopted in whole by the then independent state and parliament.

The responsibility to tax property has been vested on the Local Authorities in post-independence Kenya.¹³⁵ The Rating Act allowed rating authorities to tax either land or land and improvements like buildings.¹³⁶ This included the responsibility of construction and maintenance of the tax roll, the valuation, assessment, tax billing, collection, enforcement, appeals and taxpayer service.¹³⁷ In-house staff and other government department employees like the Ministry of Lands (there has been reliance on the Ministry of Lands for the production of the valuation rolls with only a few using private sector valuers), or the private sector were used to carry out the above mentioned functions.¹³⁸ In Kenya, property taxes (known as rates per Article 209 (4) of the Constitution of Kenya) provide an average of 20% of the total recurrent revenues for local authorities and this forms 1% of the government and 0.25% of Kenya's total GDP.¹³⁹

Kenya like any other developing country need to apply the tax weapon which is the laws so as to meet the objectives of raising enough revenue and ensure that such is raised by application of

¹³⁵ Local Government Act, CAP 265 Laws of Kenya, Section 3.

¹³⁶ Section 3 of The Rating Act, Cap 267 Laws of Kenya.

¹³⁷ Kelly, R., (2000) -Property Taxation in East Africa: The Tale of three reforms, *HIID Development Discussion Paper NO. 753*, p. 21.

¹³⁸ Ibid p. 4.

¹³⁹ The Ministry of Local Government of Kenya, FY 2000-2001 Collection as recorded through The Local Government Authorities Transfer Fund (LATF), They are consistent with those released annually by the Central Bureau of Statistics Annual Economic Survey.

laws that are equitable.¹⁴⁰ While KRA levies property taxes on leasehold properties payable annually and stamp duty payable on transfer of real estates, the county governments' property taxes are known as rates and development approval charges.¹⁴¹ Consequently, the property taxes administered in Kenya include land rent, stamp duty and all property rates.¹⁴²

Property rates have always been considered as a good local tax that is most reliable and physically available source of revenue. Additionally, it is autonomous and presents a financially independent tool of revenue for County governments.¹⁴³ This is so because, land cannot easily be moved out of the taxing jurisdiction, can be seen and thus ensuring transparency and accountability. However, in Kenya, property taxation is yet to be tapped source of revenue due to various factors which will be discussed.¹⁴⁴ To-date changes in tax revenues changes can only be achieved by:

- (a) Tax bases growth with the economy or because changes in the tax laws broaden the tax bases.
- (b) Laws providing for increase in rates.
- (c) Better enforcement mechanisms of use of property tax laws.¹⁴⁵

3.3 LEGAL REGIME FOR PROPERTY RATING IN KENYA

¹⁴⁰ Eliud Maji and Eric Ronge, (2006) *Taxation and Tax Modernization in Kenya*, Institute of Economic Affairs, p. 10.

¹⁴¹ Mutizwa, Naison and Others (2013) *Property Tax Regimes in East Africa*, UN HABITAT, NAIROBI, p. 22-34.

¹⁴² *Ibid* p. 8.

¹⁴³ *Ibid* p. 1.

¹⁴⁴ *Ibid* p. 2

¹⁴⁵ *Ibid*

3.3.1 GEOGRAPHICAL CONTEXT OF LAND IN KENYA

Kenya, as a republic can typographically be divided into four geographical and ecological zones namely, the highlands, coastal plain, arid plateau and the Lake Victoria basin. The constitution in article 1 (4) recognizes the operation of a county government and Kenya is divided into 47 counties. These semi-autonomous governments have the responsibility of levying property rates.¹⁴⁶

Kenya has a total of 175 local authorities comprising of city council, 45 municipal councils, 62 town councils and 67 county councils established under the local government act cap 265. These local authorities operate under the county governments.¹⁴⁷

3.3.2 LAND USE AND LAND TENURE SYSTEM

At independence, Kenya settler colony comprised large tracts of land mostly fertile agricultural land was exclusively owned by white settlers under freehold tenure or leasehold.

To date there are various land tenure systems inherited at independence namely: urban land (mostly government owned and acquired on leasehold by individuals for up to 1970), farm land or freehold tenure (by individuals and companies) and trust land (held on behalf of communities and governed by customary law).¹⁴⁸

¹⁴⁶ Mutizwa , Naison (2013) *Property Tax Regimes in East Africa*, The Global Urban Economic Dialogue Series, UN Habitat, p. 1-2.

¹⁴⁷ Ibid p. 4.

¹⁴⁸ Ibid p. 8-12.

Property related taxes in Kenya include land rent, property rates and stamp duty. KRA collects taxes on land rent most on leasehold properties and it is paid annually and stamp duty that is paid on transfer of real estate.¹⁴⁹

Property rating in Kenya as levied today in Kenya resulted from British colonial administration in east Africa at the start of the 20th century. As discussed earlier in feudal era of Anglo-saxon kings the idea of local governments developed. At first, land tax as commonly called was introduced in 1900 and was first applied in Mombasa.

3.3.3 APPLICATION OF PROPERTY RATING LAWS IN KENYA

Kenya, as discussed has a long history of using property tax laws (called 'rating' in most former British colonies) to realise revenue for local authorities (now county in Kenya's county governments). The Rating Laws in 1901 allowed for three types of property taxes to be administered which included stamp duty, estate duty and capital gains tax.¹⁵⁰ Later the estate duty and capital gains tax were abolished while stamp duty remained. It was during the colonial period as discussed earlier that the two Acts (Valuation for Rating Act Cap 266 and the Rating Act Cap 267) were promulgated and it empowered local authorities (now Rating Authorities) to levy rates in Kenya.¹⁵¹

¹⁴⁹¹⁴⁹Ibid

¹⁵⁰WHA Olima and PM Syagga (1996) 'Rating Systems in Kenya: Evolution, Constraints and Potentials', *Journal of Property Tax Assessment and Administration*, Vol. 2 (1), p. 22-23.

¹⁵¹Ibid p. 25-30.

The local governments to date are empowered to value land by the Valuation for Rating Act for purposes of levying rates. Procedures and methods of valuation are provided for. These are necessary in the preparation of valuation rolls, the process of valuation and it also provides for the valuation tribunal.¹⁵²

The power to impose rates on land and buildings is provided for in the Rating Act. The rating authorities have the duty to ensure that valuation rolls are prepared, appoint a valuer and also choose a rating system.¹⁵³

Section 4 (1) of the Rating Act provides for the forms of rating that can be adopted by the rating authorities; area rate (based on the size of land and use it may be flat rate or graduated rate) for rural areas, agricultural rental value, site value rate, or a site value rate combined with an improvement rate . Only one of these stipulated forms of rating is applicable to any specific area. However, the choice of any form of rating is subject to a Minister's approval. Therefore, this means that different areas within the same county may have different forms of rating to levy rates. Any unimproved value of land should not have rates levied on a percentage higher than four unless it is with the consent of the Minister.¹⁵⁴

Type of local authority	Range of tax rates (% of USV)	Median tax Rates (% of USV)

¹⁵² RCD Fransen & WHA Olima(2002) -Property Taxation in Southern and East Africa: Lessons from South Africa and Kenya,ø 15 SA Mercantile Law Journal, p. 320.

¹⁵³The Rating Act CAP 267 Laws of Kenya, Section 7.

¹⁵⁴ Franzsen RCD and WHA Olima (2003) -Property Taxation in Southern and East Africa: Lessons from South Africa and Kenya,ø 15 SA Mercantile Law Journal, p. 324.

Nairobi city council	14%	14%
Municipality	2% to 10%	6%
Towns	2% to 8%	6%
Counties	2% to 22	5%

Source: Ministry of Local Government, 2001

Consequently, county governments to date like Nairobi have adopted unimproved site value rating system in its urban jurisdictions. Since taxation of unimproved land increases the cost of holding it, these have been used to discourage land hoarding and speculation thus encouraging development of land.¹⁵⁵

3.3.4 BASIS OF ASSESSMENT

Enid Slack outlines the various stages undertaken as basis of assessment. This includes property identification where properties are identified and described on tax roll with each property assigned a roll number. This roll enables the rating authority to have information on tax billing and property transfer records.¹⁵⁶ The fiscal cadastre or assessment roll should include the address of the property, its owner, building location, its size, definition of property boundaries and

¹⁵⁵ Ibid p. 325.

¹⁵⁶ Enid Slack (2013) "Property Tax: A Situation Analysis and Overview," *A Primer on Property Tax : Administration and Policy*, 1st edition, Blackwell Publishing Ltd.p.7.

information on renovations or improvements. This is used to allocate the assessed value to the property.¹⁵⁷

Report should be made in a consistent manner and with a stipulated period of updating it (annually or frequently). Local tax rates should be assessed and tax bills issued. Mechanisms for appeals on responses made to the assessment should be in place and recognized by law. Modes of rate collection and the institution responsible should be in the law as well as means of recovering arrears from defaulters.¹⁵⁸

Property identification according to Joan Malme and Youngman is difficult in most developing countries which is the case in Kenya. For example in Kenya; maps for property identification may not exist, property ownership data is controversial due to multiple ownership, information on improvements may be missing, tax records may not be identified by the taxpayers and by property, land and buildings records may be maintained by different agencies (Ministry of Lands) and not linked to county governments, failure of computerized rate records hence not easy to retrieve information and tax rating records are considered secret. These contribute negatively on the effects of the rating laws to county system of government resulting from low revenues.¹⁵⁹

¹⁵⁷ ibid

¹⁵⁸ Ibid p.21-25.

¹⁵⁹ Joan Youngman and Jane Malme, (2004) -The Property Tax in a New Environment: Lessons from International Tax Reform Efforts,ø *International Studies Program Public Finance Conference: The Challenges of Tax Reform in a Global Economy* Massachusetts, Cambridge, Lincoln Institute of Land Policy, p. 22-25.

Section 8 of the Valuation for Rating Act provides for the basis of assessment. The valuer is empowered to use different suitable modes of valuation. This is because the Valuation for Rating Act does not specify any method of assessment. Various conflicts have arisen from interpretation of valuation methods.¹⁶⁰ Thus the valuation for Rating Act introduces uncertainty and complexity during valuations.¹⁶¹ This has led to unnecessary disputes arising from various taxpayers (rateable owners) and rating authority hence increasing the cost of administration through high costs of litigation.

Where there is self-assessment system, most taxpayers are likely to undervalue their property. On the other hand, where there is official (cadastral) assessment system, taxpayers feel that their property is overvalued. Thus, the process of valuation to a level of fairness is sometimes expensive.¹⁶² Tax on unutilized properties is important tool in influencing land use patterns, especially in urban areas. Again, taxes levied on the assessed value of property, any investment that increases value to the property will automatically increase the assessed value leading to higher tax collected. These high taxes provide incentives for less densely developed projects.¹⁶³

3.3.5 TAX BASE

According to the UN Habitat report, tax base is the value or amount that is subject to a tax.¹⁶⁴

¹⁶⁰ Mutizwa Naison (2013) *Property Tax Regimes in East Africa*, The Global Economic Dialogue Series, UN Habitat, p. 4-9.

¹⁶¹ WHA Olima and PM Syagga (1999) -Rating Systems in Kenya: Evolution, Constraints and Potentials, *Journal of Property Tax Assessment and Administration*, Vol. 2 (1), p. 28.

¹⁶² Fischell, William A. (2001) -Home voters, Municipal Corporate Governance, and the Benefit View of the Property Tax, *National Tax Journal*, 54 (1), p. 73-157.

¹⁶³ Ibid p. 14.

¹⁶⁴ Mutizwa, Naison (2013) *Property Tax Regimes in East Africa*, The Global Urban Economic Dialogue Series, UN Habitat, p. 24.

In Kenya, property rating is provided for under Article 209 (3) of the Constitution of the Republic of Kenya. The Rating Act allows the rating authority to tax either land or land and improvements (e.g., buildings).¹⁶⁵ In practice, the rating authorities tax land in urban jurisdictions and municipal areas only.¹⁶⁶ Franzsen however notes that the inappropriate rating legislation in Kenya and other eastern and southern African countries that do not take realities into account, has made it difficult or impossible to put the law into practice in an equitable and sustainable manner.¹⁶⁷

To date, the rating authorities have the duty to levy property rates. Ursula Hicks considers the role of local governments in raising enough revenue and states that if local government are to play their significant role of ensuring economic and social development, they should have access to adequate funds.¹⁶⁸ Therefore,

if they are both to act responsibly and to show initiative, some, not negligible, part of this control over resources must be independent, in the sense that the local councils are free to choose the rates (and to some extent the condition) of their taxes or services charges.¹⁶⁹

The concept of value capture is most significant in most local government where in the taxation of land, the community's expectation in the provision of local services should be considered. Where the provision of services is adequate, it leads to increase in value of land

¹⁶⁵The Rating Act CAP 267, Laws of Kenya, Section 5.

¹⁶⁶Today it is in Section 4 of the Rating Act, Cap 267, and Laws of Kenya.

¹⁶⁷RCD Franzsen and WHA Olima (2003) -Property Taxation in Southern and East Africa: Lessons from South Africa and Kenya, *15 SA Mercantile Law Journal*, p.316.

¹⁶⁸Ursula Hicks(1961) *Development from Below: Local Government and Finance in Developing Countries of the Commonwealth*, Commonwealth Secretariat, p. 277.

¹⁶⁹ibid

and county governments should be in a position to capture its benefits in terms of revenues through property rating.¹⁷⁰

The choice of property tax base or method of assessment varies from one jurisdiction to another. Some countries' tax base is land only, in others it is buildings and land.

3.3.6 VALUATION AND EXEMPTION

As provided in section 27 (1) of the valuation of Rating Act certain; properties are exempted from the valuation roll. These are cemeteries, places of worship, hospitals, education institutions, charitable institutions and libraries, sports arenas, and national parks within the definition of the national Parks of Kenya Act. Properties are only exempted if they are not used for profit making or residential purposes other than student residential.¹⁷¹

Land is valued by use of market value. The Rating Authority is required to identify the valuer who can be a country employee or from the Lands Ministry or one in the private sector. It is the responsibility though not provided for by the law to get land information. Ascertain value and produce valuation roll for rating authorities.¹⁷²

¹⁷⁰ibid

¹⁷¹ The Rating Act Cap 267 Laws of Kenya Section 22.

¹⁷² Mutizwa, Naison (2013) *Property Tax Regimes in East Africa*, The Global Urban Economic Dialogue Series, UN Habitat, p.18.

The rating authorities although through relevant departments of county governments table valuation roll, make it public and deal with objections. This valuation is then used by the counties to levy rates.¹⁷³

The preparation for valuation rolls is an important tool in effecting valuation in Kenya county system of government. The laws to date provide for supplementary tax rolls tabled on annual basis. To date most valuation rolls are not up to date and valuation rolls dates back to the early 1980s.¹⁷⁴ The unavailability of valuers cannot be the reason why this is so since Kenya's training of valuers is imminent. Thus, the systematic ability to maintain and coordinate information is lacking.

In addition, there is over-reliance on the rating department in the land ministry for creation and updates on valuation rolls. The rating authority relies on land information availed to it by the ministry of lands and do not have its own land information updated depending on the emerging changes in the property ownership and land transactions. This greatly affects the ability of the rating authorities to adequately prepare valuation roll as well imposing proper rates on rateable owners.¹⁷⁵

Bird and Slack encourage periodic valuations and revaluations which should be fair and productive. Shorter time reassessment helps in maintain the tax base legitimate and reduces the likely effect of sudden tax burdens.¹⁷⁶

¹⁷³ *ibid*

¹⁷⁴ *Ibid* p. 14-18

¹⁷⁵ Enid Slack (2000) *Property Tax: A Situation Analysis and Overview*, Enid Slack Consulting, Toronto, p. 20-21.

¹⁷⁶ *Ibid*

3.3.7 BILLING AND RATE COLLECTION

The administrative function of the rating authorities in Kenya is billing and collection of tax.¹⁷⁷ The rating authority may use its own staff, other government departments or the private sector in carrying out these functions. In some of the major municipal councils like Nairobi, revenue collections have sometimes been contracted to private sector lawyers or resulting to disappointing results. Rate billing is done by rating authorities annually and when the rate to be paid is due, demand letters are sent stating the assessed value and the rate due.¹⁷⁸

Generally, revenue collections are low with collection rates ranging from 5 to 60 percent of liabilities. This is attributed to factors such as; lack of confidence or understanding by the taxpayer in the manner the tax is levied, collected, and enforced, and used, inadequate legal and administrative collection and enforcement mechanisms, and perhaps most importantly and lack of political will. There is reduced rates revenue which is closely linked to non-payment by property owners leading to cumulative arrears. This problem of endemic rates arrears is widely visible in the print media.¹⁷⁹ Quite disappointing to note is the frequent weekly notices on the local dailies posted by county governments outlining rates arrears owed to the rating authority by

¹⁷⁷ Section 14 of the Rating Act, Cap 267, Laws of Kenya.

¹⁷⁸ Mutizwa, Naison (2013) *Property Tax Regimes in East Africa*, The Global Urban Economic dialogue Series, UN Habitat, p. 26.

¹⁷⁹ *ibid*

various rateable owners or rate waivers if payments of arrears is done within a specifies period of time.¹⁸⁰

The law on the collection procedures in Section 15 (1) of the Rating Act, Chapter 267 provides that every rate levied by the rating authority shall become due on the first day of January in the financial year for which it is levied and shall become payable on such day in the same financial year as shall be fixed by the rating authority. The rating authority makes public the payment day and the amount of rate to be paid by giving at least 30 days notice. Upon such notice, taxpayers are required to pay the amount at the rating authority's offices.

3.3.8 ENFORCEMENT PROCEDURE AND PRACTICES

The Rating Act Cap 267 provides for procedures to be followed while enforcing rate payment by defaulters.¹⁸¹ When a rateable owner fails to pay for rates due within a stipulated time (30 days), interests on any such unpaid amount of rates payable accrue. The rating authority is required to write a demand notice to be served upon the rateable owner that requires him/her to make such payment within 14 days after the demand is made.¹⁸²

¹⁸⁰In August 2013, the City Council of Nairobi posted such a notice where only rateable owners with arrears of more than Kshs 100,000 (USD 1335) had their names and amounts owed by them included in the notice (Daily Nation, August 31, 2013). Conspicuously missing on this notice were the central government and state corporations despite the former owing the council the bulk of the arrears in contribution in Lieu of Rates (CILOR) and in spite of a study commissioned by the Ministry of Local Government itself revealing that CILOR was the main non-performing revenue source (Akello, 2008; GOK, 2007).

¹⁸¹Section 17.

¹⁸²See UN Habitat 2013 Report

County governments have made use of various legal provisions encouraging and ensuring compliance and this includes charging interests on arrears, discounts for prompt payment and recovery measures from tenants. However, neither of these mechanisms has effected compliance.¹⁸³

On the other hand, rating authorities have taken a passive role in enforcement by relying exclusively on rate clearance certificates. Active enforcement measures should entail fines, tax liens and foreclosures but they do not virtually exist. No county in Kenya has applied the legal option of tax caveats to titles or used property foreclosures as means of enforcing rate compliance.¹⁸⁴

3.3.9 WEAKNESSES OF PROPERTY RATING IN KENYA

Only taxed in major urban jurisdictions and ignoring small urban jurisdictions e.g. peri-urban and informal settlements. In those major urban jurisdictions e.g. Nairobi whose property tax is currently levied, the rating system is in disrepair. This is due to poor property coverage in the vast and new urban developing properties hence they are not reflected in relevant valuation rolls or property registers.¹⁸⁵

Rural properties in some counties are not taxed. This is attributed to the absence of municipal structures in rural areas, inadequate resources and public services to introduce this tax on rural

¹⁸³Ibid p. 26.

¹⁸⁴Ibid

¹⁸⁵RCD Franzsen & WJ McCluskey (2000) 'Some Policy Issues Regarding the Local Government: Property Rates Bill' 12 SA *Mercantile Law Journal*, p. 209-211.

land and the limitations of the law on applying rates to declared rating areas. Legislation in Kenya, though, allows rural properties to be taxed.¹⁸⁶

The ability and the capacity to prepare valuation rolls and supplementary rolls at regular intervals in Kenya are lacking. Currently, legislation in Kenya mandates an ad valorem property rating system with discrete values on rateable property. The involvement of professional valuers-capacity to properly assess land for tax is virtually lacking. Franzsen and WHA Olima argue that Kenya needs to have capacity to enhance property tax because of adequate valuer professionals.¹⁸⁷

In Kenya, the property rating system prescribes to a discrete value of the ratable property. This is not sustainable considering the inadequate capacity and hence giving no effect to the law. Kenya could adopt the value banding system in property rating, hence actualizing the mass valuation systems.¹⁸⁸

Although legislation stipulates for various enforcement means, the laws have not been effective. This attributed to inadequate financial resources to take civil action against defaulters.¹⁸⁹

There is lack of adequate human resource capacity owing to physical and financial capacity. This underpins property tax administration system. In addition logistical and technical support in terms of digital storage of information is often lacking.¹⁹⁰

¹⁸⁶ Ibid

¹⁸⁷ See RCD Franzsen and WHA Olima

¹⁸⁸ Ibid p. 211-216.

¹⁸⁹ Ibid

Political Interference inhibits proper enforcement means. Taxpayer awareness or knowledge and perceptions have greatly contributed to low revenues collections and this is normally attributed to tax avoidance.

Therefore, property rating laws in Kenya in place are inappropriate and do not take realities of all these and many other shortfalls making it difficult to realize its positive effects in a sustainable and equitable manner.

3.4 CONCLUSION

All over the world, history is an important tool of social, economic, political, legal and institutional progress. History provides salient lessons, gives guidance to make better choices to enhance a better future. So is the history of property taxation and rating in particular as well as rating laws in Kenya. The application of Rating Laws in Kenya have offered a better platform to analyse, critic and come up with better ways of realising property tax revenues.

¹⁹⁰ *ibid*

CHAPTER FOUR

PROPERTY RATING LAWS AND PROPERTY RATING IN SOUTH AFRICA

4.1 INTRODUCTION

Over the years, the ability of rating authorities in many countries to direct and sustain social and economic growth in their respective areas of jurisdiction has declined.¹⁹¹ Kenya is not an exception either. South Africa has been used for comparative study because to a greater extent it has had a successive rating regime and the fact that like Kenya, the authority to levy rates is devolved and or decentralised to local governments (county governments in Kenya). The rating laws and rating in the republic of South Africa have been discussed in this chapter and its findings highlighted.

4.2 PROPERTY RATING IN SOUTH AFRICA

South Africa has a population of about 44 million.¹⁹² It is organized into 9 provinces, 6 single-tier metropolitan municipalities, 50 district municipalities, and 228 local councils (within the district municipalities). In December 2000, the new municipal structure came into effect through the amalgamation of primary-tier urban and rural municipalities into new local municipalities. Rates on property are a local tax where the provinces are prohibited from levying property rate and municipalities levy rates in all provinces. In metropolitan areas, the metropolitan local councils can impose and collect property rates while in nonmetropolitan areas, only urban municipalities

¹⁹¹Walters, Lawrence (2011) *Land and Property Tax Guide: A Policy Guide and Global Land Tool Network*, UN Habitat, p. 3-5.

¹⁹²Slack, Enid (2002) *Property Taxation in South Africa*, Enid Consulting, Toronto, p.1.

levy property rates. National and provincial governments regulate how the property rates are charged, assessed, and collected.¹⁹³

Property rates were important tax within the former white local authorities. Rebates were generously granted to residential taxpayers; hence this shifted much of the burden onto commercial and industrial properties.¹⁹⁴ Contrastingly, the former black municipalities did not levy property rates and instead they relied on grants from the central government. The absence of a property rates reflected apartheid policies which prohibited black to own land outside of the homelands. In 1993, the former black local authorities were granted an extension of the property rate bases of the former white local authorities to achieve a uniform structure throughout the jurisdiction of any local government council.¹⁹⁵

4.3 HISTORY OF PROPERTY RATE LAWS IN SOUTH AFRICA

Rating was first introduced in South Africa in 1836. After the Union of South Africa was established in 1910, the four provinces introduced their own rating ordinances. Local Government in South Africa before 1994 was designed to implement apartheid regime. Racial profiling was a key determinant in local government institutions' operations and the Black majority were denied democratic rights.¹⁹⁶

¹⁹³Ibid p.2.

¹⁹⁴ibid

¹⁹⁵ibid

¹⁹⁶Graham Sanson and Peter McKinlay, (2013) :Property Rates as an Instrument for Development: An Analysis of South African Policy, Law and Practice,ø*New Century Local Government: Commonwealth Perspectives*, Commonwealth Secretariat, p. 108.

Major reforms were introduced in 1993 by the Constitution in 1993 which recognised Local Governments and its institutions were merged (Steltler and Di Visser 2007). Almost ten years after the creation of the new constitutional dispensation in 1994, the nine new provinces are still levying rates in terms of the provincial ordinances.¹⁹⁷ South Africa has experienced far-reaching local government reform since 1993.¹⁹⁸

Historically, in South Africa, property rates are and have always been important means to fund municipal services. As noted in Kihato and Berrisford(2006:33), tax collection during the apartheid period was generally high and well received. This is because, residents enjoyed substantial profits and rebates from the provision of electricity and water.¹⁹⁹

4.4 LEGAL FRAMEWORK OF PROPERTY RATING

In 1996, the Constitution further identified the roles of Local Governments and to date, it comprises of a democratically elected political leadership.²⁰⁰ Municipals are empowered to impose surcharges for services and to levy rates on property.²⁰¹ They are also entitled to an equitable share of nationally generated revenue.²⁰² Hence, their functional areas are provided for under the Constitution.²⁰³ The Constitution expressly states the objects of local Government which are; providing democratic and accountable government for local communities, ensuring

¹⁹⁷ ME Bell & JH Bowman (2002) 'Adapting the South African Property Tax to Changed Circumstances', in ME Bell & JH Bowman (eds) *Property Taxes in South Africa: Challenges to the Post-Apartheid Era* 3-22; RCD Franzsen 'Property Tax: Alive and Well and Levied in South Africa?' (1996) 8 SA Merc LJ 348, p. 352-354.

¹⁹⁸ RCD FRANSEN & WHA OLIMA, (2002) *Property Taxation in Southern and East Africa: Lessons from South Africa and Kenya*, p. 198.-This citation is incomplete. Ensure you edit this draft thoroughly before submitting!

¹⁹⁹ Ibid (no.160) p.111.

²⁰⁰ Ibid (no. 160)

²⁰¹ The 1996 Constitution of South Africa, Section 229.

²⁰² Ibid Section 214

²⁰³ Ibid Section 156

provision of services in development, promote safe and healthy environment, and encourage the involvement of communities and community organisation in local government activities.²⁰⁴

Section 153 of the South African constitution strictly gives priority to the provision of basic needs of the Community. This developmental mandate is defined in the 1998 white paper on Local Government to include that Local Government be committed to working citizens and groups, find sustainable means to meet their social, economic and material needs and to improve their quality of life.²⁰⁵

Since there is a constitutional provision (Section 229) empowering municipalities to impose rates on property, there is manifest constitutional guarantee which is in two ways;

One is that the power to impose rates on property originates from the constitution itself.²⁰⁶ This was described by the Constitutional Court in paragraph 56, as an "original" power.²⁰⁷ All Municipal powers including rating power were "delegated" powers conferred on local authority by another state organ before the interim Constitution.²⁰⁸

Two, is that constitutionally the national government is enabled to regulate the power to impose rate on property. However, the National government is required to all times respect municipal

²⁰⁴Ibid Section 152

²⁰⁵Graham Sanson and Peter McKinlay, (2013) "Property Rates as an Instrument for Development: An Analysis of South African Policy, Law and Practice," *New Century Local Government: Commonwealth Perspectives*, Commonwealth Secretariat, p. 108.

²⁰⁶*City of Cape Town vs. Robertson* 2005 (3) BCLR 199 (CC) at para 62; *CDA Boerdery (Edns) BPK and Ander vs. Nelson Mandela Metropolitaanse Munisipaliteit en Andere* [2005] JOL 14785 (SE) at para. 6.

²⁰⁷*Ibid City of Cape Town Case* 2005 at para 56.

²⁰⁸*Fedsure Life Assurance Ltd and Others vs. Greater Johannesburg Transitional Metropolitan Council and others* (1998) (12) BCLR 1458 (CC) at para 39.

discretion to establish policy and determine rates. In *CDA Boerdeng (EDMS) BPK v.s. Nelson Mandela Metropolitanne Munisipaliteit* case for example, Legislation in Eastern Cape which required provincial permission for the imposition of a rate of over two percent was struck down. The Supreme Court of Appeal held that this was a requirement of pre -1994 dispensation, tailored to its hierarchy and matched to the administrator's supervisory control over municipalities and his executive role in relation to them.²⁰⁹ The Supreme Court Judge while referring to the 1996 Constitution stated that the premier enjoys no special supervisory powers over the exercise of local government functions or special duties in the determination of rates.²¹⁰

This does not mean that the municipalities' powers are unfettered. Section 229 limits the rating power by stating that it cannot be exercised in a manner that materially and unreasonably prejudices national economic policies, economic activities across municipal boundaries, or national mobility of goods, services, capital or labour.

4.5 RATING INSTITUTIONS

South Africa's local Government is comprised of various Municipalities; metropolitan, District and Local. The Local Government: Municipal Systems Act (2000) requires municipalities to produce and review integrated Development Plans (IDPS) necessary in planning and delivery of services.²¹¹

²⁰⁹ ibid

²¹⁰ ibid

²¹¹ Ibid (no. 169)

In Kenya, property rating institutions include the Rating Authorities (oversees the entire process), Ministry of Lands (providing maps of all land falling specifically in the counties indicating specific boundaries, ownership, location, size of the land, means of transfer of ownership etc), the Judiciary, the office of the Governor and the County Assembly, Ministry of Devolution etc. The Rating Act provides for the roles played by the Rating authority, the judiciary and the Ministry of lands. However, these other institutions' role has not been clearly stated to show the various roles to effect the administration and collection of rating revenues.²¹²

The enforcement institutions have not been left either. In South Africa, collection and enforcement provisions are primarily contained in Chapter 9 of the Local Government: Municipal Systems Act. It provides for mechanisms to be used in respect of all of the various municipal taxes, levies, duties, and charges.²¹³ The rating authority in Kenya may write a demand to defaulting rate payers to pay up within fourteen days, and institute proceedings in a subordinate court of first class upon a ratepayer who defaults after a demand is served upon to secure the payment of such rate and interest.²¹⁴ However, despite the application of these provisions of the law, the number of rate defaulters is still high.²¹⁵

To date, the rating authorities have the duty to levy property rates. Ursula Hicks considers the role of local governments in raising enough revenue and states that if local government are to

²¹²The Rating Act CAP 267 Laws of Kenya.

²¹³ RCD FRANSEN & WHA OLIMA, (2003)-Property Taxation in Southern and East Africa: Lessons from South Africa and Kenya, 15 *SA Mercantile Law Journal*, p.17-21.

²¹⁴The Rating Act, CAP 267, Section 17.

²¹⁵ Joan Youngman and Joan Malme (2004) -The Property Tax in a New Environment: Lessons from International Tax Reform Efforts, Lincoln Institute of Land Policy, Cambridge, Massachusetts, p. 26.

play their significant role of ensuring economic and social development, they should have access to adequate funds.²¹⁶ Therefore,

if they are both to act responsibly and to show initiative, some, not negligible, part of this control over resources must be independent, in the sense that the local councils are free to choose the rates (and to some extent the condition) of their taxes or services charges.²¹⁷

The concept of value capture is most significant in most local government where in the taxation of land, the community's expectation in the provision of local services should be considered. Where the provision of services is adequate, it leads to increase in value of land and county governments should be in a position to capture its benefits in terms of revenues through property rating.²¹⁸

The choice of property tax base or method of assessment varies from one jurisdiction to another. Some countries' tax base is land only, in others it is buildings and land.

In South Africa, rateable property includes immovable property which includes residential, commercial, industrial and agricultural land and anything attached to the land. However, in South Africa, land outside urban areas (rural properties) do not comprise tax base.²¹⁹ Freehold land, agricultural land less than 12 acres, and indeed most private land in the area rating rolls are however excluded from taxation by the rating authority. This is because;

²¹⁶Ursula Hicks(1961) *Development from Below: Local Government and Finance in Developing Countries of the Commonwealth*, p. 277.

²¹⁷ibid

²¹⁸ibid

²¹⁹Enid Slack (2000) *Property Taxation in South Africa*, Enid Slack Consulting Toronto, p. 5

- (a) these properties are already taxed through the agricultural cess,
- (b) these properties do not receive local authority services, and
- (c) these properties are not legally obligated to pay property taxes.

The choice of tax base is often linked and should always be linked to the land tenure system and forms of land holding. Where majority of land is held by leasehold, then focus should be on annual rental value. In South Africa, property rate base includes communal land and land occupied under traditional forms of land tenure.

4.6ASSESSMENT IN SOUTH AFRICA

Land and cadastral agencies contribute to the development of value-based taxes. These agenciesø traditional roles in recording ownership and transfers of property rights, together with their data bases and information systems, have led naturally to a larger role encompassing valuation as well, both for individual properties and in computerized mass valuation systems.²²⁰

South Africa, presents a particularly interesting example of questions concerning the role of valuation agencies and professional associations where valuation rolls must be prepared every four years. With the consent of the provincial Member of the Executive Council (MEC) responsible for local government it could be extended for one more year. So a valuation cycle will have a lifespan of at most five years. Only registered valuers may be appointed as municipal valuers. The Bill make it possible to opt for a 'mass valuation system or technique', where

²²⁰ Joan Youngman and Malme (2004) -The Property Tax in a New Environment: Lessons from International Tax Reform Efforts,ø*The Property Tax in a New Environment: Lessons from International Tax Reform Efforts*, Lincoln Institute of Land Policy, Cambridge, Massachusetts, p.17.

`available market related data of any category of rateable property is not sufficient' for the use of techniques to determine discrete values.²²¹

In Kenya, challenges do exist where accurate valuation by assessors is difficult or sometimes inaccurate due to combination in the value of land and improvements during sale. In applying site value taxation, there will be need to subtract improvements value from the value of property as a whole. This results to an assessed value of land. These registries tend to be incomplete and out of date due not to the lack of trained valuers in Kenya but rather to the lack of proper incentives and the reliance on individual 'single parcel' valuation. Kenya also does not use any form of mass valuation, thus making the valuation process both costly in terms of time and resources.²²²

Various tax ratio can be applied which are; the ratio of market/property values to GDP(MV/GDP), the assessed base to market value- assessment ratio, taxable base to assessed base (exemptions), and the ratio on taxes collected to taxes assessed (enforcement).²²³In applying these ratios in South Africa, heavier property taxes are imposed by non-residential especially on commercial properties and these ranges from place to place.

Secondly, considerable discretion is granted on local authorities in different states with respect to property taxes. This is done by use of provisions on effective property tax rate. Fischell states that property tax is like a benefit tax because they help to cater for local services. This has resulted to public support and appreciation of being levied property taxes where these local

²²¹Ibid (no. 183) p. 317

²²²Kelly Roy(2000) *Property Taxation in Kenya*, World Bank Report, Duke University, p. 8.

²²³Ibid p.7.

services promote efficient public decisions.²²⁴ However, Zodrow argues that property tax has distorted the housing market since property taxation is based on market value. This discourages buildings resulting to under-utilization of land.²²⁵

4.7 TAX RATES

The laws in South Africa allow local municipalities to levy different rates on different classes of property.²²⁶ Different rates can be imposed for land held for specific uses e.g. Agriculture or mining. Currently, three different rating systems apply in South Africa. Municipalities generally have a choice between 'site rating' (land value only), 'composite rating' (land and improvements at separate rates), and 'flat rating' (capital improved value).²²⁷ They do this by choosing methods of identifying categories from pre-determined property owners; subtract the market value hence reducing rates liability.²²⁸ Section 8 (2) of the MPRA includes a list of categories, including such as residential, industrial, business and commercial, farm properties, small holdings, state-owned properties, public service infrastructure, state trust land, communal land, properties owned by public benefit organisation etc. However, local government municipalities may determine their own categories based on permitted use or geographical location.

In Kenya and as stated earlier, Section 4 of the Rating Act stipulates that rating authorities may use various forms of rating which includes area rate, agricultural rental value rate, site value rate etc. Alternatively, section 5 provides for flexibility in the use of area rating where flat rate or

²²⁴ Fischell, Zodrow, George R., (2008) 'The Property Tax as a Capital Tax: A Room with Three Views', *National Tax Journal*, 54 (1), p. 56-136.

²²⁵ *ibid*

²²⁶ Franzsen Riel C. D (2001) 'Local Government and Property Taxation Reform in South Africa', *Land lines*, (Lincoln Institute of Land Policy Studies. p. 5-11).

²²⁷ See ME Bell 'Property Tax Structure and Practice' in *Bell & Bowman* op cit note 39 at 64-67; Franzsen & McCluskey op cit note 1, p. 212.

²²⁸ Section 1 (1) of MPRA.

graduated rate upon the area of land is used. It is the responsibility of local authorities to set these tax rates which should be approved by the Minister.

4.8 COMPARING THE SOUTH AFRICA AND KENYAN RATING REGIMES

Currently, legislation in South Africa and Kenya mandates an ad valorem property tax system with discrete values for each rateable property. This means that they have the capacity to prepare valuation rolls and supplementary rolls for all of the current rating jurisdictions at regular intervals.²²⁹ It is sufficient to specify in the law the legal standard of market value, the use of mass appraisal/valuation techniques as the preferred method for estimating real property value, the assignment of administrative responsibilities and authority with requirements for quality assurance testing of the valuations, and an effective appeals system with adequate notice and information for taxpayers to evaluate and dispute the accuracy and fairness of their taxable values.²³⁰

Clearly, a property rate system that prescribes a discrete value for each rateable property, as is currently the case in South Africa, is neither practicable nor sustainable. Such a system presupposes sufficient accurate property data as well as the necessary capacity and skills to analyse that data. In South Africa the data and capacity, generally, do not exist to give effect to the law. Such is the case in Kenya.

²²⁹ Ibid 10

²³⁰ Joan Youngman and Joan Malme (2004) -The Property Tax in a New Environment: Lessons from International Tax Reform Efforts, *The Property Tax in a New Environment: Lessons from International Tax Reform Efforts*, Lincoln Institute of Land Policy, Cambridge, Massachusetts, p.28.

Apart from serious deficiencies in property tax laws, administration practice which is one of the key issues which need to be addressed if property tax revenues are to increase significantly, political interference in one or more of the necessary steps (coverage, assessment, billing, collection, and enforcement) that ensure a successful property tax system.²³¹ This is one of the main factors that influence the practicability of the property taxation. Although legislation provide for an array of enforcement procedures against defaulters (usually, including seizure of property), in South Africa these are greatly used effectively.²³² County governments in Kenya which now lack the financial resources to take civil action against defaulters, have a practicable example of enforcement means.

Computerised and technological storage and back up of property information both identified, valued and assessed information as recognised by South African laws offers a practicable solution to property rating law reforms in Kenya.

Key problem areas that are common to the South Africa and widely prevalent in the application Kenya's rating laws can be summarised as:

One, rating legislation is inappropriate and does not take realities in the country into account, which makes it difficult or impossible to put the law into practice in an equitable and sustainable manner.

²³¹ RCD FRANSEN & WHA OLIMA, *Property Taxation in Southern and East Africa: Lessons from South Africa and Kenya*, p 33.

²³² Ibid

Two, the property coverage within the jurisdiction that does assess properties and levy rates is often incomplete, especially with regard to informal settlements and peri-urban developments. The extension of the rates base to include communal land, freehold and land occupied under traditional forms of land tenure.²³³ This will present new challenges to the valuation profession.

Three, there is a shortage of qualified and skilled professionals to survey land, record and maintain an accurate deeds register (proper cadastral information), assess properties and prepare proper valuation rolls, do interim valuations, and do regular general re-valuations, all of which are usually prerequisites for a legitimate and efficient property tax system. The retention of properly qualified (registered) valuers within the civil service is a serious problem. South Africa like Kenya lacks appropriate practical training programmes for municipal valuers and property tax administrators. To 'save costs', statutory valuation cycles are often not adhered to and re-valuations postponed. The inevitable result is that in many instances valuation rolls are hopelessly outdate. There is little, if any, regional co-operation between professional associations across national boundaries.²³⁴

Fourth, apart from human resource capacity, there is also a lack of physical and financial capacity to underpin a sustainable property tax administration system. Often there is no, or only limited, access to technical and logistical support (such as computer hardware and software, telephone and fax lines, and vehicles).

²³³ RCD Franzsen (2001) 'Future Prospects for Property Taxation in Southern Africa', *Paper Presented at the Third African Real Estate Society Conference, Arusha*, 23-25, p. 37-39.

²³⁴ See WHA Olima & PM Syagga (1996) 'Rating Systems in Kenya: Evolution, Constraints and Potentials' *Journal of Property Tax Assessment & Administration* 2(1) 2, p. 22-23.

Five, collection and enforcement leave much to be desired in South Africa and Kenya. This has already been discussed earlier.

Sixth, taxpayers have to be educated and allowed to participate in the formulation of rating laws which directly affect them to improve public knowledge and perceptions regarding assessment, rating, and the provision of local government services in Kenya.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 INTRODUCTION

This research had two specific objectives: to show how property rating can be effective by suggesting reforms to address gaps existing in the legal and institutional framework and to examine how effective property rating laws are as a source of income for county governments. At the end, the study suggests legal and institutional changes that can make the law robust.

This chapter outlines and summarises the research findings, and makes appropriate recommendations.

5.2 LEGAL REFORMS

To realize the potential property tax revenue improvements, counties need undertake strategic legal reform, combining policy and administrative interactions to improve tax base coverage, property valuations, and collection, enforcement and taxpayer services. The tax legal and policy reforms need to be adjusted in defining tax base and tax rate structures along with making appropriate legal decisions linked to valuation standards, appeals, collection and enforcement.

Property rating law reforms must be designed cognizant of these administrative constraints, the existing reform environment, government administration capacities, and political will, as all

rating law reforms must be country specific, adapting international best practice to each unique reform environment.

The law regulating rating administrative structures need to focus on improving tax base coverage, valuation, and collection, along with taxpayer services.²³⁵ Major administrative reforms, undertaken within a proper property rating legal and policy framework, are crucial to ensure sustainable implementation of a more equitable and efficient property tax system.²³⁶

The rather unique system of value banding could also be reviewed for possible adaptation to the rating laws and application in Kenya.²³⁷ But it is important to note that any international assistance must indeed be appropriate for the relevant county or counties, and the goals set and systems introduced must be sustainable.²³⁸

To be successful, property rating law reforms should be linked to a "demand-driven" fashion to the broader public sector reforms such as decentralization, in order to build on the momentum, the stakeholder interest, the political will and the available institutional, financial and human resources. Isolated "supply driven" reforms rarely gain sufficient traction to generate sustainable momentum. Thus, a key design strategy for successful property tax reform could be to anchor the property tax as an integral and pivotal component of the broader decentralization reforms in a country. In this way, the property rating law reforms could become a demand-driven activity

²³⁵ Roy Kelly (2004) "Making Property Tax Work," *International Center for Public Policy Working Paper*, p. 6.

²³⁶ Ibid 1

²³⁷ WJ McCluskey, FAS Plimmer & OP Connellan (2002) "Property Tax Banding: A Solution for Developing Countries?" *9(2) Assessment Journal* 37-47; Frances Plimmer, William J McCluskey & Owen Connellan "Valuation Banding: an International Property Tax Solution?" *20(1) Journal of Property Investment & Finance*, p. 68-83.

²³⁸ Nsamba-Gayiiya op cit note 20. See also RCD Franzsen (2002) "Property Taxation Within the Southern African Development Community (SADC) and British Commonwealth", *Paper Delivered at the David C Lincoln Fellowship Workshop, Hosted by the Lincoln Institute of Land Policy, Cambridge, Massachusetts*, p.20-21.

needed to support the broader public sector reform objective. And the purpose of the property rating law reform then moves beyond just strengthening the property rating itself, to becoming a means of supporting the broader vision to improve the efficiency and accountability of governance and service delivery for county governments.²³⁹ This will help create demand support for the law reform, making it easier to mobilize a broader set of the key stakeholders and resources, balance the impacts and incentives of other reform initiatives, minimize political, administrative and taxpayer opposition and generate the synergy needed to design, implement and sustain a successful property tax reform. Successful property rating system can then help support these other reforms seeking to enhance responsive, efficient and accountable government and improved public service delivery.²⁴⁰

To ensure that the property rating can deliver the revenues, equity and efficiency needed to support the broader decentralization reforms, the legislature should focus attention on identifying the required policy and administration rating components and then designing and implementing an appropriate reform implementation strategy to make the property rating work.²⁴¹

Within the broader political economy environment, the legislature must clearly understand the key economic, policy and administration determinants of property taxation in order to design and implement appropriate, effective and sustainable interventions.

Additionally, the laws should typically expand the ratable property tax base. Kenya's land and its improvements tax base should be interpreted to include a list of categories including residential,

²³⁹Ibid 15

²⁴⁰Ibid

²⁴¹Ibid 30

industrial, business and commercial, farm properties, small holdings, state-owned properties, public service infrastructure, state trust land, communal land, properties owned by public benefit organizations etc.

There is the need for rating laws to be in place stipulating for a definite property tax structure in terms of administration. This includes the various personnel in authority (human resource), their modes of ascending to office, their roles and means of accountability.

There is need for laws to specifically state that the rating authorities are allowed set the tax rates and receive the tax proceeds, laws for value-based property taxes need to establish an integrated legal and administrative framework for real property valuation, assessment and taxation. Kenya's property rating laws should broaden tax bases to include real estate transfer taxes and taxes on underground resources like water, mineral and hydrocarbons. Legislation providing for variations in setting the autonomy over tax base through provisions on exemptions, deductions, credits may lead to complexity and lack of tax harmonization.²⁴²

Property rating laws need to limit the number of exemptions at the start is important to maintain revenue growth potential, limit individual tax burdens by creating a broad tax base, encourage taxpayer support and compliance, minimize unfair competition, increase fiscal transparency and reduce administrative costs.²⁴³ Legislations provide for a process of certifying the tax-exempt

²⁴²Jorge Martinez- Vazquez and Mark Riders (2008) *The Assignment of Property Tax: Should Developing Countries Follow the Conventional Wisdom?* *What Role for Property Taxes?* Conference, Georgia State University, p.6.

²⁴³*Ibid* p.11-14.

status of properties as articulated in Vermont Supreme Court Division.²⁴⁴ The Courts decision the distinction on "public use" from "mandated Municipal services" or essential governmental "functions" was that to qualify for public use tax exemption on property, it must be dedicated unconditionally to public use, the public served should be an indefinite class of persons who are part of the public who not only use it but also to the society at large. It must be owned and operated on for a non-profit venture.²⁴⁵

There is need to have all land information systems to be digitally kept. This computerized system ensures that county governments have sufficient data on all land within their jurisdictions. This data exists and is important for individual valuations of taxable parcels of land.

Again, there should exist a statutory formula based on objective criteria approximating an index of market value may be preferable to an explicit market-value standard on grounds of certainty and ease of administration. It is important to specify in the law the market value legal standard, the use of mass appraisal/valuation techniques as the preferred method for estimating real property value, the assignment of administrative responsibilities and authority with requirements for quality assurance testing of the valuations, and an effective appeals system with adequate notice and information for taxpayers to evaluate and dispute the accuracy and fairness of their taxable values.

²⁴⁴ *AMERICAN MUSEUM OF FLY FISHING INC VS. TOWN OF MANCHESTOR*, 557 A2d 900 (VT-1989).

²⁴⁵ *ibid*

5.3 INSTITUTIONAL REFORMS

Legislative and Institutional changes are needed to ensure prudent administrative practices in carrying out County government systems. Given the inability of the rating authority to adjust tax rates and other charges to the rising cost of delivering services, it will be necessary for the law to provide for a rating regulator in the county governments.²⁴⁶

The rating regulator may have the responsibility of indexing taxes and charges against costs, and this ensures the value of municipal revenue is constant. Such an institution may have the powers to determine tax rates charges, make the necessary adjustments and penalize the rating authority officials in case of failure to adhere to the rules.²⁴⁷

There is need for appeals procedure and dispute resolution mechanisms to be spelt out in the laws regulating property taxation. Appeals mechanisms could include a local board while dispute resolution mechanisms could stipulate for a tribunal before matters can be tried in a court of law.

The researcher recommends that the Rating Act in Kenya provides for property tax boards. They will have their composition. The importance of this board is to broaden the current county government fiscal domain in helping address the challenges of growth, urbanization, and improved agricultural, social amenities and services in the counties.²⁴⁸ The board by provision in

²⁴⁶Graham Sanson and Peter McKinlay(2013) -Property Rates as an Instrument for Development: An Analysis of South African Policy, Law and Practice,ø*New Century Local Government: Commonwealth Perspectives*, Commonwealth Secretariat, p. 103.

²⁴⁷ibid

²⁴⁸ Ibid (no. 210) p.104

the laws may also broaden the sphere in as ratable properties, and assist in putting in place independent and transparent procedures for assessing property tax.²⁴⁹

The ambiguous provision of roles of a Minister as provided for by both the Rating Act and the Valuation for Rating Act is appalling. The revision of the Local Government Act to match the new constitutional dispensation did not expressly interpret the said Minister in the many roles allocated. Thus, the rating authorities in various jurisdictions are bound to be faced with numerous challenges and multiplication of duties and constant interference from the national government. There is need to review the laws to ensure that they are free of such ambiguities.²⁵⁰

5.4 CONCLUSION

The constitutional and legislative/statutory framework for property rates in Kenya permits and expects rating authorities to levy property rates in a transparent, just, equitable and uniform manner. However, as discussed in this paper this is not the case to a larger extent. Much can be Kenya's legal and institutional framework in the reforms on law and their application. Kenya's county governments systems need to efficiently apply the laws to operate from a firm ideological and policy basis. The property rating laws in Kenya need a lot of reforms and this paper has made some proposal on the same. The researcher hopes that these recommendations will be of use to future researches, county governments, the rating authorities and the government in general.

²⁴⁹ibid

²⁵⁰William Mc Cluskey, Gary C. Cornia and Lawrence Walters, (2013) *A Primer on Property Tax: Administration and Policy*, Wiley Publishers, p.196.

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