

**LAND DISPUTES RESOLUTION IN KENYA: A COMPARISON OF THE
ENVIRONMENT AND LAND COURT AND THE LAND DISPUTES TRIBUNAL**

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DECLARATION

I **Maureen Wangari Maina** 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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Date:

This thesis has been submitted with my approval as a University Supervisor

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Date:.....

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DEDICATION

I dedicate this thesis to my family and friends.

LIST OF ACRONYMS AND ABBREVIATIONS

CoK	Constitution of Kenya 2010
ELC	Environment and Land Court
LDT	Land Dispute Tribunal
LCB	Land Control Board
ELRC	Employment and Labour Relations Court
ADR	Alternative Dispute Resolution
TDRM	Traditional Dispute Resolution Mechanism
LDGI	Land Development and Governance Institute

TABLE OF CASES

Kenyan cases

Karisa Chengo, Jefferson Kalama Kengha & Kitsao Charo Ngati v Republic [2015] eKLR

Criminal Appeal No.44, 45 and 76 of 2014

TABLE OF LEGISLATION

South Africa

South Africa Constitution

National

The Constitution of the Republic of Kenya, 1963 (As Amended To 2008)

Constitution of Kenya, Promulgated in 2010

Environment and Land Court Act, No. 19 of 2011

Land Dispute Tribunal Act, No. 18 of 1990

Labour Relations Act, 2011

The Judicature Act, Cap 8, Laws of Kenya

Supreme Court Act, (2011) No. 7 (Kenya)

ABSTRACT

Until recently, the legal framework on land was marred by the existence of multiple land laws, some of which were incompatible. These laws, coupled with the rampant land injustices hampered efficacy in land ownership, management and administration of land. As a result, the Constitution of Kenya (CoK) has changed the laws on land and the dispute resolution institutions. The CoK has created the Environment and Land Court (ELC), which shall be a superior Court with the status of the High Court with the jurisdiction to hear and determine disputes relating to the environment and the use and occupation of, and title to land. This study seeks to critically examine the effectiveness of the ELC as one of the main institutions mandated to deal with land disputes.

TABLE OF CONTENTS

DECLARATION	i
ACKNOWLEDGEMENTS	ii
DEDICATION	iii
LIST OF ACRONYMS AND ABBREVIATIONS	iv
TABLE OF CASES	v
TABLE OF LEGISLATION.....	vi
ABSTRACT.....	vii
TABLE OF CONTENTS.....	1
CHAPTER ONE	5
INTRODUCTION	5
1.1 Introduction.....	5
1.2 BACKGROUND	6
1.3 STATEMENT OF THE PROBLEM	9
1.4 JUSTIFICATION OF THE STUDY	10
1.5 THEORETICAL AND CONCEPTUAL FRAMEWORK.....	10
1.6 LITERATURE REVIEW	14
1.7 RESEARCH OBJECTIVES	18

1.7.1 Main objective of the study	18
1.7.2 Specific objectives.....	19
1.8 BROAD ARGUMENT LAYOUT	19
1.9 HYPOTHESIS	20
1.10 RESEARCH QUESTIONS	20
1.11 RESEARCH METHODOLOGY.....	21
1.12 SUMMARY OF CHAPTERS	22
CHAPTER TWO	23
HISTORICAL EVOLUTION OF LAND OWNERSHIP IN KENYA	23
2.1 Introduction.....	23
2.2 Disposition of land ownership by Africans	25
2.3 Conclusion	30
CHAPTER THREE	32
THE STRUCTURE, PLACEMENT AND COMPOSITION OF THE ELC AND LDT IN KENYA.....	32
3.1 Introduction.....	32
3.2 Structure, placement and composition of the ELC and the LDT.....	32
3.2.1 Structure of the ELC and the LDT	32
3.2.2 Composition of the ELC and the LDT	36
3.2.3. Placement of the ELC and the LDT in the hierachy of Court system in Kenya	41

3.3 Conclusion	50
CHAPTER FOUR.....	52
THE ELC’S MANDATE AND JURISDICTION AND THE LAW APPLICABLE IN RESOLVING LAND DISPUTES IN KENYA.....	52
4.1 Introduction.....	52
4.1.1 Legislative background to the LDT and the ELC in Kenya.....	52
4.2 Jurisdiction of the ELC and the LDT	58
4.3 Appeal on decisions under the ELC and the LDT	61
4.4 Law applicable under the ELC and the LDT	63
4.4.1 Advantages and Disadvantages of ADR and TDRM mechanisms.....	69
4.4.2 Preferred ADR mechanisms for land disputes	70
4.5 Accessibility and Cost under the ELC	73
4.6 Conclusion:	76
CHAPTER FIVE	81
CONCLUSION AND RECOMMENDATIONS	81
5.1 Introduction.....	81
5.2 Recommendations.....	86
5.2.1 Knowledge and Advocacy about the ELC	86
5.2.2 Legal and Institutional Reforms.....	87
5.2.3 Composition of the ELC and ADRs.....	88

5.2.4 Appeals of decisions from the ELC 89

5.2.5 Need for more courts..... 90

SELECTED BIBLIOGRAPHY 91

CHAPTER ONE

INTRODUCTION

1.1 Introduction

The issue of land and land disputes is one of great concern in Kenya's society. If it is left in abeyance for long periods of time it can cause social disruption, loss of life, negative impact on the development and use of land and ultimately on the local and general economy. In Kenya land is considered as an important aspect of the life of any society. Land has been characterised for its importance such as food production and security, supports important biological resources and processes, sustains the livelihoods of the majority of Kenyans, and constitutes an important cultural heritage for many communities.¹ The CoK² provides for and safeguards individual's right to own property in Kenya. In that regard there is bound to be societal conflict between individuals on ownership of land. An efficient and effective system for settling land disputes is an essential element of any country's land administration. It is generally accepted that in kinship-based societies, a land dispute settlement system must be locally based, participatory, simple to administer, affordable and likely to receive the general support of communities. However settling land disputes is considered complex.³

¹ J.M. Migai Akech, Land, the Environment and the Courts in Kenya (February 2006).

² Constitution of Kenya 2010 (Constitution 2010), Art 40.

³ Jim Fingleton and Norm Oliver, Settling customary land disputes in Papua New Guinea, p 228
<http://www.ausaid.gov.au/Publications/Documents/MLW_VolumeTwo_CaseStudy_11.pdf> accessed 27th November 2012.

The CoK makes elaborate provisions for land laws. It categorises land into three; private⁴, public⁵ and community⁶ land. Principles on land shall be implemented through the national land policy where land shall be held, used and managed in a manner that is equitable, efficient, productive, sustainable and in accordance with the principle of security of land rights.⁷ Further, the CoK provides for a National Land Commission whose function is to recommend a national land policy to the national government and to initiate investigations on its own initiative or on a complaint into present or historical land injustices and recommend appropriate redress.⁸

The CoK provides guidance on the legal and institutional framework governing land. Article 162(2)(b) provides that Parliament shall establish Courts to hear and determine disputes pertaining to the use, occupation of and title to land. This study will look at the ELC established under the ELC⁹ as one of the main institutional body in land dispute resolution and its effectiveness in solving individual land disputes in Kenya.

1.2 BACKGROUND

The Constitutional creation of the ELC was necessitated by the existing realities underpinning the injustices occasioned due to lack of proper legal mechanisms in determining land disputes. The issue of land, its ownership, use and management is highly emotive and was one of the key issues that drove the need for a new Constitution.¹⁰ Okoth-Ogendo¹¹ notes the sensitivity of land

⁴ Constitution 2010, Art 64.

⁵ *ibid*, Art 62.

⁶ *ibid*, Art 63.

⁷ *ibid*, Art 60, s1.

⁸ *ibid*, Art 67.

⁹ ELC Act, No.19 of 2011.

¹⁰ Coulson Harney Advocates, 'a snapshot of the new land laws in Kenya' [2012]

<<http://www.coulsonharney.com/News-Blog/Blog/A-snapshot-of-the-new-land-laws>> accessed 23 November 2012.

ownership in Africa and traces the origins of Kenya's agrarian law and institution through colonial and post-colonial periods.

Since colonisation, land is perceived as one of the most contentious issues in Kenya mainly because of the fact that 80% of rural Kenyans eke their livelihood on land.¹² British colonialism in Kenya was administrative and accompanied by massive and widespread land alienation for the benefit of white settlers.¹³ This led to the struggle for independence which was largely informed by a struggle to acquire back land that had been taken away from the natives.¹⁴ At independence Kenya inherited the skewed land policy system of land ownership¹⁵ used by the colonialist, thus failing to change this loss of African land.

Subsequent governments continued with this system all promising to reverse historical land injustices.¹⁶ Disputes were handled by LDTs and Land Control Boards which were ineffective. After three government regimes, the question on land injustices has continued to aggravate leading to a national crisis.¹⁷ Further, reforms to redistribute previously settler farmland among Kenyans are ongoing, ineffective, and, ridden with political interests thus failing to address equity.

¹¹ H.W.O. Okoth-Ogendo, *Tenants of the Crown: Evolution of agrarian Law and Institution in Kenya*, (African Centre for Technology studies, Nairobi: ACTS Press 1991).

¹² Timothy Gachanga, 'Land disputes in Kenya', <http://www.africaspeaks.com/kenya/Timothy_Gachanga.html> accessed 4 December 2012.

¹³ Kenya land alliance and Kenya human rights commission, 'Policy brief' 'Righting the wrongs: Historical injustices and land reforms in Kenya', p. 1

¹⁴ Herbert Wamalwa, 'Governing Land In Kenya: The Problem Just Refuses To Go Away' <<http://www.igi-integrity.com/DocumentsKenya-LandReform.pdf>> accessed 27 November 2012.

¹⁵ P.L. Onalo, *Land Law and Conveyancing in Kenya*, (Heinemann 1986)

¹⁶ Kenya land alliance (n13).

¹⁷ Wiliam Kalande, 'Kalande paper, 'Kenyan Land Disputes in the Context of Social Conflict Theories' [2008] <http://www.fig.net/commission7/verona_am_2008/papers/13_sept/kalande_paper.pdf> accessed 4 December 2012.

Without secure land rights, there can be no sustainable development, as investors will shy away from making long-term investments.¹⁸ It is arguable that one of the reasons for the establishment of the ELC was to restore confidence in investors and redress the issue of equitable ownership of land and its use. This is in recognition that equitable access to land is an essential precursor for economic development in Kenya, as most primary and secondary economic activities are dependent on land.¹⁹ Land disputes threatened the Kenyan cultural and ethnic harmony in the recent past bringing the Kenyan economy to its knees.²⁰ Most land disputes are fuelled by factors such as; unfair land tenure regimes, changes in land laws, outdated statutory laws, lack of and inaccessibility to modern land information.²¹

Whilst it is noted that there are several institutions prescribed by the CoK to deal with land disputes, this study will mainly look at the ELC, as one of the main institutions mandated under the ELC²² to deal with land disputes, while having regard to external political, social and economic reasons to settle land disputes. This study will look into private disputes between individuals and the role that the ELC plays in solving such disputes. Given the nature of land disputes and the important role that land plays in the economic interests of Kenya, it may be argued that the role to be played by the ELC in resolving land disputes will be invaluable to the development of the legal and institutional framework on land.

¹⁸ Tumusiime K. Deo, *The African Executive: 'Uganda Land Disputes an Impending Volcano'* [2012] <<http://www.africanexecutive.com/modules/magazine/articles.php?article=4723>> accessed 4 December 2012.

¹⁹ Kenya land alliance (n 13).

²⁰ Kalande (n17).

²¹ Tumusiime (n18).

²² *ibid* (n 9).

In assessing the role of the ELC, this study will look at its mandate, jurisdiction and functions and compare it with the LDTs under²³ which will be discussed in the next chapter. From the comparison, the study will determine if the ELC is better placed to effectively, efficiently and conclusively resolve land disputes in Kenya, and with a view of identifying any shortcomings in the legal framework that may hinder the ELC from discharging its mandate.

1.3 STATEMENT OF THE PROBLEM

The ELC is a new concept in the Kenyan judicial system. This study seeks to examine the jurisdiction, mandate, composition and placement of the ELC as one of the legal institutions established under the CoK and determine whether the Court, which replaces the LDTs, is adequately envisioned, mandated and equipped to deal with the existing array of land disputes in an effective, efficient and conclusive manner. Further, this study implies that given the Court's placement within the legal framework, it risks being construed as merely another layer of Court in an already congested legal framework with no substantial improvements being made to address the grave concerns and challenges affecting the institutions dealing with land disputes.

This study will focus on the legal regime and or institutional framework for land dispute resolution in Kenya. It will discuss the ELC as a land dispute resolution organ and compare its regime with that of the LDT which it replaced and to draw lessons on the extent to which the ELC is capable of solving land disputes in Kenya.

²³ LDT Act, Act No.18 of 1990.

1.4 JUSTIFICATION OF THE STUDY

Land disputes in Kenya are considered to be very emotive. Land disputes therefore require extra care by legal institutions handling them. The CoK implementation process is at an important formative stage which provides an opportunity to revise the historical legal and institutional framework governing land ownership, land administration and land disputes resolution. If the CoK is not implemented with the required foresight, it risks being construed and applied in a manner which has the effect of creating a fresh layer of problems to the institutional framework mandated to resolve land disputes in Kenya. The CoK creation of the ELC being a new concept to Kenya's legal and institutional framework, this study will be of great reference material to various actors in Constitutional implementation process.

The study is quintessential as it recommends possible avenues and solutions to help in realising the Constitutional intention under Article 162(2)(b). This study will provide an in depth understanding of the complexities and challenges in land disputes by investigating the efficiency of the ELC in solving disputes.

1.5 THEORETICAL AND CONCEPTUAL FRAMEWORK

The bedrock of this research is based on the interplay of the two interdependent theories of Historical school of jurisprudence/ sociological approach to law and social theory.

The historical school of jurisprudence is a like a poor and slightly eccentric relation and it has been mentioned as the fore runner of the sociological jurisprudence.²⁴The school postulates that law in its essence is not imposed on a community from above or from without, but that law is an inherent part of its ongoing life which comes from the spirit of the people and as developed in

²⁴ Robert E.Rodes, Jr.: On The Historical School Of Jurisprudence, Notre Dame Law School, Robert.E.Rodes.1@nd.edu

the peculiar historical experience of that people.²⁵ The school therefore views law in action in line with the peoples experiences and current circumstances in the society. This law is pegged on the notion that people have a lot in common worldwide such that some elements appear in almost all legal systems but there are other elements that are unique to a particular legal system. Historical jurisprudence is used by judges who consider history, tradition, and custom when deciding a legal dispute.

Sociological jurisprudence postulates that true law is determined through observable phenomenon in the society by observing both law in fact as provided in statues and texts, and law in action. It moves from the rigidity of the assertion of law being universally applied and unchanging as postulated by the natural law theory, to a system that is neither timeless nor universal but relates specifically to the conditions of a particular legal system and to the kinds of claims and expectations brought to it for recognition and satisfaction.²⁶ Positivist school of thought postulates that law should be applied and interpreted “as is”. However, the prevailing legalistic theory does not relate with the real world. It is proposed that law as is should be combined with social theory so that it is understood as a system functioning in the real world and not binding rules.²⁷ Marie observes that motivational and cognitive processes are central since psychology and society are interdependent and each cannot exist on its own.²⁸ As such conflicts or disputes in the society cannot be understood without considering both law as it is and law in action in the society.

²⁵ *ibid*

²⁶ Roger Cotterrell, *the Politics of Jurisprudence*, (London: Butterworths 1989) p. 154.

²⁷ Bontty, Monica Marie, *Arbitration and award-Egypt-History Mediation- Egypt- History Dispute resolution (Law)*

²⁸ *ibid*

Carrie Menkel- Meadow in his article²⁹ in critiquing the work of Stuart Hampshire, is of the view that procedural justice such as the court system is not the best in solving disputes as between individuals. He is of the opinion that there is more to a conflict than having two parties and the court as the arbiter between them. He is of the opinion that conflicts are characterised by more issues such as resource allocation and third party impacts such that such phenomenon have to be considered in dispute resolution. Ultimately, Carrie is of the view that alternative dispute resolution are a proper forum for attaining justice in the society as compared to the court system.

The reason for adopting the sociological approach to law is to identify the effectiveness of the ELC by looking at the social, political and economic factors to solving land disputes.

Classical Marxism on social theory provides that individuals within society have differing amounts of material and nonmaterial resources³⁰, meaning that society comprises of the wealthy, who exploit the poor. The Ndung'u Report is against the systematic perversion of established procedures meant to protect public interest for political gain and the unjust enrichment of a few.³¹ History is the causal role of things such as forces of production, relations of production, political and legal arrangement in historical explanation.³² Given their history, causes, form and net effects in society, land disputes are a type of social conflict between the rich and the poor. The reason for adopting the social theory is because land relationships in traditional and modern Kenya are highly social and social change is what is needed for a better society. Land disputes

²⁹ From Legal Disputes to Conflict Resolution and Human Solving: Legal Disputes Resolution in a Multidisciplinary Context) Association of American Law Schools, 2004)

³⁰ *ibid.*

³¹ Ndungu Land Report.

< <http://cemusstudent.se/wp-content/uploads/2013/01/Ndungu-Land-Report.pdf>>

³² Christopher Roederer and Darrel Moellendorf, Jurisprudence (Juta and Co.) p. 138.

are also constituted by an assertion of conflicting claims on land ownership, land use rights and land laws.³³The main theory underpinning this study will be the sociological approach given that the study is largely pegged on historical injustices that remain unresolved despite having shaped societal land needs.

The principal objectives of creating the ELC is to facilitate just, expeditious, proportionate and accessible resolution of disputes and to ensure reasonable and equitable access to its services in every county. Its objectives are met by allowing parties and their representatives, to assist the Court to further the overriding objective.³⁴

The role of the ELC is to use laws to shape society and bring about social order.³⁵ This can be achieved by an empirical study by moving law from the passive form of being used as a litmus test to measure the rightness or wrongness of a matter according to the already established law (law as is) to, involve creative interpretation of land disputes with the prevailing observable social changes (law as it ought to be) in order to mirror situations in society and attain social justice.³⁶ The ELC should adopt an instrumentalist approach³⁷ where the determinant of judicial creativity should not be derived from legal doctrine only but also from a variety of policy considerations, social pressures, political factors or economic imperatives.

³³ Kalande (n17).

³⁴ *ibid* (n 9) , s3

³⁵ Omony, J.P, *Key Issues in Jurisprudence: An In-Depth Discourse on Jurisprudence Problems* (1st ed. Law Africa) 88.

³⁶ George C. Christie and Patrick H. Martin, *Jurisprudence: Texts and Readings on the Philosophy of Law*,(2nd edn, West Publishing Co.1995) p. 828

³⁷ Cotterrell (n 26).

This study examines land injustices occasioned by the colonial land administration systems which inform the needs in society today. This study argues that law ought to change with changing societal needs and should be shaped by sociological developments as opposed to being rigid. This study will look into the most effective and efficient ways of resolving the same through a simultaneous empirical evaluation³⁸ and assess if the Court in its findings, takes cognisance of these factors.

The ELC should aspire to minimize social conflicts by integrating Constitutional principles with changing social attitudes and values as manifested in common law and other legal doctrines³⁹, in order to reconcile various competing land interests, control social order and effectively resolve land disputes. Failure to do so will be tantamount to the country as no change will be realised in the legal and institution framework in solving land disputes.

1.6 LITERATURE REVIEW

A review of literature on historical injustices, which is the premise of this study, indicates that many authors concur that there have been historical land injustices that are unique and have remained unresolved to date. Similarly, the authors differ on the best way of resolving land injustices. This study agrees with the authors that historical land injustices have informed societal land needs, use and disputes. This study proposes a wholesome, comprehensive mode of solving prevailing land injustices.

³⁸ Brian Bix in analysing Hart, states that law is a human creation, designed to serve needs which require human participation.

³⁹ *ibid.*

A review of literature reveals that there is limited jurisprudence on the function of the ELC's to deal with land disputes in a wholesome, comprehensive and conclusive manner within African countries. Thus publications on the role of the Court are based on other jurisdictions, particularly in the USA and Australia. However this study does not imply that such jurisdictions are more developed in their land law legal and institutional framework.

This study has discussed the relevant literature in themes namely: those addressing historical land injustices and those addressing the appropriate dispute resolution mechanisms given evolving societal requirements on land ownership and use.

Takashi Yamano and Klaus Deininger⁴⁰ state that land issues are increasingly becoming a source of social conflicts in Sub-Saharan Africa where land access had traditionally been characterized as relatively classless but land conflicts have erupted into large scale civil strife and political movements. The current land tenure systems in Africa are not in a position to resolve land conflicts.⁴¹ This study agrees with this position in that formal systems of dispute resolution has been in existence since colonization and post independence but land disputes still continue to aggregate in the country. The authors have not dealt with the ELC in Kenya, but the same is because it is a new concept. This study proposes that the formal system ought to consider social needs in solving disputes in order to keep up with societal evolutions or else it may be construed as another Court incapable of solving land disputes.

⁴⁰ Takashi Yamano and Klaus Deininger, 'Land Conflicts in Kenya: Causes, Impacts, and Resolutions' [2005] FASID Discussion Paper 2005-12-002
< <http://www3.grips.ac.jp/~yamanota/Land%20Conflicts%20in%20Kenya%20%28FASID%20DP%29.pdf> >
accessed 27 November 2012.

⁴¹ *ibid.*

William Kalande⁴² advances the views by Takashi and Klaus that, failure of land order in Kenya was occasioned by colonialists who took proprietary powers over land leading to suppression and subversion of indigenous land governance structures, institutions and laws in Kenya. The successive governments confirmed and safeguarded the unpopular property laws and administrative structures thus prolonging the existing and proliferating land disputes. The three authors agree that there has been a formal system of dispute resolution. Kalande offers a solution to Kenya's present land problem which includes: nullification of titles, resettlement of communities and land redistribution. This study is in support that solving land disputes can be achieved by looking into the Kenya's land tenure evolution. The current legal reforms which include the consolidation of the various land registration regimes and establishment of the ELC may end up being marred with political interests and protecting the interests of the dominant class. However this study disagrees with his analysis to the extent that he only gives a practical approach to settling land disputes but does not mention what path the Court can adopt in solving land disputes. This study will look into the legal and institutional framework of the ELC in solving the historical evolution causes of land disputes and determine its effectiveness in solving them with continuing evolving societal needs.

Donald Kaniaru⁴³ recognizes that the CoK makes provision for land and environment under Chapter Five.⁴⁴The CoK in enforcing human rights mandates the Courts to effectively determine

⁴² Kalande (n 17).

⁴³ Donald W. Kaniaru, 'Environmental Courts and Tribunals: The Case of Kenya' [2012] 23(4)Volume 29 Environmental Courts and Tribunals: Improving Access to Justice and Protection of the Environment Around the World.

⁴⁴ Constitution 2010, Art 19 to 59.

disputes.⁴⁵ This study agrees with him that the ELC⁴⁶ is inherently defective as it was created in a frantic process thus errors crept into several texts of the Act and the Court. This error will hinder the efficient discharge of justice in land disputes. This study differs with him as his analysis is weighted on environmental issues and has a limited stand on land issues. Similarly **Migai Akech**⁴⁷ places more emphasis on the environmental dispute mechanisms and not on the land disputes resolution mechanisms.

Robert Foster⁴⁸ states that unlike in Africa, land titles in America are protected by more legislation than any other single right. The reason for land conflicts lies with the concept of ownership. This study agrees with Foster's analysis that land disputes should be resolved by way of friendly negotiations and mediation.⁴⁹ This study disagrees with Foster as he not keen on the land Court process for reasons that it takes long and is expensive.⁵⁰ This study intends to determine the efficacy of the ELC in conclusively solving land disputes with the issue of cost being immaterial. It will also look at the role of the LDTs and assess its performance in resolving land disputes with a view of considering whether the ELC is likely to be more successful in discharging its functions.

An analysis of the Tanzanian Land Acts and the existing local customs governing land indicate that there is need for an efficient formal system of solving land disputes in Tanzania as in Kenya.⁵¹ Land conflicts in Tanzania like Kenya are in profusion as the judiciary is slow and

⁴⁵ *ibid*, Art 20 (3).

⁴⁶ *ibid* (n 9).

⁴⁷ Migai Akech (n 1).

⁴⁸ Robert W. Foster, 'The U.S. Surveyor's Role?' [2010] 16 (11) *Boundary Disputes* <http://www.fig.net/pub/fig2010/papers/ts10k%5Cts10k_foster_4352.pdf> accessed 3 December 2012.

⁴⁹ *ibid*.

⁵⁰ *ibid*.

⁵¹ Land affairs, 'Law and justice; the Tanzanian Land Court System'(20 January 2010)

hardly accessible to people thus incapable of dealing with large number of cases. This analysis does not identify the colonial historical injustices occasioning land disputes. This study proposes to determine if the ELC better placed to solve land disputes as compared to the LDTs.

Raghav Sharma⁵² states that debates surrounding land disputes in Australia are pegged on the role of history.⁵³ This study agrees with him in the relationship between history and land disputes in Australia, which is similar to Kenya. This study is of the opinion that there is need for a formal system of dispute resolution. This study proposes to look into the legal and institutional framework of the ELC and its perceived role in solving historical injustices upon which land disputes arise having regard to evolving societal issues. Further, the study will make recommendations on how to make the current system more effective, efficient and conclusive.

1.7 RESEARCH OBJECTIVES

1.7.1 Main objective of the study

The main objective of this study is to conduct an in depth analysis and review of the mandate, jurisdiction, composition and placement of the ELC and compare it with the mandate of the LDTs with a view of establishing if the ELC is sufficiently mandated to deal with historical and emerging land disputes in Kenya today. This study will assess if the ELC is better placed to deal with such disputes as opposed to being an additional Court formed in an already overcrowded

<<http://land-affairs.typepad.com/tanzania/2010/04/law-and-justice-the-tanzanian-land-court-system.html>> accessed 29 November 2012.

⁵² Raghav Sharma, 'Green Courts in India: Strengthening Environmental Governance?' [2008] 4 (1) Law, Environment and Development Journal, p. 61,

< <http://www.lead-journal.org/content/08050.pdf>. > accessed 19 November 2012.

⁵³ *ibid.*

system. Further, this study proposes to identify and recommend necessary reforms that would result in a more effective and efficient system of handling land disputes.

1.7.2 Specific objectives

- a) To assess the provisions of the repealed LDTs Act and assess its performance in land dispute resolution.
- b) To assess the provisions in the ELC Act that mandates the ELC and informs its mandate, jurisdiction and function to deal with land disputes.
- c) To compare the mandate, jurisdiction and functions of the two institutions and identify potential challenges and legal impediments that may affect the ELC from discharging its obligations having regard to societal changes and the challenges previously experienced by LDTs.
- d) To recommend legal and institutional reforms that would improve the framework dealing with issues on land disputes in order to make it more comprehensive, effective and efficient.

1.8 BROAD ARGUMENT LAYOUT

The CoK created the ELC because of the importance of land as an asset to Kenya, the significance of its ownership to the citizenry, the emotive nature of perceived land injustices when allocating land and to resolve land disputes. There is a lacuna in the CoK and the ELC Act on the institutional difference now and under the old system in resolving land disputes. Further it has been argued on how issues that have existed since independence will be solved effectively without creating additional problems that did not previously exist. In order to effectively solve

land disputes, this study shall propose pragmatic solutions to an efficient mode of resolving land disputes.

1.9 HYPOTHESIS

The study is based on the following hypothesis:-

- i) The piece meal institution and weak legal framework for resolving land disputes may be the major cause of the ineffective and inefficient system of land dispute resolution.
- ii) The jurisdiction, mandate and function of the ELC as compared to the LDTs is not the cure for resolving land disputes.
- iii) There is a lacuna in the creation of the ELC in that it is likely to result in a more convoluted and inefficient legal framework with an additional Court being formed into an already overcrowded legal system, resulting in the application of the provisions of the Constitution in a manner that was not envisaged.

1.10 RESEARCH QUESTIONS

The research project aims to answer the following questions:

- i) How have injustices in land shaped the development of the formal institutional framework governing land dispute resolution in Kenya?
- ii) How does the jurisdiction, function and mandate of the ELC compare to that of the LDTs?
- iii) Is the ELC better placed institutionally to deal with and resolve land disputes as compared to the LDTs?

iv) What are the legal and institutional reforms that would be required to improve the framework dealing with issues pertaining to land and resolution of land disputes in order to make it more comprehensive, effective and efficient?

1.11 RESEARCH METHODOLOGY

The research methodology used will be largely qualitative. The following research strategies will be used:

This study is intended to be an exploratory research predominantly based on the review of already existing literature. The study will apply secondary source of data. The study intends to use the library services where relevant materials from textbooks, scholarly articles and reports on the subject will be used to support the arguments made in the study. These literature materials will be majorly sourced from the University of Nairobi Parklands Campus library. Taking cognisance that the University might not be able to stock all the recent publications touching on the subject of this study, I shall use the internet to obtain articles on the subject.

The study is also inquisitive, analytical and prescriptive. It delves into an inquiry on the appropriateness of the ELC in solving land disputes in Kenya today. It seeks to gauge the likelihood that the ELC as is statutorily mandated, will not appropriately resolve land disputes in Kenya. The study will use the regime used under the LDTs in answering the question whether the ELC is an appropriate mechanism for resolving land disputes in Kenya today.

1.12 SUMMARY OF CHAPTERS

This study shall contain five chapters. Chapter one discusses the introduction to the sensitive issue on land ownership in Kenya. It further, lays out a back ground to the research and outlines the content and structure of the thesis. Chapter two highlights the evolution of land ownership in Kenya from the colonial period to date thus forming the basis of forming institutions in Kenya to handle land disputes in Kenya. Chapter three shall explore on the structure, placement and composition of the ELC within the hierarchy of the Court system and the structure of the ELC in the court room. The study will compare the structure, placement and composition of the ELC with that of the LDT with a view of determining whether the ELC is well placed within the court system to efficiently, effectively and more importantly appropriate to resolve land disputes in Kenya. Chapter four shall analyse the ELC's mandate, jurisdiction and the law applicable in the ELC in resolving land disputes. The study will compare the said mandate and law under the ELC Act with similar provisions under the LDT Act with a view of determining whether the ELC is well mandated to deal with land disputes in Kenya. Chapter five will summarise the findings of the study then conclude by giving recommendations that would improve the legal and institutional framework dealing with land disputes in Kenya in order to make the system more comprehensive, more effective, efficient and appropriate to resolve land disputes in Kenya.

CHAPTER TWO

HISTORICAL EVOLUTION OF LAND OWNERSHIP IN KENYA

2.1 Introduction

The present chapter has briefly set out in the background the legal regimes as regards land administration from pre- colonial and how the same land administration processes continued to be applied in Kenya even after Independence. At independence, we find that Kenya inherited the colonialist' skewed land policy system of land ownership that continued to create hostility amongst its citizens. The issue of land and individual land ownership in Kenya is a very sensitive and an emotive one which requires undue attention. This is because, Kenya and Africa at large highly depend on land as a source of livelihood and economic growth. Kenya mainly being an agricultural economy highly depends on land as a source of its economic growth. As a result, it is every individual's interest to own property in form of land for survival.

The land question in Kenya can be traced from the colonial period to post and neo-colonial era.⁵⁴ The issue on land ownership is increasingly becoming a source of conflict in Kenya and Africa at large.⁵⁵ Many conflicts in sub-Saharan Africa are over rights to land and natural resources.⁵⁶ Study has shown that, land conflicts can lead to individual loss and fray the fabric of communities; others can cause large-scale displacements of people, or war.⁵⁷ The results of such land conflicts in a country is to undermine a countries development, thus depleting a countries

⁵⁴ Leach Adam, 'Land reform and Socio-Economic Change in Kenya' in Wanjala C. Smokin, Essays on Land Law; The Reform Debate in Kenya (Faculty of Law University of Nairobi 2000) p 192.

⁵⁵ *ibid* (n 40).

⁵⁶ Focus on land in Africa

<<http://www.focusonland.com/development-themes/conflict-and-resolution>>

⁵⁷ *ibid*

economy.⁵⁸ All land conflicts, no matter how peaceful or violent they are, produce negative consequences for individual people as well as for the entire society.⁵⁹ Land disputes can arise between land holders and their neighbours, relatives, landlords, or governments. Land conflicts can also occur after a war when displaced people eventually decide to go back to their ancestral land but only to find other people occupying the said land. Land conflicts may also occur in cases where a government compulsorily acquires land without compensating the individual owners of the land. Kenya experienced and continues to experience land conflict as a result of the 2007 post elections violence that rocked the country. Much of the violence was linked to the long standing land disputes in Kenya.⁶⁰ Many people fled from their homes where they lived and owned land. This chapter shall highlight on the history of land ownership in Kenya with a view of understanding the source, consequences and policy's applied that saw the beginning of land disputes in Kenya.

Of major interest to this study is individual land conflict in Kenya. Such individual land conflicts are as a result of instances where an individual loses his land which he has been in actual occupation but has no title to show, and he loses it to a person with title to the said land. Such a case will lead to individual land conflict between the citizen without a title but in occupation and the individual with a proper title but not in possession. Until recently, the government started issuing titles to individuals who proved ownership of land in various areas of the country. However, this exercise of issuing titles was not appreciated by many, especially the people who had no proof of title or letter of allotment. It is with regard that this study seeks to find out

⁵⁸ *ibid.*

⁵⁹ Babette Wehrmann, *Land Conflicts, A practical guide to dealing with land disputes*, Eschborn 2008.

⁶⁰ *ibid* (n 56).

whether the ELC is the appropriate channel to effectively and efficiently handle such individual land disputes.

The legislation on land ownership in Kenya that was adopted by the government after independence and continued to be applied by successive governments, has to a large extent contributed to the issue on land disputes in Kenya. We find that such legislation continued to dis-entitle the Africans from communally under trustees system from holding and owning land in Kenya. As shall be highlighted in this chapter, we find that the government started holding land on behalf of its citizen thus ousting the element of individual land titles in Kenya. This action by the government lead to and continues to create land disputes in Kenya today. Land disputes were in the past resolved by community elders under the LDT and the LCB in Kenya but we find that Kenya has set back to the colonial institutional framework (court system) in resolving land disputes. The CoK created the ELC with a specific mandate to deal with environment and land disputes in Kenya. The ELC is a foreign concept for many Kenyans. This is because the formal laws applicable in the said court, the judges, the lawyers, the procedures and systems are alien to a majority of Kenyans.⁶¹ On this premise, this study will seek to examine whether the ELC as a one off institutional mechanism is in a position to solve land disputes given the nature of land disputes in Kenya which are wide spread as a result of the historical land injustices in Kenya.

2.2 Disposition of land ownership by Africans

Kenya has experienced a long history of land conflicts which date back to its colonial period when the British promulgated policies and practices that alienated from their customary land and

⁶¹ Land Development and Governance Institute (LDGI), ‘An Assessment of the performance of the Environment and Land Court, 12th score card report’ *Full Report Released: 17th September 2013.*

pitted one ethnic group against another.⁶² We find that these policies were extended after independence and they were adopted by preceding regimes. The 1954 Swynnerton Plan granted secure individual land titles to African farmers. The plan was reinforced further by the native Land Registration ordinance 1959 which was replaced by other laws after independence.⁶³ Adam Leach⁶⁴ postulates that historical events and patterns of land tenure have had significant socio-economic effects on the poor people in modern Kenya and have set the conditions for land reforms today. Adam notes that, since independence, there has been a laxity by the government to create comprehensive programmes for land reform and land tenure systems in Kenya. That since post-independence, little has been done especially with regard to reform of the institutions which govern the management and use of land in Kenya.⁶⁵

In the 1890's, the British authorities proclaimed and declared in 1897 that all waste and unoccupied land was crown land. The said land was held and vested in the imperial power.⁶⁶ However, in 1899 and on the advice of the Law Officers of the crown, they argued that in Kenya all land had in fact accrued to the imperial power simply by reason of assumption of jurisdiction. Thereafter, Kenya slipped very quickly into a territory of individual private estate owners the legitimacy of whose titles were derived from the imperial power. From 1902 onwards, white settlers were allowed and issued with freehold titles or long leases over land in the protectorate. Under the 1902 ordinance, there emerged two problems between crown land and natives land. The first was the extent of the natives rights to land especially land found to be suitable for the

⁶² *ibid* (n 56).

⁶³ *ibid* (n 56).

⁶⁴ Leach Adam, (n 54).

⁶⁵ *ibid*.

⁶⁶ H.W.O Okoth-Ogendo, ' Land Policy Development in East Africa a survey of recent trends'

white settlers and the second was labour offered by the Africans.⁶⁷ The 1902 Ordinance in conformity with the 1901 Lands Order-in-Council prohibited grants of land in the actual occupation of the Africans. It provided that where grants included native settlement, the settled area was deemed to be excluded from the grant until it was vacated. Therefore the 1901 ordinance provided that the white settlers were not to interfere with natives land which was in actual occupation by Africans. The settlers however had an issue with the provisions under the Ordinance particularly on the fact that mere rights of occupation were given status equivalent to an encumbrance which was good against an actual or prospective feeholder. This therefore introduced the concept of native reserves which some were established through the use of quasi-legal mechanisms as treaties or declarations under the outlying Districts Ordinance of 1902.⁶⁸

A good example of such a treaty and or agreement was the 1904 and 1911 by the Maasai. The first agreement by the Maasai's through their ritual heads allegedly agreed to move their people and flock to areas that were not crown land. They sought to leave all the land and moved to Laikipia on condition that the white settlers would not take up land anywhere in the so called reserved native area in Laikipia.⁶⁹ It is important to note that these early reserves constituted a positive step towards the protection of African rights to land. However under the 1902 Ordinance, the Indians were completely prohibited from owning and acquiring land that was considered suitable for the white settlers. Unlike the Africans, the Indians had the money and the political backing of the government of India behind them.⁷⁰

⁶⁷ *ibid*, p 29

⁶⁸ *ibid*, p 30.

⁶⁹ *ibid*, p 29.

⁷⁰ *ibid*.

A Crown Lands Bill⁷¹, established African rights to land by giving the Governor the power to reserve from sale, lease or any disposal any crown land which in own opinion was required for the use of the members of the native tribes of the pretocorate.⁷² Such reservations had to be gazetted but the Governor had the power at any time to cancel such gazettelement if he though that such land so reserved was not required for the use and support of the members of the natives tribes for which it had been reserved.⁷³ The extent of land reservation was therefore pegged on the actual need by the natives of such land.

When Kenya was formally decalared a colony by the year 1920, all land in the country, irrespective of whether it was occupied or unoccupied, it was considered by the British authorities as ‘Crown Land’. The said land was therefore available for alienation to white settlers for their use as private estates. Attempts were made in 1922 to try and address land rights for African cultivators to create reservations for each ethnic group in Kenya did not protect the Africans land rights. The Maasai’s attempted to come up with treaties similar to those concluded in Central and Southern Africa but the said treaties did not offer them protection in owning land in Kenya. It was only in 1938 that several inquiries and commissions were put in place whereby the so called ‘Crown Land’ was alienated giving rise to private titles which were granted and native lands was held in trust for the Africans in actual occupation. This is because, the Indians had acquired a lot of land in the Sultan’s Dominions thus they were in the pretocrate much longer than the settlers.

⁷¹ The Crown, 1908 Bill.

⁷² *ibid* (n 66).

⁷³ *ibid*.

After independence and despite its long experience with comprehensive land tenure reforms, little effort was made to change the legal policies in place with regards to land rights in Kenya. Private ownership rights derived from the sovereign remain as they were during the colonial period. This is because native lands now called trust lands are still being held by statutory trustees or the government instead of being held by indigenous people in the country who occupy the said land. The state therefore became the ultimate authority in matters of control and management of land. Not much changed for the interest and benefit of individual land ownership since 1938. This is because attempts were made to convert trust land into individually held absolute proprietorship but the same did not work.

Seeing as land is one of the most basic resources available to individuals and societies in Africa, most national constitutions and legislation define the tenets of their land governance. In August 2010, Kenya ushered and approved a new constitution which brought with it significant changes to land governance and tenure in Kenya. The new Constitution of 2010 seems to provide some hope that such historical land disputes will be addressed. Whether Kenya's land conflicts based on such historical land injustices will be addressed will depend on how the constitutional provisions dealing with land policies and land administration will be implemented and enforced.⁷⁴

Unlike the old constitution which was dressed in colonial terms, the CoK 2010 has adeptly provided for use and management of land and environment⁷⁵, Article 68 provides for the enactment of legislation on land whose object is to revise, consolidate and rationalize existing

⁷⁴ *ibid* (n 56).

⁷⁵ Constitution 2010, Chapter five.

land laws, and this was the basis of enactment of the Land Act No. 6 of 2012. In addition to creating new law on land management, the CoK under⁷⁶ created a judicial institution to specifically handle land disputes in Kenya. The CoK created the ELC as the institution to deal with both environmental and land disputes in Kenya. The CoK was therefore perceived as the hope for Kenyans that indeed the judicial institution will reform to provide for an institution that will effectively, efficiently and most importantly resolve land disputes in Kenya.

The CoK intention of creating the ELC can be uploaded as it promotes good governance and good land administration. Land governance addresses the ways in which decisions about the use of and control over land are made, implemented and enforced, and the way that competing interests are managed. In African countries, land governance is carried out by statutory, customary and religious institutions. In many African countries, customary practices play a major role in land governance. The vast majority of rural people in sub-Saharan Africa, including small-scale farmers and pastoralists, access land and natural resources based on customary practices, rules and institutions. We find that many nations, Kenya included under the ELC Act⁷⁷ are working to harmonize statutory and customary approaches to land governance.

2.3 Conclusion

The issue on land ownership has continued to be a challenge for Kenya today. This is informed by the weak land policy system of land ownership that Kenya adopted from the colonialist. The post-election violence experienced in Kenya reminded Kenya of the real issues surrounding land. This disputes well emanated from the existing historical injustices on land ownership since pre

⁷⁶ibid, Art 162 (2) (b)

⁷⁷ ELC Act.

and post-independence. Majority of Kenyan's were dis entitled of their community and ancestral land thus creating a lot of hostility on the issue of land ownership in Kenya. Creation of institution, law and policy to resolve land disputes is of major concern for Kenya.

The inadequate land administration policy in place lead to problems on land ownership. Accordingly, in August 2010, Kenya passed its new constitution which saw a lot of changes on land reform. The CoK paved way for creation and harmonisation of laws to govern land in Kenya. Further, the CoK created the ELC with the sole mandate to resolve both environment and land disputes in Kenya. The CoK therefore came in to save a majority of Kenyans battling it out with land issues. The ELC is yet to be established in all counties in Kenya as envisaged under⁷⁸ therefore, there remains a lot to be done to achieve the CoK's intention of creating an ELC. The CoK created the ELC as a superior court of record with the status of the High Court and to exercise jurisdiction throught Kenya.⁷⁹ Therefore, this study seeks to find out if the ELC as a one off instututional mecahnism can effectively, efficiently and conclusively resolve historical and emerging land disputes in Kenya today.

⁷⁸ *ibid*, sec 4 (3).

⁷⁹ *ibid*, sec 4.

CHAPTER THREE

THE STRUCTURE, PLACEMENT AND COMPOSITION OF THE ELC AND LDT IN KENYA

3.1 Introduction

The previous chapter discussed the historical evolution of land ownership in Kenya. It accessed the historical pattern of laws and policies in Kenya on land ownership that led to the creation of an ELC with a specific mandate to resolve land disputes in Kenya. This chapter shall outline the structure and placement of the ELC and compare it with that under the provisions of the LDT. On structure, the study will look into the ELC's structure in the court and compare it with that under the LDT. It will also look into the structure and placement of the ELC in the court system and compare it with that under the LDT all with a view of establishing whether, the ELC as it is today is better structured and placed in the current hierarchy of the court system in Kenya to appropriately solve land disputes in Kenya. Further, this chapter shall access the composition of the ELC and compare it with the composition under the LDT in order to determine whether the ELC is well composed to resolve the day to day land disputes in Kenya.

3.2 Structure, placement and composition of the ELC and the LDT

3.2.1 Structure of the ELC and the LDT

The court structure under the ELC is that of a formal court setting. The court comprises of a judge dully appointed in accordance with the provisions of section 7 of the ELC Act. Section 5 of the ELC Act provides for the Composition of the Court which shall consist of the Presiding Judge and such number of Judges as may be determined by the Judicial Service Commission

from time to time. The ELC Act⁸⁰, provides for the coram of the court. It provides that the Court shall be properly constituted for the purposes of its proceedings by a single judge. The court has a court clerk and a court interpreter when the need arises. The ELC Act⁸¹ provides that the language of the court shall be English. The Act further states that in all appropriate cases, the court shall facilitate the use by the parties of indigenous languages, Kenyan sign language, Braille and other communication formats and technologies accessible to persons with disabilities.⁸² Further, the parties to a dispute appear in the said court with their appointed representatives who are lawyers if any. The ELC Act⁸³ provides that a party to the proceedings may act in person or be represented by a duly authorised representative. The ELC under section 9 makes provision for a Registrar of the Court under the following terms:-⁸⁴ Part V of the ELC Act⁸⁵ makes provision for the sitting of the court. It provides that the Court shall ensure reasonable and equitable access to its services in all Counties. We however note that to date, four years after the ELC came into play, not all counties have access to and knowledge of the existence of an ELC.

The structure of the LDT was that the LDT was construed as a tribunal amongst other tribunals in Kenya. The tribunal was subordinate to the High Court and the Court of Appeal. Unlike under the ELC which boasts of thirty four courts in the country, the LDTs were located in each

⁸⁰ *ibid*, Sec 21.

⁸¹ *ibid*, Sec 23.

⁸² Where it is expedient and appropriate to do so, the Court may direct that proceedings be conducted and appearances be made through electronic means of communication, including tele-conferencing, video-conferences or other modes of electronic communication.

⁸³ ELC Act, Sec 22.

⁸⁴ (1) There shall be a Registrar of the Court appointed by the Judicial Service Commission under section 20 of the Judicial Service Act, 2011.

(2) Any administrative function of the Registrar may in the Registrar's absence, be performed by any member of staff of the Court authorized by the Judicial Service Commission.

⁸⁵ ELC Act, Sec 26.

District. Accordingly, justice under the LDTs was more achievable as contemplated under the CoK.⁸⁶ This is in terms of cost, accessibility and distance for the parties to a land dispute. According to a survey conducted by the Land Development and Governance Institute (LDGI)⁸⁷, it revealed that the LDT's were accessible to the people thus reducing the cost of having to travel for long distance in search of an LDT.

The LDT structure was such that it comprised of a chairman who was appointed from time to time by the District Commissioner from the panel of elders appointed under section 5 of the LDT Act and either two or four elders selected by the District Commissioner from a panel of elders appointed under section 5 of the LDT Act. Such a composition under the LDT was likely to promote better justice in that there were more people involved in the decision making of a dispute instead of a single person determining a dispute. However, as indicated, the ELC is properly constituted with a single judge with exceptional circumstances enlisted under section 21 (2) of the ELC Act. A composition of a single judge in land disputes is not ideal for solving disputes because in my view the single judge might not be in a position to understand the language, cultural and traditional practices of parties in dispute. Further, we find that the composition under the tribunal was not alien to the parties to a dispute because the elders were people who came from communities of the parties to a dispute. However, the ELC judges are strangers to the parties to a dispute. The lawyers too are alien to the parties to a dispute and as a result, we find that parties to a dispute might be afraid of appearing and stating their cases before the court. This study infers that decisions under the LDT were more solid and conclusive to the extent that minimum appeals were encouraged to the High Court but only on matters of law.⁸⁸

⁸⁶ Constitution 2010, Art 48.

⁸⁷ *ibid* (n 61).

⁸⁸ LDT Act, sec 8.

However, decisions of the ELC are appealable to the Court of Appeal as envisaged under section 16 of the ELC Act.

On matters of language used under the LDT, this study infers that the LDT were more friendly to parties to a dispute. With a composition of the tribunal having elders from the communities of the parties to a dispute made communication much more easier. These were people who spoke the same language and shared a similar custom unlike under the ELC where the language of the court is either English with an avenue of having an interpreter in the event a party can not communicate in the English language. Therefore, this study is of the view that under the ELC, there is a likelihood of a misunderstanding or mis-interpretation between the judge, the interpreter and the parties to a dispute in the event that a case is wrongly interpreted. This therefore results to incorrect decisions being arrived thus denying parties proper justice.

From the foregoing, the study finds that the structure of the ELC as compared to that under the LDT is more or less similar save for the issues highlighted above. Accordingly, it is my view that the ELC has replaced the LDT with a similar structure only that the ELC has been given the status of a court and not a tribunal. The study is of the view therefore, that the ELC is not better placed to deal with land disputes in an appropriate manner as compared to the LDT. The ELC can be construed to be just another court created under the CoK with a formal structure to function like the LDT. This study is of the view that the ELC has not brought anything new in terms of structure that places the ELC as the appropriate institution for resolving land disputes in Kenya.

3.2.2 Composition of the ELC and the LDT

On the composition and organisation of the ELC, as earlier indicated consists of the presiding judge and such other number of judges as may be determined by the Judicial service Commission from time to time.⁸⁹The presiding Judge of the ELC shall be elected in accordance with Article 165 (2) of the Constitution which provides that there shall be a Principal Judge of the High Court, who shall be elected by the Judges of the High Court from among themselves. The qualifications of and appointment of the other Judges of the ELC are provided for under section 7 of the ELC Act. Section 7 of the ELC Act provides for other qualifications of a judge to be appointed under the ELC apart from the qualifications provided for under Article 166 (2) of the CoK. The ELC Act provides that for a judge to be eligible for appointment to sit at the ELC, the judge is required to have at least ten years experience as a distinguished academic or legal practitioner with knowledge and experience in matters relating to environment or land.⁹⁰

A reading of the provisions of section 7 of the ELC Act indicates that the additional requirement for a judge to be appointed to sit in the ELC is that a person should have experience in matters relating to land or environment. This postulates therefore that a judge of the ELC can be a person with either experience in environment or land matters. We find that both the environment and land matters are heard in the same court with a presiding judge over the matter. This composition of the ELC brings out a challenge in the efficient resolution of disputes. This is because the ELC can be presented with a land matter but we find that the judge presiding over the matter has only experience in environmental matters only and vice versa. We can appreciate the fact that environmental issues or concerns are not necessarily concerned with land and similarly, land

⁸⁹ ELC Act, Sec 5.

⁹⁰ *ibid*, Sec 7 (1) (b).

issues are not necessarily environmental issues. With that in mind, we find that there is fear that a land matter may be construed and adjudicated upon by a judge appointed under the ELC as an environmental issues thus defeating the purpose and intention of solving the said land dispute.

At this point due regard should be placed on the functionality of the ELC under its jurisdictional mandate. The intention of creating an ELC in line with its mandate was to adequately, efficiently and most importantly appropriately resolve pending and emerging land disputes in Kenya. However, we note the ELC is placed with jurisdiction to deal with both environment and land disputes. The Court at the end of the day is placed with a multiple jurisdictions of dealing with both environment and land matters. Unlike under the LDTs, the tribunal was placed with the sole jurisdiction of dealing with land disputes. The tribunals were spread out in various areas in order to efficiently and adequately deal with land disputes in Kenya. With this regard and as a result of the multiple jurisdiction of the ELC, this study is of the view that the court is not better placed as compared to the LDT in dealing with land disputes in Kenya.

In addition to the matters referred to in section 13 (1) and (2) of the ELC Act, the ELC exercises appellate jurisdiction over the decisions of the subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the court.⁹¹ In exercise of its jurisdiction under the ELC Act, the ELC shall have power to make any order and grant any relief as the Court deems fit and just. As shall be discussed in the next chapter, the ELC as placed under the hierarchy of the court system in Kenya, the ELC is neither the High Court in accordance with the provision of Article 165 nor does it perform the functions of the High Court. With that in mind, appeals that lie from the subordinate courts to the ELC can not be inferred to be appeals to the

⁹¹ *ibid*, Sec 13 (4).

High Court. With this regard, the ELC as placed in the hierarchy of the court system can be construed to be another court within the division of the High Court and not the High Court itself.

Further, the ELC Act provides that appeals from the Court shall lie to the Court of appeal against any judgment, award, order or decree issued by the ELC in accordance with Article 164 (3) of the CoK⁹² which provides that the Court of Appeal has jurisdiction to hear appeals from the High court and any other tribunal as prescribed by an Act of Parliament. However, appeals from the Magistrates Courts shall lie within the mandate of the ELC. With an appeal of decisions of the ELC lying with the court of Appeal, it can be inferred at this point that some ELC decisions referred to the appeal Court render the ELC not appropriate in conclusively resolving land disputes in Kenya. This is because and as already stated, the spirit and intention of the CoK creating the ELC was for the court to conclusively resolve land disputes. However, we find that the LDT's had an element of conclusiveness in resolving land disputes with minimum appeal lying to the High court on matters of law.

Further, and in consideration of the requirements for eligibility of an ELC judge under Article 166 of the CoK and section 7 of the ELC Act, we find that a matter on appeal from the ELC to the Court of Appeal is deemed to fail. This is because, the court of Appeal judges only have the qualifications set out under Article 166 of the CoK, thus they lack the capacity to hear a matter from the ELC. At this point, it can be inferred that the intention of the CoK and the ELC Act to have the ELC facilitate the just, expeditious, proportionate and accessible resolution of disputes fails because the composition of judges of the court of appeal does not march up to the spirit and dict of the CoK in creating the ELC.

⁹² *ibid*, Sec 16.

The composition under the LDTs unlike under the ELC, consisted of a chairman appointed from time to time by the District Commissioner from the panel of elders appointed under section 5 of the;⁹³ and either two or four elders selected by the District Commissioner from a panel of elders appointed under section 5 of the Act.⁹⁴ It is instructive to note that the composition of the LDT was made up of elders from a particular district. Unlike the ELC, the composition of the LDT does not include people like lawyers who are appointed as judges to sit in the ELC. The judges under the ELC are appointed from different jurisdiction and as such they might not understand the pertinent issues and the customs of a particular region.

Under the LDT, the Act provided for appeals to the Appeals Committee and the High Court. The LDT Act made provision for an appeal mechanism for decisions of the LDT. The Act provided that a party to a dispute who is aggrieved by the decision of the tribunal may, within thirty days of the decision, appeal to the Appeals Committee constituted for the Province in which the land which is the subject matter of the dispute is situated.⁹⁵ The LDT Act provides that the Minister shall establish for each Province a Land Dispute Appeals Committee which shall consist of⁹⁶ a chairman appointed from time to time by the Provincial Commissioner from the panel of elders appointed by the Minister by notice published in the Gazette for purposes of appeals;⁹⁷ and such persons, not being less than five, appointed by the Minister.⁹⁸

⁹³ LDT Act, Sec 4 (2) (a).

⁹⁴ *ibid*, Sec 4 (2) (b).

⁹⁵ *ibid*, Sec 8 (1).

⁹⁶ *ibid*, Sec 9 (1).

⁹⁷ *ibid*, Sec 9 (1) (a).

⁹⁸ *ibid*, Sec 9 (1) (b)

Section 10 of the LDT act provides for Rules prescribing the procedure of tribunals.⁹⁹ The decisions of the Appeals Committee shall be final on any issue of fact and no appeal shall lie therefrom to any Court.¹⁰⁰ However, either party to the appeal may appeal from the decision of the Appeals committee to the High Court on a point of law within sixty days from the date of the decision complained of.¹⁰¹ This is feasible provided that no appeal shall be admitted to hearing by the High Court unless a judge of that court has certified that an issue of law is involved.¹⁰² This provision on Appeals of decisions of the Appeals committee indicates an element of finality in solving land disputes under the LDTs. We find that right from the composition of the members of the LDT and the Appeals Committee, the intention under the LDT was to have members and or elders of the district where the subject matter of the dispute arises from constituted the Court. In so doing, the decision of the LDT is presumed to deal with all arising issues conclusively with no need for appeals. However, under the ELC, the court is not the final arbiter of land disputes emanating from the court or appeals from other subordinate courts as further appeals lie at the court of appeal and the supreme court.

3.2.3 Placement of the ELC in the hierarchy of court system in Kenya

⁹⁹The Minister may make rules---

(a) prescribing the procedure of Tribunals. in particular, the form in which any decision, order or determination of a Tribunal shall be given;

(ii) the evidence which may be admitted in proceedings before a Tribunal and the taking of such evidence; and generally for all matters in connection with the bringing, hearing and determining of disputes referred to a Tribunal to be resolved;

(b) prescribing the composition and qualifications for membership of the Tribunal and of the Appeals Committee and the terms of service of such members all of whom shall be eligible for re-appointment;

(c) prescribing any procedural requirements which the Minister may deem desirable in relation to appeals additional to the provisions set out in section 7; and

(d) prescribing generally for all other matters which may be deemed by the Minister necessary for the better carrying out of the provisions of this Act and for the payment of such fees as may be considered necessary

¹⁰⁰ LDT Act, Sec 8 (8).

¹⁰¹ *ibid*, Sec 8 (9).

¹⁰²*ibid*.

3.2.3. Placement of the ELC and the LDT in the hierarchy of Court system in Kenya

Section 4 of the LDT Act establishes the tribunals, while section 5 provides for the panel of elders establishing and or composing the LDT. The LDT Act established the LDT for every registration district in Kenya. It can be inferred therefore that this provision under the LDT Act gave rise to a wider geographical coverage of the LDTs. This therefore made the LDTs easily accessible to the people of Kenya and also cost effective. The LDT was created to be subordinate to the High Court and the Court of Appeal. The LDT had a clear identity and placement within the court system. It was created as a Tribunal which limited the jurisdiction of the magistrate's courts under its establishing Act in certain cases relating to land.¹⁰³ The LDT limited the jurisdiction of the Magistrate's court in the following terms:-¹⁰⁴

“Where any proceedings to which section 3 (1) of this Act applies have at the commencement of this Act, been filed in a magistrates court, then unless the court has at that time heard and pronounced judgment thereon, the proceedings shall be discontinued until the dispute has been referred to the Tribunal and determination in accordance with this Act.”

Accordingly, the LDT Act conferred the Tribunal with a specific jurisdictional mandate under section 3 (1). The old constitution of Kenya¹⁰⁵ had in place a court structure. It provided for superior courts, subordinate courts and the tribunals in Kenya. It was therefore clear which matters lay under the LDT and those under other court. Further, it was clear where the LDT was placed within the court system.

¹⁰³ *ibid*, Preamble.

¹⁰⁴ *ibid*, Sec 13.

¹⁰⁵ The Constitution of the Republic of Kenya, 1963 (as Amended to 2008).

Appeals of the decisions of the LDT lay with the Appeals Committee.¹⁰⁶ A further appeal of the decision of the Appeals Committee lay with the High Court.¹⁰⁷ Appeal to the High Court was to be done within sixty days from the decision complained of and it was limited to matters of law only.¹⁰⁸ This study finds that, the LDT had an element of finality in its decision making. This is because it encouraged minimum appeals and only on matters of law to proceed to the High Court. This is unlike under the ELC as shall be discussed in this study whereby, the decision of the ELC is appealable as a whole subject to the Court of Appeal.

The ELC in Kenya is established under Article 162 (2) (b) of the CoK and elaborated in an Act of Parliament¹⁰⁹ as provided for under the CoK. The CoK makes provision for system of Courts under its Article 162. The CoK provides that the superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts mentioned in clause (2).¹¹⁰ Part II of the ELC Act makes provision for the establishment and constitution of the ELC. Section 4 of the ELC Act provides that the ELC is established as a superior court of record with the status of the High Court.¹¹¹ This is in line with the Constitutional provision under Article 162 (1). The ELC is established to exercise its jurisdiction throughout Kenya¹¹², therefore the ELC is expected to cover all the forty seven counties in Kenya. However, to date that has not been actualised in all counties in Kenya.

With the CoK provision on creation of the ELC, a question therefore arises as to its placement under the court system in Kenya. The ELC has been established by the CoK as a superior court

¹⁰⁶ LDT Act, Sec 8 (1).

¹⁰⁷ *ibid*, Sec 8 (9).

¹⁰⁸ *ibid*.

¹⁰⁹ ELC Act.

¹¹⁰ Constitution 2010, Art 162 (1).

¹¹¹ ELC Act, Sec 4 (2).

¹¹² *ibid*, Sec 4 (3).

under the system of the court.¹¹³The CoK goes further to provide under Article 162 (2) (b) an ELC with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land. The CoK provides that Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to employment and labour relations; and the environment and the use and occupation of, and title to, land.¹¹⁴ Both of these courts are superior courts of record of the same status as the High Court, along with the Supreme Court¹¹⁵ and the Court of Appeal.¹¹⁶ Therefore, the ELC shall, pursuant to Article 162(2)(b), exclusively deal with original, supervisory, and appellate jurisdiction while dealing with land disputes. In the exercise of its mandate and jurisdiction, the ELC is expected to streamline and hopefully direct appropriately on application of other sources of law in Kenya for example customary laws in making its determination in land disputes as between parties. As earlier indicated, on the composition, structure and organisation of the ELC, the ELC consists of the presiding judge and such other number of judges as may be determined by the Judicial Service Commission from time to time.¹¹⁷The presiding Judge of the ELC shall be elected in accordance with Article 165 (2) of the Constitution which provides that there shall be a Principal Judge of the High Court, who shall be elected by the Judges of the High Court from among themselves. The qualifications of and appointment of the other Judges of the ELC are provided for under section 7 of the ELC Act.

From the aforementioned provisions of the CoK, we find that the CoK's intention was to create an ELC as a superior court and with the status of the High Court. However, a CoK interpretation

¹¹³ Constitution 2010, Art 162.

¹¹⁴ *ibid*, Art 162 (2).

¹¹⁵ Supreme Court Act, (2011) No. 7 (Kenya).

¹¹⁶ Constitution 2010, Art 164.

¹¹⁷ ELC Act, Sec 5.

of its intention of creating an ELC has brought a lot of confusion as to the ELC's placement in the court system today.

The ELC's placement in the court system today has led to the filing of constitutional interpretation applications to determine its placement in the hierarchy of courts in Kenya. This study will examine the case of *Karisa Chengo, Jefferson Kalama Kengha & Kitsao Charo Ngati v Republic [2015] eKLR*.¹¹⁸ Where the Learned Judges **Okwengu, Makhandia & Sichale, JJ.A** sitting in Malindi grappled with the question on jurisdiction of the ELC as contemplated under the CoK in further determining the courts placement in the court system. The judges stated of by setting out the guiding principles in interpreting the spirit and intention of the CoK in so far as the jurisdiction of the ELC is concerned as follows:-

*Under Article 259 of the Constitution, the Constitution is to be interpreted in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of rights, permits the development of the law and that contributes to good governance. In exercising its judicial authority, this Court is obliged under Article 159(2)(e) of the Constitution to protect and promote the purpose and principles of the Constitution. Secondly, in *Ndyanabo v Attorney General [2001] 2 EA 485* the Tanzanian Court of Appeal held that in interpreting the Constitution, the Court should be guided by the general principles that; the Constitution was a living instrument with a soul and consciousness of its own. Thirdly, the principle established in *Kigula and Others v Attorney General [2005] 1 EA 132* by the Ugandan Court of Appeal is that the entire Constitution has to be read as an integral whole and no one*

¹¹⁸ Criminal Appeal No.44, 45 and 76 of 2014.

*particular provision destroying the other but each sustaining the other and that all provisions bearing on a particular issue should be considered together to give effect to the purpose of the instrument. See also **Tinyefuza v Attorney General of Uganda, Constitutional Petition No.1 of 1997 (1997 UGCC 3)**. Fourthly, the Constitution should be given a purposive and liberal interpretation as gathered from its spirit and the intention of the drafters. The Supreme Court in **Re The Matter of the Interim Independent Electoral Commission Constitutional Application No.2 of 2011** at para.51 adopted the words of Mohamed A J in the Namibian case of **State v Acheson 1991 (2) SA 805, 813(NM)** at page 8132 B-C where he stated that:-*

“The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relationship between government and the governed. It is a mirror reflecting the “national soul” the identification of ideals and ... aspirations of a nation, the articulation of the values bonding its people and disciplining its government. The spirit and tenor of the Constitution must, therefore preside and permeate the process of judicial interpretation and judicial discretion.”

The provisions of Article 162 of the CoK makes provision for superior Courts in Kenya namely the Supreme Court, the Court of Appeal, the High Court, and the two Courts contemplated under clause (2) of Article 162 of the CoK which include the ELC, while Article 165 of the CoK establishes the High Court of Kenya. Further, and as earlier indicated, Parliament is empowered under the said Article to establish courts with the status of the High Court to hear and determine

disputes relating to (a) employment and labour relations; and (b) the environment and the use and occupation of, and title to, land. Under Article 162(3), Parliament is empowered to determine the jurisdiction of the court of the status similar to that of the High Court. Accordingly, Parliament enacted the ELC Act with the object as an Act of Parliament to give effect to Article 162(2) (b) of the CoK; to establish a superior court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land and to make provision for its jurisdiction, functions and powers, and for connected purposes.

The court went further to state that in trying to understand the origin and or historical context which led to the creation of these Courts with the status of the High Court, it is important to look into the CoK 2010 making process. The discussion on the creation of the two courts with the status of the High court can be deciphered from the Final Report of the Committee of Experts on Constitutional review. Notably, these provisions were not in the various constitutional drafts the precursor to the current Constitution being the Bomas, Ghai and Wako Drafts. A Committee of Experts which was appointed to reconcile and harmonise all these drafts, included the provision regarding the establishment of the two specialized courts but in their draft forwarded to the Parliamentary Select Committee on the Constitution, the references to the specialized courts were deleted. The Parliamentary Select Committee recommendations were that the specialized courts be removed from the draft Constitution and instead be replaced with a broad grant of authority to Parliament to establish other courts with such jurisdiction, functions and status as Parliament may determine.

The Judiciary's response to the Harmonized Draft noted the difficulties inherent in having a High Court and other courts of the status of the High Court. The Judiciary was of the opinion that:-

“The problems inherent in this provision are as follows: Already, specialized divisions of the High Court have been administratively created. They deal with disputes concerning Commercial Law, Criminal Law, Family Law, Land & Environmental Law and Constitutional Law. It is not clear how the proposed new courts will relate with these divisions. It is not clear what jurisdiction the proposed new courts will have vis-à-vis the High Court. Already, existing legislation that gave the Industrial Court the same status as the High Court has brought about a jurisdictional conflict.”

As a result, the Judiciary proposed that the two courts be established as divisions of the High Court. Consequently, the Committee of Experts reinstated the provision allowing Parliament to establish by legislation the two courts but maintained in the Constitution that they would be of the status equivalent to that of the High Court. It was therefore became clear as to what jurisdiction the two courts contemplated under Article 162(2) would exercise. The jurisdiction of the High Court as established under Article 165 of the Constitution is limited into two. First, the High court is mandated not to exercise jurisdiction on matters reserved for the Supreme Court and matters falling within the jurisdiction of the two courts contemplated in Article 162(2). This provision clarifies the jurisdiction of the High Court in that the High Court no longer had original and unlimited jurisdiction in all matters as it used to have under the repealed Constitution. Under the new CoK 2010, the High Court cannot not deal with matters set out under section 12 of the ELRC Act and section 13 of the ELC Act. Similarly, the courts contemplated in Article 162(2) of the Constitution cannot deal with matters reserved for the High Court.

Of fundamental importance in this study is the provision of Article 165(6) of the CoK. It empowers the High Court to supervise subordinate courts and any other person exercising

judicial or quasi-judicial function but not over a superior court including the ELRC and ELC. This provision therefore raises a question as to the nature of the relationship between the High Court, ELRC and the ELC. In answering this question, the judges¹¹⁹ in the case of *Karisa Chengo, Jefferson Kalama Kengha & Kitsao Charo Ngati v Republic [2015] eKLR* indicated that the intention and the spirit of the provision of Article 162 (2) of the CoK, was for parliament to establish courts with the status of the High court. The court was of the view that the use of the words ‘with the status of the High Court’ is to clarify that the High court is not higher in hierarchy as compared to the ELC and ELRC but that the three courts are equal in hierarchy. Therefore, by being of equal status, the High Court therefore does not have the jurisdiction to superintend, supervise, direct, guide, shepherd and/or review the mistakes, real or perceived, of the ELRC and ELC administratively or judiciously as was the case in the past under the previous CoK.

The court went further to state that the opposite equally applies to the ELC and the ELRC in that both these courts are not the High Court and vice versa. The court created a distinction between the words “status” and “Jurisdiction”. The court was of the view that the intention of the framers of the CoK was that the three courts; that is the High Court, ELRC and ELC are of the same juridical hierarchy and therefore are of equal footing and standing. However, the court’s interpretation of the constitutional intention of those words was that the ELRC and ELC exercises the same powers as the High Court in performance of its judicial function, in its specialised jurisdiction but they are not the High Court. The court made a comparison of a similar provision of the constitution under the South African Constitution. It is instructive to note at this point, Kenya borrowed the provision creating other courts with the status of the High Court. The South

¹¹⁹ Judges Okwengu, Makhandia & Sichale, JJ.A

African Constitution under¹²⁰, it provides that courts include, “*any other court established or recognized in terms of an Act of Parliament, including any court of a status to either the High Courts or Magistrates Court.*” Under **Article 169** of their Constitution, the High Court may decide;

- “a. *Any constitutional matter except a matter that*
 - i. *Only the Constitutional Court may decide or*
 - ii. *Is assigned by an Act of Parliament to another court of a status similar to a High Court; and*
- b. *Any other matter not assigned to another court by an Act of Parliament.’’*

Accordingly, the South Africa Parliament enacted the Labour Relations Act of 1995 establishing the Labour Court as a Court with the status of the High Court to adjudicate over a class of labour disputes. Section 151 of the Labour Relations Act provides that the Labour Court;

“Is a superior court that has authority, inherent powers and standing, in relation to matters under its jurisdiction, equal to that which a court of provincial division of the Supreme Court has in relation to the matters under its jurisdiction.”

The intention of creating a labour court as is the case in Kenya is for the court to be autonomous, distinct and independent of the High Court and it is for that reason that it was bestowed with the status of the High Court. However, South Africa does not have a specialized ELC unlike in

¹²⁰ South African Constitution, Art 166.

Kenya. The reason for establishing an ELC in Kenya was for good reason which can be traced and as earlier indicated to historical land injustices that still remain unresolved. Kenya's economy heavily relies on agriculture as a boost to its economy, therefore land is a concept that is very emotive in Kenya and ought to be dealt with expeditiously. The matters handled under the ELC are extremely important and sensitive which have an impact on socio-economic well-being. The court concluded on the issue of the hierarchy and jurisdiction of the three courts by stating that the three courts are of equal status, autonomous of each other and each exercises peculiar jurisdiction but they are not one and the same.

The ELC as earlier discussed and elaborated later in this study is that decisions of the ELC are a subject of appeal to the Court of Appeal.¹²¹ The appeals are on the whole subject matter under the ELC thus rendering the ELC inappropriate to resolve land disputes because its decisions are not final. Further, and as earlier stated, the court of appeal judges are not qualified to determine matters under the ELC because they are not qualified to do so under section 7 of the ELC Act. This therefore, renders the ELC's mandate insignificant in the court system in Kenya.

3.3 Conclusion

It is clear from the foregoing discussion on the structure, placement and composition of the ELC as compared to that under the LDT, that the composition under the LDT was better placed to deal with land disputes as compared to the current composition under the ELC. The LDT comprised of elders from the districts where parties to a dispute came from. This in my view was commendable in solving land disputes. With judges of the ELC having experience in either environmental or land disputes does not efficiently and adequately solve land disputes in cases

¹²¹ ELC Act, Sec 16.

where the matter before the court is a land dispute matter whereas the judge handling the case has no vast experience in land matters nor the cultural practices of the parties to the dispute. Further, the ELC is not the final determinant of land disputes in Kenya. Its decisions are appealable to the court of appeal thus the court runs the risk of being construed as another court or a division of the High court mandated do deal with land disputes in Kenya.

The CoK in creating the ELC was to have a separate court with the status of the High Court to deal with both environmental and land matters. Further and as the Judiciary proposed during the constitutional making process, that the two courts be established as divisions of the High Court. However, we find that the Committee of Experts reinstated the provision allowing Parliament to establish by legislation the two courts but maintained in the Constitution that they would be of the status equivalent to that of the High Court thus creating a confusion as to the placement of the ELC within the Court system. From the discussion above, the decision by the Court in establishing the hierachy and the placement of the ELC in the court system, well elaborated the ELC's placement under the court system. The ELC as it is placed can be construed to be merely another court within the High Court Divison which does not introduce or bring anything new to resolve land disputes in Kenya. It has no peculiar placement because it is not the High Court but a court with the status of the High court. Therefore, it is in my view that a court which has no specific placement in the court system might fail to discharge of its mandate. The ELC as it is placed cannot appropriately resolve land disputes in Kenya to their logial conclusions.

CHAPTER FOUR

THE ELC'S MANDATE AND JURISDICTION AND THE LAW APPLICABLE IN RESOLVING LAND DISPUTES IN KENYA

4.1 Introduction

4.1.1 Legislative background to the LDT and the ELC in Kenya

Land ownership in Kenya is a very emotive topic. Due to the sensitive nature of land use and ownership in Kenya today, there is bound to be conflict or disputes that emerge from various overriding interests in land. As a result, such land disputes require an adequate and efficient legal system to handle them. A robust land dispute resolution system is crucial for effective land administration and management. Given the importance of land in Africa, many African countries are working hard to modernize and streamline their land administration systems.

Before coming into effect of the CoK 2010, land disputes in Kenya were resolved under the Land Disputes Tribunals and the Magistrates Courts. The adoption of the ELC Act in 2011 repealed the Land Disputes Tribunal Act, No.18 of 1990¹²². This was by virtue of section 31 of the ELC Act whereby apparently there was no saving provision for proceedings which were either pending hearing before the Tribunal or adoption before the Courts. Decisions on land disputes made under the LDTs lay on the Appeals Committee with a further appeal to the High Court on issues of law and not customary law. In examining how tribunals have fared in resolving disputes in Kenya, it emerged that tribunals in Kenya address issues of administrative justice, which would instead end up going for adjudication and resolution by the ordinary court

¹²² ELC Act, Sec 31.

system. Before the creation of the ELC, land disputes in Kenya were referred to the Magistrates Courts and the High Courts. The High Court served as an appeal's court of decisions from the Magistrates Courts. Some disputes were also dealt with under the LDTs as indicated above, However, with time, these systems or mechanisms of solving land disputes in Kenya became characterized with some challenges that rendered them inefficient.

The preamble of the LDT Act provides that the LDT was created as an Act of Parliament to limit the jurisdiction of magistrates courts in certain cases relating to land; to establish Land Disputes Tribunals and define their jurisdiction and powers and for connected purposes. From the very reading of the preamble to the Act, the LDTs were purposed to limit the jurisdiction of the Court system in particular the Magistrates Courts. The LDT Act is divided into thirteen sections. Section 2 of the Act provides for the preliminary that sets out the definition of terms as used under the Act. Section 3 provides for the limitation of jurisdiction of cases under the LDT. Section 4 establishes the tribunals, section 5 provides for the panel of elders, section 6 provides for the jurisdiction of the tribunal and decisions of the tribunals are provided for under section 7 of the Act. Section 8 of the Act provides for Appeals to the Appeals Committee and the High Court, section 9 provides for the Land Disputes Appeals Committee. Section 10 makes provision for Rules to govern the functions of the LDTs and section 13 provides for Transitional provisions. Accordingly, from the following division of sections under the ELC Act, there is a clear difference of arrangement and provisions under the various sections as shall be seen later in this chapter.

As a result, the ELC was created to cure the existing lacuna in the institutional framework in solving land disputes in Kenya. In response to these challenges, the Sessional Paper on the National Land Policy and Article 162 of the Constitution of Kenya provided for the establishment of a court specifically charged with hearing and determining cases on land and the environment.¹²³ This was realized in August 2011 when the President assented the ELC Act, thus establishing the ELC. The ELC was created under the CoK to determine disputes relating to the environment and the use and occupation of, and title to, land. As the main legal institution tasked with dealing in land disputes, the ELC is required to efficiently and effectively solve both historical and emerging individual land disputes in Kenya today.

Accordingly, this chapter shall outline the evolution of the legal framework governing land disputes. It shall assess the provisions of the ELC's Act, the mandate and jurisdiction of the ELC, accessibility and cost and make a comparison with similar provisions under the LDT's Act with a view of determining whether the ELC as compared to the LDT offers a solution if any to the existing land disputes in Kenya. Further, this chapter shall assess the law applicable under the ELC and make a comparison the law applied under the LDT in solving land disputes in Kenya.

The ELC in Kenya is established under the CoK¹²⁴ and elaborated in an Act¹²⁵ of Parliament as provided for under the CoK. The CoK makes provision for system of Courts under its Article 162. The CoK provides that the superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts mentioned in clause (2).¹²⁶ The CoK provides that Parliament shall

¹²³ibid (n 61).

¹²⁴ Constitution 2010, Art 162(b.)

¹²⁵ ELC Act.

¹²⁶ Constitution 2010, Art 162 (1).

establish courts with the status of the High Court to hear and determine disputes relating to employment and labour relations; and the environment and the use and occupation of, and title to, land.¹²⁷ Both of these courts are superior courts of record of the same status as the High Court, along with the Supreme Court¹²⁸ and the Court of Appeal.¹²⁹ Therefore, the ELC shall, pursuant to Article 162(2)(b), exclusively deal with original, supervisory, and appellate jurisdiction while dealing with land disputes. In the exercise of its mandate and jurisdiction, the ELC is expected to streamline and hopefully direct appropriately on application of other sources of law in Kenya for example customary laws in making its determination in land disputes as between parties.

The CoK further tasked the Parliament of Kenya to determine the jurisdiction and functions of the courts contemplated.¹³⁰ In 2011, parliament passed the Environment and Land Court Act through which the Environment and Land Court was established. In accordance with the provisions of this act, the court is mandated to ensure reasonable and equitable access to its services in all counties. In dealing with land disputes in Kenya, the Chief Justice and the President of the Supreme Court of Kenya published some practice directions on Proceedings relating to the Environment and the use and Occupation of, and Title to Land.¹³¹ The Chief Justice under practice direction number seven directed that;-

¹²⁷ *ibid*, Art 162 (2).

¹²⁸ *ibid* (n 115).

¹²⁹ Constitution 2010, Art 164.

¹³⁰ *ibid*, Art 162 (3).

¹³¹ Chief Justice Dr. Willy Mutunga, 'Practice Note dated November 12, 2012 vide Gazette Notice No. 16268 < <http://kenyalaw.org/kl/index.php?id=839>>.

*“Magistrates courts shall continue to hear and determine all cases relating to the environment and the use and occupation of, and title to land (whether pending or new) in which the courts have the requisite pecuniary jurisdiction”.*¹³²

In so doing, the jurisdiction of the magistrate Courts will continue solving land disputes in Kenya but with an appeal avenue vested upon the ELC. Through a debate by lawyers in Kisumu¹³³ on the jurisdiction of the ELC; Professor Albert Mumma expressed that the ELC is a court *sui generis*. He noted that the ELC cannot strictly be referred to as the High Court or an administrative tribunal. This is because the ELC has a constitutional interpretation and human rights enforcement jurisdiction, appellate jurisdiction, supervisory and judicial review jurisdiction.¹³⁴ Professor Mumma in his paper titled¹³⁵ was of the view that there was bound to be an overlap with the Jurisdiction of the High Court as provided for under the CoK because not all disputes fit into compartments, impression around concepts of environment, land and natural resources. He was of the view that the reason for establishing a court *sui generis* to determine environment and land disputes include perception that environment and land disputes are unique compared to other cases.¹³⁶ The judges in the case of ***Karisa Chengo, Jefferson Kalama Kengha & Kitsao Charo Ngati v Republic [2015] eKLR***.¹³⁷, grappled with the question of whether judges presiding over the jurisdiction of the ELC can hear and determine cases in the High Court criminal Division. The Judges in the said case were of the opinion that judges appointed to the ELC could not hear an appeal at the High Court Criminal division. They were of the opinion

¹³² *ibid.*

¹³³ Presented by *Harold Ayodo, LSK Programme Officer (Communications)*.

¹³⁴ *ibid.*

¹³⁵ *The Jurisdiction of the Environment and Land Court.*

¹³⁶ *ibid* (n 133).

¹³⁷ *ibid* (n 118).

that, the set out qualifications for appointed to be a judge as provided for under Article 166 (2) of the CoK was different from that of the judges of the ELC. The ELC Act provides for extra requirements for appointment of judges of the ELC. The ELC Act¹³⁸ provides that a judge must have ten years experience in addition to the qualifications set out under Article 166 (2) of the CoK. With that regard ruled that the judges appointed in the ELC cannot puport to adjudicate upon criminal matters under the High Court. Accordingly, it can be concluded that the jurisdiction of the High Court under¹³⁹ difers from the jurisdiction of the ELC as envisaged under¹⁴⁰of the CoK.

The preamble of the ELC Act, defines the ELC Act as an Act of Parliament to give effect to Article 162(2)(b) of the Constitution; to establish a superior court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land, and to make provision for its jurisdiction functions and powers, and for connected purposes.¹⁴¹ A study by the Land Development and Governance Institute (LDGI) in 2013 established that only fifteen judges have been appointed to the ELC to cover fourteen stations in the country.¹⁴²The ELC Act provides for the overding objective of the ELC.¹⁴³ The ELC has been tasked with the principal objective to facilitate the just, expeditious, proportionate and accessible resolution of disputes governed by the ELC Act.¹⁴⁴ The ELC Act further provides that the ELC shall, in the discharge of its functions under the Act give effect to the principal objective in subsection (1).¹⁴⁵ The ELC Act provides that the parties and their duly authorised representatives, as the case may be, shall

¹³⁸ ELC Act, Sec 7.

¹³⁹ Constitution 2010, Art 165.

¹⁴⁰ *ibid*, Art 162 (2).

¹⁴¹ ELC Act.

¹⁴² *ibid* (n 61).

¹⁴³ ELC Act, Sec 3.

¹⁴⁴ *ibid*, Sec 3 (1).

¹⁴⁵ *ibid*, Sec 3 (2).

assist the Court to further the overriding objective and participate in the proceedings of the Court.¹⁴⁶

The ELC Act is further divided into five parts. Part I of the Act provides for the preliminary that sets out the definition of terms as used under the Act. Part II provides for the establishment and constitution of the Court. Part III establishes the jurisdiction of the Court, part IV makes provision for the proceedings of the Court and Part V provides for any miscellaneous provision to include regulations governing the ELC.

4.2 Jurisdiction of the ELC and the LDT

As indicated, Part III of the ELC Act, provides for the jurisdiction of the ELC. The CoK envisages the ELC to have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the CoK and with the provisions of the ELC Act or any other law applicable in Kenya relating to environment and land.¹⁴⁷ The ELC Act sets out the matters and or issues that the ELC should hear and determine which include:- disputes relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources. Disputes relating to compulsory acquisition of land. Disputes relating to land administration and management. Disputes relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and any other dispute relating to environment and land.¹⁴⁸ In addition to the matters referred to in section 13 (1) and (2) of the ELC Act, the ELC shall exercise appellate jurisdiction over the decisions of the

¹⁴⁶ *ibid*, Sec 3 (3).

¹⁴⁷ *ibid*, Sec 13 (1).

¹⁴⁸ *ibid*, Sec 13 (2).

subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the court.¹⁴⁹ In exercise of its jurisdiction under the ELC Act, the ELC shall have power to make any order and grant any relief as the Court deems fit and just, including:-¹⁵⁰ On the other the LDT under the LDT Act, it was conferred with jurisdiction over matters that were set out under section under section 3 (2) of the Act which include disputes as to the division of or the determination of boundaries to land including land hold in common, a claim to occupy or work land or trespass to land. The LDT Act limited the jurisdiction of the magistrates court by conferring mandate upon the LDT to entertain matters as set out under section 3 (2) of the Act.

On jurisdiction and mandate of the ELC, we see that the ELC Act confers the ELC with more mandate and jurisdiction in dealing with environmental and land disputes in Kenya. Limitations of Jurisdiction of the Land Disputes Tribunals is provided for under the LDT Act. Section 3 of the LDT Act provides for the limitation of jurisdiction of the LDT. The jurisdiction of the LDT is limited to civil cases in involving a dispute as to the division of or the determination of boundaries to land including land hold in common, a claim to occupy or work land; or trespass to land. As regard service of summons, the provisions under the Civil Procedure Act applied. Section 3 (7) of the Act provides and applies customary laws while adjudicating on land disputes. The Act provides that the tribunal shall adjudicate upon the claim and reach a decision

¹⁴⁹ *ibid*, Sec 13 (4).

¹⁵⁰ *ibid*, Sec 13 (7).

- (a) interim or permanent preservation orders including injunctions;
- (b) prerogative orders;
- (c) award of damages;
- (d) compensation;
- (e) specific performance;
- (g) restitution;
- (h) declaration; or
- (i) costs.

in accordance with recognised customary law after hearing the parties to the dispute. The Act limits that jurisdiction of the magistrates courts by providing that no magistrates court shall have or exercise jurisdiction or powers in cases involving any issues set out in section 3 (a) , (b) and (c) of the Act. Under its transitional provisions , the magistrates courts were barred from hearing any disputes subject matter under section 3 (1) of the Act unless the Court has at that time heard and pronounced judgement thereon. The proceedings shan be discontinued until the dispute has been referred to the Tribunal and determined in accordance with the LDT Act. It is imperative to not that the LDT Act gave more power to the LDTs as compared to the formal legal system under the magistrates court.

Unlike under the LDT, the ELC has an added jurisdiction over environmental disputes. Further, the ELC has been conferred with an appellate jurisdiction over the decisions of the surbordinate courts or local tribunals in respect of matters falling within the jurisdiction of the court.¹⁵¹It would be imagined that, with a more and stronger jurisdictional mandate of the ELC, the ELC will effectvely and efficiently solve land disputes in Kenya. The Court under the LDT had a specific jurisdiction to deal with disputes as to the division of or the determination of boundaries to land including land hold in common, a claim to occupy or work land or trespass to land.¹⁵²I am of the view that the LDT was better placed to deal with land disputes for reasons that the mandate of the court was specific to issues pertinent to land disputes only. The ELC on the other hand has a congested jurisdictional mandate that the Court has to deal with. The constitutional intention of creating an ELC was to ensure that there is a specialised court separate from other courts in the Judiciary to deal specifically with land disputes. However, and as already stated, we

¹⁵¹ *ibid*, Sec 13 (4).

¹⁵² LDT Act, Sec 3 (2).

find that the ELC has an equal mandate to deal with environmental disputes in the Country. As a result, I believe that the focus and intention of creating an ELC in tandem with the constitution and the situation in the country as regard land disputes is defeated. Environmental disputes are not necessarily land disputes therefore the ELC in dealing with an environmental disputes eventually and automatically locks out a land dispute that is pending the courts determination.

Further, the ELC has been conferred with an appellate jurisdiction over the decisions of the subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the court. Such a mandate again congests the court rendering it impossible to efficiently and effectively deal with fresh land disputes filed under the ELC. This therefore raises the question as to whether, the purpose of creating the ELC was strictly to deal with land disputes or both environmental disputes. Further, if the court was created as an appeal court or a court of first instance to deal with land disputes in Kenya.

4.3 Appeal on decisions under the ELC and the LDT

The ELC Act provides that Appeals from the ELC shall lie to the Court of appeal against any judgment, award, order or decree issued by the ELC in accordance with Article 164 (3) of the CoK¹⁵³ which provides that the Court of Appeal has jurisdiction to hear appeals from the High court and any other tribunal as prescribed by an Act of Parliament. However, appeals from the Magistrates Courts shall lie within the mandate of the ELC. With an appeal of decisions of the ELC lying with the court of Appeal, it can be inferred at this point that some ELC decisions referred to the appeal Court render the ELC ineffective in conclusively solving land disputes in Kenya. The LDT Act makes provision for an appeal mechanism for decisions of the LDT. The

¹⁵³ ELC Act, Sec 16.

Act makes provision for appeals to the appeals committee and the High Court. The Act provides that a party to a dispute who is aggrieved by the decision of the tribunal may, within thirty days of the decision, appeal to the Appeals Committee constituted for the Province in which the land which is the subject matter of the dispute is situated.¹⁵⁴ The LDT Act provides that the Minister shall establish for each Province a Land Dispute Appeals Committee which shall consist of¹⁵⁵ a chairman appointed from time to time by the Provincial Commissioner from the panel of elders appointed by the Minister by notice published in the Gazette for purposes of appeals;¹⁵⁶ and such persons, not being less than five, appointed by the Minister.¹⁵⁷Section 10 of the LDT act provides for Rules prescribing the procedure of tribunals.¹⁵⁸The decisions of the Appeals Committee shall be final on any issue of fact and no appeal shall lie therefrom to any court.¹⁵⁹ However, either party to the appeal may appeal from the decision of the Appeals committee to the High Court on a point of law within sixty days from the date of the decision complained of.¹⁶⁰This is feasible provided that no appeal shall be admitted to hearing by the High Court unless a judge of that court has certified that an issue of law is involved.¹⁶¹ This provision on Appeals of decisions of the Appeals committee indicates an element of finality in solving land disputes under the LDTs.

¹⁵⁴ LDT Act, Sec 8 (1).

¹⁵⁵ *ibid*, Sec 9 (1).

¹⁵⁶ *ibid*, Sec 9 (1) (a).

¹⁵⁷ *ibid*, Sec 9 (1) (b).

¹⁵⁸The Minister may make rules--

(a) prescribing the procedure of Tribunals. in particular:-

i) the form in which any decision, order or determination of a Tribunal shall be given;
(ii) the evidence which may be admitted in proceedings before a Tribunal and the taking of such evidence;
and generally for all matters in connection with the bringing, hearing and determining of disputes referred to a Tribunal to be resolved;

(b) prescribing the composition and qualifications for membership of the Tribunal and of the Appeals Committee and the terms of service of such members all of whom shall be eligible for re-appointment;

(c) prescribing any procedural requirements which the Minister may deem desirable in relation to appeals additional to the provisions set out in section 7; and

(d) prescribing generally for all other matters which may be deemed by the Minister necessary for the better carrying out of the provisions of this Act and for the payment of all such fees as may be considered necessary

¹⁵⁹ LDT Act, Sec 8 (8).

¹⁶⁰ *ibid*, sec 8 (9).

¹⁶¹ *ibid*, sec 8 (9)

We find that right from the composition of the members of the LDT and the Appeals Committee, the intention under the LDT was to have members and or elders of the district where the subject matter of the dispute arises from. In so doing, the decision of the LDT is presumed to deal with all arising issues conclusively with no need for appeals.

4.4 Law applicable under the ELC and the LDT

The important role that land plays in the different aspects of Kenyan lives cannot be over emphasised. Be it for domestic use or economic use, issues relating to land administration, access to land, land use planning, restitution of historical injustices, the institutional framework and land information management system have always been very emotive and consequently present a challenge in land management.¹⁶² Resolution of land administration and management issues is a critical requirement for sustainable recovery and growth of any economy.¹⁶³

Land disputes related to access, use and control of natural resources are common in all parts of Kenya regardless of the tenure system.¹⁶⁴ Individual land disputes in Kenya have far reaching negative effects and their resolution in the most effective, efficient and appropriate way is a critical requirement for sustainable economic growth. Adequate resolution to land disputes will aid in minimizing conflicts and tensions between and among various communities and for contributing to national unity.¹⁶⁵ However, as noted, the court system in resolving land disputes in Kenya has overtime been characterized with foul play, corruption, inefficiency, delays, technicalities and solutions that mainly leave disputants as enemies at family and community

¹⁶² Policy brief: Alternative Dispute Resolution (ADR) Mechanisms for Land Disputes: Institution of Surveyors of Kenya

¹⁶³ *ibid.*

¹⁶⁴ *ibid.*

¹⁶⁵ *ibid.*

level.¹⁶⁶ A Policy brief on alternative dispute resolution (ADR) mechanisms for land disputes in Kenya¹⁶⁷ postulates that land disputes are unique in that they involve both technical matters and complex issues that relate to traditional and customary practices in the management and administration of land.

It is the complexity of land issues that requires a change in dealing with land disputes by recommending ADRs as the core approach to solving such disputes.¹⁶⁸The CoK gives judicial authority by encouraging the judiciary to use alternative dispute resolution (ADR) mechanisms in resolving issues¹⁶⁹ including land matters. ADR mechanisms are mostly preferred as they lead to speedy resolution of disputes, flexibility, less technicalities, cost effectiveness, ability to involve experts, privacy, saving on courts time, among others. ¹⁷⁰ADR were also aimed at ensuring continued co-existence of the communities by ensuring that conflicts were fully addressed to prevent them from re-emerging in future.¹⁷¹This is in contrast with the formal justice system that seeks to solve disputes without looking at the real cause of an issue thus presenting a situation whereby the conflict can re- emerge.

The Judicature Act¹⁷² sets out the formal sources of law in Kenya. Section 3 (2) of the Act provides that

“ The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it

¹⁶⁶ *ibid.*

¹⁶⁷ By the Institution of Surveyors of Kenya.

¹⁶⁸ *ibid.*

¹⁶⁹ Constitution 2010, Art 159 (2) (c).

¹⁷⁰ Policy brief (n 162).

¹⁷¹ Makumi Mwangi, ‘Conflict in Africa’: Theory, Processes and Institutions of Management (Centre for Conflict Research, Nairobi, 2006). P 36-45.

¹⁷² Laws of Kenya, Cap 8.

or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay”.

The formal sources of law and the mode of jurisdiction of the court are listed as follows: the the Constitution; Statutory law or Acts of Parliament, including foreign laws named in the First Schedule of the *Judicature Act*; Subsidiary legislation; the substance of the common law, doctrines of equity, English Statutes of general application, and procedure and practice observed in courts in England until 12 August 1897; and African customary laws, including certain religious laws (Islamic and Hindu).¹⁷³

The CoK creation of the ELC is to a larger extent encouraging land disputes to be solved through both litigation and ADRs. The ELC Act provides for proceedings under the ELC the law applicable and alternative dispute resolution mechanism.¹⁷⁴Section 18 of the ELC Act provides for the guiding principles of the ELC. Part IV of the ELC Act sets out the conduct on how proceedings in the ELC should be carried out. In exercise of its jurisdiction, the ELC is envisaged to be guided by the following principles:¹⁷⁵The ELC however in exercise of its

¹⁷³ *ibid*, Sec 3. (1).

¹⁷⁴ ELC Act, Part IV.

¹⁷⁵ *ibid*, Sec 18, which provides for the guiding principles of the ELC as:

- (a) the principles of sustainable development, including—
- (i) the principle of public participation in the development of policies, plans and processes for the management of the environment and land;
 - (ii) the cultural and social principles traditionally applied by any community in Kenya for the management of the environment or natural resources in so far as the same are relevant and not inconsistent with any written law;
 - (iii) the principle of international co-operation in the management of environmental resources shared by two or more states;

jurisdiction shall act expeditiously, without undue regard to technicalities of procedure.¹⁷⁶ The ELC shall be bound by the procedure laid down by the civil procedure Act.¹⁷⁷ This study is on land and looking at the provisions of Article 60 of the CoK, it provides by encouraging communities to settle land disputes through recognised local community initiatives consistent with the constitution.¹⁷⁸ The ELC and the CoK have both recognised the need and encouraged the Courts to use communities to settle land disputes.

In view of the aforementioned, the ELC Act further makes provision for the use of Alternative Dispute Resolutions (ADRs).¹⁷⁹ Alternative Dispute Resolutions (ADRs) refers to other processes for resolving disputes other than litigation.¹⁸⁰ The phrase ADR refers to all those decision making processes other than litigation including but not limited to negotiation, enquiry, mediation, conciliation, expert determination, arbitration and others.¹⁸¹ The ELC Act provides that the ELC can adopt and implement, on its own motion, with the agreement of or at the request of the parties, any other appropriate means of alternative dispute resolution.¹⁸² This provision of the ELC Act indicates that the ELC can adopt any of the alternative dispute resolution mechanisms to include conciliation, mediation and traditional disputes resolution

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- (iv) the principles of intergenerational and intragenerational equity;
 - (v) the polluter-pays principle; and
 - (vi) the pre-cautionary principle;
 - (b) the principles of land policy under Article 60(1) of the Constitution;
 - (c) the principles of judicial authority under Article 159 of the Constitution;
 - (d) the national values and principles of governance under Article 10(2) of the Constitution; and
 - (e) the values and principles of public service under Article 232(1) of the Constitution.

¹⁷⁶ ELC Act, Sec 19 (1).

¹⁷⁷ *ibid*, Sec 19 (2).

¹⁷⁸ Constitution 2010, Art 60 (1) (g).

¹⁷⁹ ELC Act, Sec 20.

¹⁸⁰ Kenya law resource center < <http://www.kenyalawresourcecenter.org/2011/07/alternative-dispute-resolution.html>>.

¹⁸¹ Kariuki Muigua, ‘ Alternative Dispute Resolution and Article 159 of the Constitution.’

¹⁸² ELC Act, Sec 20 (1).

mechanisms in accordance with Article 159 (2) (c) of the CoK.¹⁸³ The said provision of the CoK provides that the judiciary in exercising judicial authority, the courts and tribunals shall be guided by among other principles alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted. However,¹⁸⁴ provides that traditional dispute resolution mechanisms (TDRM) shall not be used in a way that contravenes the Bill of rights¹⁸⁵, is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality¹⁸⁶ or is inconsistent with the Constitution or any written law.¹⁸⁷ In effect, the ELC Act takes cognisance of both statutory law and TDRM. A study by the Land Development and Governance Institute (LDGI) in 2013 established that in some cases ADRs were effective in resolving land disputes and were easily accessible as well as cost effective.¹⁸⁸ However, the study established that in other instances ADRs were not effective in resolving land disputes.¹⁸⁹ Some aggrieved respondents felt that they were denied fair hearing in the context of ADRs thus they sought legal redress.

Gutto B. O. Shadrack in his article on Land and Property Rights in modern constitutionalism: Experiences from Africa and Possible Lessons for South Africa¹⁹⁰, is of the view that security of property and land rights may be expressed either in a constitution or outside it¹⁹¹, according to him, either way, the real protection resides in the overall legitimacy the property and land rights and relations enjoy in a society as a whole, and that, when expressed or not expressed in a

¹⁸³ELC Act, Sec 20 (1).

¹⁸⁴ Constitution 2010, Art 159 (3)

¹⁸⁵ibid, Art 159 (3) (a).

¹⁸⁶ ibid, Art 159 (3) (b).

¹⁸⁷ ibid, Art 159 (3) (c).

¹⁸⁸ ibid (n 61).

¹⁸⁹ ibid

¹⁹⁰ Gutto B.O Shadrack p 235.

¹⁹¹ ibid p 244.

formal constitution document, the legitimacy can be secured through broadly shared traditions, values, and systems of law contained in common law, customary law and ordinary statutory law. It is therefore imperative that the laws and statutes to be applied in dealing with the sensitive and emotive issue of land should be clear and precise.

Like proceedings under the ELC, and the provisions of the CoK, the LDT's applied and recognised customary law in reaching its decision.¹⁹² The elders under the LDT adjudicated upon land disputes by listening to both parties to the disputes therefore they applied various forms of ADR's in resolving individual land disputes. The LDT's also applied rules of procedure in adjudicating land disputes. Like the court process, the LDT had a procedure of filing a claim and service of the same to the other party.¹⁹³ The LDT's entered judgment in accordance with the decision of the tribunal and a decree was issued and was enforceable in the manner provided for under the Civil Procedure Act.¹⁹⁴ Accordingly, it can be concluded that the LDT's applied both ADR and procedures under the ordinary court system.

From the foregoing provisions of the ELC Act and the LDT Act, it is clear that both legal systems applied and or apply both statutory law on rules of procedure as well as ADR. Seeing therefore that the LDT performed similar functions and applied similar laws while adjudicating on land disputes, the ELC as it is today is not in a better position to deal with land disputes because the ELC has not come up with any inique application of the law or other methods of solving land disputes that were not present under the LDT.

¹⁹² LDT Act, Sec 3 (7).

¹⁹³ *ibid*, Sec 3.

¹⁹⁴ *ibid*, Sec 7 (2).

4.4.1 Advantages and Disadvantages of ADR and TDRM mechanisms.

ADR and TDRM have been adopted as the means of resolution of conflict and settlement of disputes since the pre-colonial era.¹⁹⁵ These modes of conflict resolutions have been and continue to be associated with a number of advantages over the Court system.¹⁹⁶ ADR are mostly preferred because they are expeditious, cost effective and lenient on procedural rules.¹⁹⁷ ADR mainly goes to the root of a dispute with a view of parties to a dispute reaching an amicable solution. ADR seeks to preserve good relationships that existed between individuals before the dispute occurred. Litigation is classified under dispute settlement mechanism while ADR is classed as a conflict resolution mechanism.¹⁹⁸ Resolution of conflicts under the ADRs is associated with giving rise to an outcome based on mutual sharing of a problem which individuals to a conflict cooperate in order to redefine their conflict and their relationship.¹⁹⁹ The outcome of a conflict such as a land dispute that involves individuals is said to be enduring, mutually satisfying, address the root cause of a conflict, rejects power based outcomes and it is non-coercive.²⁰⁰ However, ADRs that incorporate traditional practices face a lot of challenges such as changing times and societal ways of life, use of technology, unequal bargaining powers, enforceability challenges which require court action, lack of precedents system, and lack of expertise.²⁰¹ Further, ADRs mechanisms used are not consistent in their application and use.²⁰² There are no standards or enforcement mechanisms in some of the ADRs. ADRs as highlighted

¹⁹⁵ Kariuki Muigua (n 181).

¹⁹⁶ *ibid.*

¹⁹⁷ *ibid.*

¹⁹⁸ *ibid.*

¹⁹⁹ *ibid.*

²⁰⁰ *ibid.*

²⁰¹ Policy brief (n 162).

²⁰² *ibid.*

come into play for their efficiency that relieves the courts and the disputants since they are meant to compliment the court process.²⁰³

Research has shown that the role played by community leaders during land adjudication has made ADRs more suitable for solving land disputes in Kenya. A survey conducted by the Land Development and Governance Institute (LDGI) in 2013, established that in some cases ADRs were effective in resolving land disputes.²⁰⁴ This is because ADRs were easily accessible to the members of the public and they were all cost effective. However, the survey established that in other instances ADRs were not effective in resolving land disputes.²⁰⁵ The survey indicated that some aggrieved individuals were of the opinion that they were not garnted a fair hearing during the ADR mechanisms and as result some of them sought legal redress through the formal court system.

4.4.2 Preferred ADR mecahnisms for land disputes

The National Land Policy recommends negotiation, mediation and arbitration methods of ADR. However, literature study and field research has revealed that ADRs applied on land disputes resolutions mainly favour mediation and arbitration.²⁰⁶ This forms of ADRs are mostly prefered in disputes that relate to communal land disputes. This study is concerned with individual land disputes and as such negotiations are most prefered in such instances. Negotiations and mediation have been classified to operate well at family and individual level where common custom and beliefs may contain the emotive nature of land matters which may render

²⁰³ibid.

²⁰⁴ ibid (n 61).

²⁰⁵ibid.

²⁰⁶ Policy Brief (n 162).

negotiations unfeasible.²⁰⁷ Mediation which is a form of ADR which incorporates conciliation methods has been classified as more favourable in resolving individual land disputes in Kenya.²⁰⁸ Before an individual land dispute is taken to Court and or the ordinary court system, research has established that a quasi judicial form of ADR is a suitable mechanism of handling such disputes which have not been resolved at mediation level.²⁰⁹ Mediation and arbitration may be compulsory and awards in mediation may be binding. However, the application of traditional practices in mediation makes its awards enforceable therefore it is highly recommended that both mediation and arbitration should be made compulsory as the first instance of land dispute settlement mechanisms.²¹⁰

In matters land, semi-formal bodies are established through legal provisions to help manage land. They include liaison committees, management committees, land control boards and land dispute tribunals.²¹¹ As earlier indicated the creation of the ELC Act repealed the previously used land disputes tribunals that saw disputes resolved between parties.

In Kenya ADRs are used in resolving land disputes of various categories; public, private and community land.²¹² ADRs have been used and continue to be used to resolve land disputes in cases such as boundary disputes, succession, access to and claims to land. Disputes under community lands are subjected through ADR by application of negotiation, mediation or through

²⁰⁷ *ibid.*

²⁰⁸ *ibid.*

²⁰⁹ *ibid.*

²¹⁰ *ibid.*

²¹¹ *ibid.*

²¹² *ibid.*

arbitration. Disputes related to private land ownerships, which is a concern of this study and public lands disputes are best referred for ADRs.²¹³ A general survey and community leaders during adjudication of land disputes makes ADR a sustainable tool for resolving boundary disputes and claims to land. Mostly, in the rural areas, ADRs are applied in solving land disputes and due to their wide geographical coverage ADRs operations should be promoted and supported throughout the country.²¹⁴

The land dispute tribunal included traditional institutions like elders' courts, elders committees, neighbourhood groups and chief's institutions use customary approaches to address and settle disputes within families and communities. These traditional institutions are said to be more effective and are said to be adaptive to changing times and thus combine both traditional and modern approaches. Unlike the court system, the judge adjudicating upon individual land disputes can be from any community in Kenya who might not be conversant with the subject matter of the dispute. The ELC Act makes provision for ADRs.²¹⁵ The ELC Act provides that the ELC can adopt and implement, on its own motion, with the agreement of or at the request of the parties, any other appropriate means of alternative dispute resolution.²¹⁶ This provision of the ELC Act indicates that the ELC can adopt any of the alternative dispute resolution mechanisms to include conciliation, mediation and traditional disputes resolution mechanisms in accordance with Article 159 (2) (c) of the CoK.²¹⁷ The said provision of the CoK provides that the judiciary in exercising judicial authority, the courts and tribunals shall be guided by the among other

²¹³ *ibid.*

²¹⁴ *ibid.*

²¹⁵ ELC Act, Sec 20.

²¹⁶ *ibid.*, Sec 20 (1).

²¹⁷ *ibid.*

principles alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted.

4.5 Accessibility and Cost under the ELC

The whole idea behind the CoK's creating of the ELC was to enable access to justice for all the people in Kenya in solving land disputes. The CoK guarantees the right to access to justice as one of rights under the Bill of Rights.²¹⁸ The CoK envisages that the State shall ensure access to justice for all persons²¹⁹ in Kenya. Article 22 of the CoK provides for enforcement of Bill of Rights. It provides that every person has the right to institute Court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.²²⁰ The CoK provides and safeguards the right to protection of right to property under its Article 40. The CoK provides that every person has the right either individually or in association with others, to acquire and own property of any description and in any part of Kenya.²²¹ In cases where an individual's right to own property is infringed, the individual has recourse of the courts under the ELC. With the clear constitutional provisions and statutes on the role of the ELC in Kenya, a question arises as to whether the ELC's are easily accessible to the citizens of Kenya in order to create justice in individual land disputes in Kenya. The LDT's were located in each District in the country. In essence, the LDT's were readily available to the citizens of Kenya in cases of land disputes. However, we find that the ELC's are yet to be established in all counties in the country to date. This lack of the ELC's in the country translates to land injustices in areas that do not have ELC. The LDT Act provides that a dispute was

²¹⁸ Constitution 2010, Chapter Four.

²¹⁹ *ibid*, Art 48.

²²⁰ *ibid*, Art 22 (1).

²²¹ *ibid*, Art 40 (1) (a), (b).

adjudicated upon by elders from communities of the parties to a dispute. This composition of the tribunal indicates that the LDT's were readily available to parties to a dispute as the elders had to be sourced from the communities that the parties to a dispute were located. In as far as the costs of adjudication under the LDT's is concerned, the costs set out under schedule two of the LDT Act were affordable to parties to a dispute.

A survey was conducted by the Land Development and Governance Institute (LDGI) in 2013, with a view to assess the perceptions of the members of the public on whether the formation of the ELC had improved the handling of disputes related to land.²²² The report contains the findings of a study commissioned by the (LDGI) on land dispute resolution under the ELC in which interviews were conducted in fourteen counties with an Environment and Land Court and fourteen counties without the ELC. The report revealed that a total of 470 respondents (of which 70 percent were male and 30 percent were female) were interviewed in 28 counties across the country.²²³ Out of the 28 counties sampled for the survey, 14 counties had an ELC while the remaining 14 counties did not have the ELC. It was observed that the bulk of the respondents felt that the ELC were fairly accessible to them. 30% of the respondents felt that accessing ELCs was easy while 45% said that it was fair and 25% of them said it was difficult. Though the ELC has been set up in only fourteen counties²²⁴, respondents were satisfied with its proximity. However, a quarter of the interviewed respondents still felt that the ELC are difficult to access, owing to the distances they had to travel in search for justice. The survey by the LDGI in 2013 was a clear indication that the ELC were not easily accessible to all the people in Kenya. Out of 47 counties

²²² *ibid* (n 61).

²²³ *ibid*.

²²⁴ Bungoma, Kilifi, Nairobi, Kirinyaga, Nyeri, Kisumu, Nakuru, Meru, Busia, Mombasa, Kakamega, Kisii, Uasin Gishu and Trans-Nzoia

in Kenya with only 14 counties out of the 28 Counties samples shows the ELC had not covered a wide geographical area in Kenya thus denying many Kenyan access to the ELC which translates to injustice in solving individual land disputes.

Accessibility can be looked at from the point of distance of the ELC to the local people. The study by the Land Development and Governance Institute (LDGI) indicates that respondents complained that they were being referred to distant areas where the ELC is in operation.²²⁵In such cases, the ELC becomes inaccessible to the people thus defeating the purpose of right to access to justice.

The issue on costs is a key factor in access to justice and it is provided for under the CoK. Article 48 of the CoK provides that if any fee is required in order for an individual to access justice, the fee should be reasonable and shall not impede access to justice. The survey conducted by the Land Development and Governance Institute (LDGI) indicates that majority of respondents felt that the cost of seeking justice was affordable with 53% and 6% of the respondents reporting that it was affordable and very affordable respectively. 34 % of the respondents were of the opinion that the cost was unaffordable and 7% felt that the cost was completely unaffordable. An analysis of the survey indicates that majority of the cost of accessing the ELC was affordable to most of the people with a few people indicating that the cost incurred in accessing the ELC was high.

The Land Development and Governance Institute (LDGI) concluded on the efficiency of the ELC based on the survey conducted by stating that most of the respondents they interviewed had confidence in the judicial process under the ELC; 64% of the respondents had confidence in the

²²⁵ *ibid* (n 61).

ELC and a further 21% were very confident in the ELC. However, 15% of the respondents had no confidence in the ELC.²²⁶ From the study, the high level of confidence in the court was attributed to the speedy and fair determination of cases. On the other hand, those who had no confidence in the ELC felt that corrupt individuals could still manipulate the court system to their advantage.²²⁷

4.6 Conclusion:

A general and preliminary examination of Tribunals in Kenya from their statutory framework indicate that tribunals play a vital role in adjudication and resolution of disputes in Kenya.²²⁸ The LDT's just like other tribunals in Kenya were vested with more advantages over the ordinary Court system in Kenya. The LDT's just like other tribunals in Kenya are more informal and not stringent as the ELC's. Further, the LDT's are vested with simpler procedures and are cheaper as compared to the ordinary court systems.²²⁹ A study conducted by the Land Development and Governance Institute (LDGI) revealed that a section of the public that was interviewed opted to make use of other alternatives in resolving land dispute such as councils of elders and religious groups. This were the same people that comprised the council of elders under section 5 of the LDT Act that resolved land disputes that were brought to the LDT's. From the foregoing, we can conclude that the LDT's were effective in solving land disputes in Kenya. The elders that comprised and established the LDT's were persons in the community or communities to which parties by whom the issues is raised belong and who are recognised by custom in the community

²²⁶ *ibid.*

²²⁷ *ibid.*

²²⁸ [Reforming Tribunals In Kenya - Concept Paper by Joash Dache](http://www.klrc.go.ke/index.php/klrc-blog/522-reforming-tribunals-in-kenya-concept-paper-by-joash-dache)

<<http://www.klrc.go.ke/index.php/klrc-blog/522-reforming-tribunals-in-kenya-concept-paper-by-joash-dache>>

²²⁹ *ibid.*

or communities as being, by virtue of age, experience or otherwise, competent to resolve issues between the parties to a dispute.²³⁰With this regard, disputes under the LDT's were amicably resolved by elders who very well understood the pertinent issues to a dispute. We find that the elders comprising the tribunal were picked from communities where the parties to a dispute came from. Having such a composition in the tribunal made resolution of disputes faster and cheaper for parties to a dispute.

From the foregoing provisions of the LDT Act, it can be seen that this mechanism of solving land dispute in Kenya was applied for a very long period of time. Most land conflicts have seen their way to the court arena for resolution. This playground has overtime been characterized with foul play, corruption, inefficiency, delays, technicalities and solutions that mainly leave disputants as enemies at family and community level. Land disputes involve not only technical matters but mainly complex issues that relate to traditional and customary practices in the management and administration of land. The complexity calls for a change in the approach for resolving

land disputes and ADRs are recommended as a first line approach.²³¹ However, with time, this mechanism began to fail for reasons such as corruption and the increased back log of cases pending before the LDTs. A survey conducted by the Land Development and Governance Institute (LDGI) revealed that initially, these LDTs were efficient in handling land disputes in Kenya but they gradually fell short due to the complexity of land transactions as a result dynamism of land markets.²³²In addition, the survey revealed that there was a gradual build up of a backlog of unresolved disputes pending before these tribunals thus rendering them inefficient

²³⁰ LDT Act, Sec 2.

²³¹ Policy Brief (n 162).

²³² *ibid* (n 61).

in solving land disputes in Kenya. The whole justification for having the LDT in Kenya was to enable citizens to access administrative justice easily, speedily, cheaply and fairly²³³ but the system of tribunals then and today as seen in Kenya does not foster these core values of an administrative justice system.²³⁴The Tribunals in Kenya are constituted and operate as part of the administration whose decisions are normally called into question before them. They lack independence and impartiality. They enjoy wide discretion without adequate mechanisms for accountability, leading to great variations in decision making. So many fundamental differences defying rational justification exist between the Tribunals that the principle of equal access to justice is undermined.²³⁵

It is due to these inadequacies of the LDT's and the appeal mechanism to the High Court that probably formed the rationale of creating the ELC under the CoK to efficiently hear and determine individual land disputes in Kenya. It is clear from the foregoing discussion that there is a need to have the ELC easily accessible to the citizens of Kenya. The ELCs also need to be affordable and efficient for justice in land disputes to be realised in Kenya. Before the creation of the ELC, the LDTs took centre stage in solving individual land disputes in Kenya. The ELCs creation under the Constitution and under the²³⁶, repealed the²³⁷ leaving people with little to no information about the ELC. Therefore there is a need to create awareness of the existence of the ELCs in Kenya. The survey conducted by the Land Development and Governance Institute (LDGI) in 2013 revealed that some of the people were not aware of the existence of the ELC. Likewise, the study also advocates for creation of a public awareness forum especially on the

²³³ *ibid* (n 228).

²³⁴ *ibid*.

²³⁵ *ibid*.

²³⁶ ELC Act.

²³⁷ LDT Act.

jurisdiction and functions of the ELC. Further, the law applicable under the ELC is no different from that applied under the LDT. The LDT applied rules of procedure as well as customary law which encouraged the use of ADR. As a result, the ELC has not brought anything new with regards to the laws applicable in solving land disputes in Kenya. As a result and as indicated, the ELC risks as being regarded as an additional court in an already congested legal system that has added no tangent improvement on how better to solve land disputes in Kenya.

This study is of the view nevertheless even as the CoK advocates for the existence of the ELC, the ELC should either be given a status of finality in the sense that decisions from the ELC ought to be final with no further appeal to the Court of Appeal. With the current status of the ELC, it stands to be construed as another Court in addition to the already convoluted legal system of solving individual land disputes in Kenya. From its composition, the ELC is made up of judges appointed by the Judicial Service Commission to serve under the ELC. Unlike It is therefore imperative to note that in order for justice in individual land disputes to be realised in Kenya, Parliament should create an ELC that is not only accessible, and cost effective but an institution with a final decision. The ELC has an appellate jurisdiction of all decisions from the Magistrates Courts and other Tribunals. This attribute of the ELC makes no difference in the Courts system before the CoK 2010. Land disputes were referred to the LDTs and Magistrates Court with appeals to the High Court and further appeals to the Court of Appeal. Even as new ELCs continue to be created with new judges being posted in these courts, the ELC still stand to be construed as any other courts in Kenya and to perform the functions as those under the LDTs with no unique characteristics in solving individual land disputes.

The report by the Land Development and Governance Institute (LDGI) recommended that there was need to increase the number of courts to cover all counties in order to reduce the cost of travelling. Land Development and Governance Institute (LDGI) were however of the view that, which I am in agreement with, where alternative dispute resolution mechanisms have been established, they should be strengthened to reduce back log of cases in the ELC.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

This chapter shall give a conclusion of the study based on a concise summary of the previous chapters of the study. It shall propose the necessary recommendations that would improve the framework dealing with land disputes in order to make the system more comprehensive, more effective and efficient.

This study is premised on two hypothesis. The first hypotheses was that the piece meal institution and weak legal framework for resolving land disputes may be the major cause of the ineffective and inefficient system of land dispute resolution. The second hypothesis was that the jurisdiction, mandate and function of the ELC as compared to the LDTs is not the cure for resolving land disputes. The third hypothesis was that there is a lacuna in the creation of the ELC in that it is likely to result in a more convoluted and inefficient legal framework with an additional Court being formed into an already overcrowded legal system, resulting in the application of the provisions of the Constitution in a manner that was not envisaged.

The preceding chapters have sought to test the accuracy of the hypotheses set. Chapter one of the study set out the scope and framework of the study by setting out the statement of the problem, the objectives of the study and the research questions. The study was premised on a theoretical framework that land disputes in Kenya require ADRs in settling disputes between individuals. This was tested under chapter four of the study which looked at the preferred ADRs

in settling individual land disputes in Kenya. This fact was proved through the various studies that were conducted on the effectiveness or the performance of the ELCs in solving individual land disputes in Kenya. More specifically, the study looked at a survey that was conducted by the Land Development and Governance Institute (LDGI) in 2013. It was established throughout the study that indeed, the formal court legal system should accommodate and encompass ADRs while settling individual land disputes in Kenya. Several reasons for inclusion of the ADRs came out in the study as mechanisms of solving land disputes in Kenya.

It will be appreciated that developing effective land administration systems is challenging. It requires a country's financial resources and trained personnel, both of which are in short supply in most African countries. Customary land administration arrangements and statutory systems are often disconnected, and reconciling the two in a manner that serves the rural poor, and land users generally, can be difficult. Furthermore, weak land administration contributes to use of land for patronage purposes. In order to understand the fact that the ELC is not the cure for resolving individual land disputes in Kenya, this study started off by looking at the historical evolution of land ownership in Kenya. It emerged from chapter two of the study that land ownership in Kenya emanated from the colonial period. Land in Kenya was mainly owned by the colonialist with the natives providing labour to the said land. With time, natives were allowed to own land but only under trustees or community ownership. After independence, Kenya adopted the skewed colonial institutional and legal framework that highly contributed and led to a majority of the Kenya's being disposed of land ownership in Kenya. This is because the government purported to own land on behalf of individuals thus disentitling individuals of their land.

Further, it emerged from chapter three of the study on the structure, placement and composition of the ELC, that the ELC due its structural placement, it can be construed to be another court within the High Court Division. The research quoted the decision of the Court of Appeal sitting in Malindi in the case of *Karisa Chengo, Jefferson Kalama Kengha & Kitsao Charo Ngati v Republic [2015] eKLR*.²³⁸, where it was held that the structure and placement of the ELC in the court system indicates that the ELC is not the same as the High Court as envisaged under Article 165 of the Constitution. The courts ruling on the structure and composition of the ELC clearly indicates that the constitutional intention under²³⁹to have two separate courts with the status of the High court has not been achieved in reality. The judges in the said case were of the opinion that the ELC is not a High court as it is not conferred with a similar jurisdiction as that of the High court under Article 165 of the constitution. With that in mind, the study established that the ELC is not better placed to handle land disputes in Kenya. This is because the placement of the court in the hierarchy of court places it merely as another court in the legal system. This study therefore advocates that the ELC has only the status of the High court in that it is a court with an appeal mechanism of the decisions from the magistrates courts and other tribunals in Kenya but it is not the High court.

In order to provide an illustrative study, of the efficiency of the ELC in solving land disputes in Kenya, this study considered a study conducted by the Land Development and Governance Institute (LDGI) ²⁴⁰was to elaborate and evaluate the efficiency and adequacy of the ELC since

²³⁸ *ibid* (n 118).

²³⁹ Constitution 2010, Art 162 (2)

²⁴⁰ *ibid* (n 61).

it came to life in 2011. It emerged from the said study that majority of the people were of the opinion that the ELC was not easily accessible to parties to a dispute. This study appreciates that the Chief Justice has and continues to place an ELC in every County in the country but all the same the study by LDGI indicates that the judicial justice system is expensive. This study therefore advocates that the ELC's should be easily accessible and cost friendly to the members of the public. The study by LDGI showed the inadequacies of the ELC in solving land disputes in Kenya and came up with some recommendations for an efficient ELC in Kenya. Dispute resolution is a core component of land administration and management. While drawing from the findings of the LDGI²⁴¹, this study appreciates the fact that the ELC started off on a positive note, however, this study opines that there remains much to be done with regard to dispute resolution in the land sector and the following recommendations can be drawn from this study.

The study also looked at the structure of the ELC in terms of the composition of the court room. It emerged from the study that the ELC has judges, court clerks and lawyers present in court who are alien to the parties to a dispute. This automatically affects the conduct and the input of the parties to a dispute because they feel like they are in the presence of strangers while in court.

The study went further to analyse the mandate and the law applicable in the ELC Act under its chapters four and compared it with similar provisions of the repealed LDT Act with a view of establishing whether the ELC is properly mandated to efficiently and effectively adjudicate upon emerging individual land disputes in Kenya today. It emerged that the ELC is mandated in general to deal with both environmental and land disputes in Kenya as compared to the LDT which was mandated to deal with land disputes only. It emerged from the study that the ELC has

²⁴¹ *ibid.*

a wide jurisdictional mandate because it deals with both environmental and land disputes. This jurisdictional mandate of the ELC does not therefore adequately, efficiently and most importantly deal with specifically the day to day land disputes in Kenya. As a result we find that the LDT was better placed to deal with land disputes as the tribunal only dealt with land issues and was not conferred with a wide jurisdiction to deal with other issues. Further, from the study, it emerged that the ELC has no finality in its determination of matters brought before it. The Constitutional intention of creating an ELC was to have a court that specifically dealt with land and environmental issues to finality but we find that decisions from the ELC are subject to further appeal to the court of appeal.

It also emerged in the course of the analysis that the composition of the LDT was better placed to handle land disputes in Kenya. The ELC comprises of judges appointed in accordance with the provisions of Article 166 of the Constitution and section 7 of the ELC Act. The constitution under Article 60 (1) (g) encourages the use of communities to settle land disputes. In line with that we find that the LDT comprised of elders from communities where parties to a dispute came from. Such elders were in a better position to solve land disputes seeing as they understood the cultural and traditional practices of the parties to a dispute and as result land disputes were adjudicated better. The LDTs promoted the use of ADR and cultural practices as envisaged under the constitution, therefore the LDT should have continued dealing with land disputes in Kenya and not the ELC.

5.2 Recommendations

The recommendations proposed herein will benefit a lot from the analysis of the various literature materials reviewed in chapter one. These were tested against the legal provisions from the constitution, statutes, court pronouncements on the subject and the study conducted by other organisations.

The recommendations adopt a two tier course including knowledge and advocacy on the existence of the ELC in Kenya.

5.2.1 Knowledge and Advocacy about the ELC

Under this recommendation, I propose that there should be a comprehensive further study to determine if the public is aware about the existence of the ELC in Kenya today and its jurisdictional mandate. The statistical data collected by the LDGI, revealed that public awareness of the existence and operation of the ELC was very low.²⁴² Further, the CoK created the ELC that repealed the LDT. This left an information gap with a majority of the public still not aware of the existence of these courts. The Government should therefore promote public awareness on the existence, jurisdiction and functions of the Environment and Land Courts with a view of enlightening the public on the existence of the court for legal redress. Public awareness of the ELC in my view can be achieved through public civic education on the provisions of the CoK with specific reference to the constitutional provision of the ELC.

²⁴² *ibid.*

5.2.2 Legal and Institutional Reforms

I propose that there should be an amendment of the various legal texts that have relevance and impacts on the functioning of the ELC in Kenya. The constitution being the supreme law of the land should spear head such changes on the structure and placement of the ELC in Kenya. The constitution created the ELC under its Article 162 (2) (b) thus the same should clearly state and make provision for the structure and placement of the ELC. The constitution should be amended to accommodate and give a better clearance of the placement of the ELC under the court system in Kenya. The said provisions of the constitution can be amended by parliament in accordance to the provisions of Article 256²⁴³ through the introduction of a Bill in Parliament to amend the particular Articles of the constitution.

The ELC is currently a court with the status of the High Court. As was well elaborated by the judges in the case of *Karisa Chengo, Jefferson Kalama Kengha & Kitsao Charo Ngati v Republic [2015] eKLR*²⁴⁴, the ELC can not be called a High court within the meaning of Article 165 of the CoK. It has only been given the status to act as a High Court in Kenya with a different jurisdictional mandate from that of the High Court. With that regard the placement of the ELC today is unclear within the hierarchy of the court system in Kenya. There is therefore need for clarity on the structure and placement of the ELC in the hierarchy of courts in Kenya. In line with the constitutional amendment, the ELC Act should also be amended to encompass changes under the constitution under its long title which mainly gives effect to the provisions of the constitution. The constitution clearly sets out the systems of the courts under Article 162. The constitution is clear on the hierarchy of the courts in Kenya with the supreme court, the court of

²⁴³Constitution 2010, Art 255 (3) (a).

²⁴⁴ ibid (n 118).

Appeal and the High court and the courts referred to in clause (2) of Article 162. We find that the constitution goes further to discuss superior courts under part 2 of Article 162 .The courts so discussed are the supreme court, court of appeal and the High court. The ELC as a court created under Article 162 (2) (b) of the constitution is not enumerated or discussed as superior court. The only mention of the court is that the court shall have a status of the High Court. We need to have a court whereby the judges, advocates and litigants are aware of the structure and placement of the ELC within the system of the court. As indicated there is need to clarify the structure of the ELC under the constitution and other statutes.

5.2.3 Composition of the ELC and ADRs

I propose that the government should amend the provisions on composition of the ELC as provided for under the ELC Act. The ELC comprises of judges appointed in accordance with the provisions of Article 166 (2) of the constitution. The ELC Act makes provision for an extra requirement for a judge to be appointed in the ELC.²⁴⁵ As earlier indicated under chapter three of this study, the LDT comprised of elders to listen and determine land disputes in Kenya. We find that such a composition as that under the LDT well understood the issues surrounding a dispute before them. These elders were particularly appointed from the communities where the parties to a dispute came from. As a result, they understood the cultural and traditional practices of the parties to a dispute and were therefore better placed to deal with such a dispute.

For the efficient functioning of the ELC, the court should accomodate such elders to assist in determining a dispute before the court. With the current composition under the ELC, the judges

²⁴⁵ ELC Act, Sec 7 (1) (b).

are appointed from different walks of life, therefore a particular judge may not understand the real issues underneath a certain dispute. Accordingly, there is a risk of land disputes being determined through rules of procedure with no due regard to the existing sociological practices of the communities of the parties in dispute. It is commendable that the constitution encourages the courts to apply ADRs in solving disputes. It is at this point that such ADRs should include the elders to try and amicably solve the existing land disputes.

Further, the government and Civil Society should promote public awareness on the importance of adopting Alternative Dispute Resolution Mechanisms as an alternative option in resolving land disputes. ADRs should however not be misconstrued to replace the role of courts but they should be adopted at the first instance in cases of a land disputes with a view of trying to amicably solve a land dispute.

5.2.4 Appeals of decisions from the ELC

The Constitution and the ELC Act have made provision for the jurisdictional mandate of the ELC. The ELC is conferred with original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162 (2) of the constitution and with the provisions of the ELC Act or any other law applicable in Kenya relating to environment and land.²⁴⁶ The ELC Act further provides that Appeals from the court of Appeal against any judgement, award, order or decree issued by the court in accordance with Article 164 (3) of the constitution.²⁴⁷ I propose that the ELC should be mandated with the original and appellate jurisdiction but with an element of finality. We find that land disputes are very sensitive and require urgent and quick resolution. In

²⁴⁶ ELC Act, Sec 13.

²⁴⁷ ELC Act, Sec 16.

line with the its principle objective, the ELC should be seen to resolve land disputes expeditiously and justly, therefore, the ELC should have an original and appellate jurisdiction with an element of finality. This means that decisions made by the ELC as envisaged under section 13 (7) of the ELC Act should be final and binding to the parties to a dispute with minum appeals to the court of appeal. Such appeals to the court of appeal should be limited to certain questions of law and not on the whole substantive issues creating the dispute. We find that the ELC was specially created under the CoK with a set out creteria of appointment of judges of the ELC which is not requisite for judges under the other courts in Kenya. Therefore, if a case the subject matter of the ELC is subjected to appeal in the court of appeal, there is likelihood that the court will not efficiently handle the said matter for lack of expertise as envisaged under section 7 (1) (b) of the ELC Act.

5.2.5 Need for more courts

With the current status of the ELC, there is need to extend the reach of the ELC to cover all counties in Kenya. This will be in line with the provisions of section 4 of the ELC Act, which states that the court shall ensure reasonable equitable access to its services in every county. The Chief Justice should therefore ensure that such courts are placed in all counties in Kenya. To date not every county has an ELC as envisaged by the CoK and section 4 (3) of the ELC Act. In the mean time as more courts are being established, justice can still be achieved for parties with land disputes through establishment of mobile courts that may sit at a location without the court on specified days of the week.

SELECTED BIBLIOGRAPHY

BOOKS

1. Bix Brian, Jurisprudence: Theory and Context, (3rd edn, London: Sweet & Maxwell 2003)
2. Christie C. George and Martin H. Patrick, Jurisprudence: Texts and Readings on the Philosophy of Law,(2nd edn, West Publishing Co.1995)
3. Cotterrell, Roger, The Politics of Jurisprudence, (London: Butterworths 1989)
4. J.P Omony, Key Issues in Jurisprudence: An In-Depth Discourse on Jurisprudence Problems (1st ed, LawAfrica)
5. Roederer Christopher and Moellendorf Darrel, Jurisprudence (Juta and Co.)
6. Okoth-Ogendo H.W.O, Tenants of the Crown: Evolution of agrarian Law and Institution in Kenya, (African Centre for Technology studies, Nairobi: Acts Press 1991)
7. Onalo P.L, Land Law and Conveyancing in Kenya, (Heinemann 1986)

ARTICLES

1. Bontty, Monica Marie, Arbitration and award-Egypt-History Mediation- Egypt- History Dispute resolution (Law)

2. Carrie Menkel- Meadow, *From Legal Disputes to Conflict Resolution and Human Solving: Legal Disputes Resolution in a Multidisciplinary Context*) Association of American Law Schools, 2004)
3. Kaniaru Donald W, ‘Environmental Courts and Tribunals: The Case of Kenya’ [2012] 23(4)Volume 29 *Environmental Courts and Tribunals: Improving Access to Justice and Protection of the Environment Around the World*
4. Kenya Human Rights Commission and Kenya Land Alliance, ‘*Policy brief*’ [year] ‘Righting the wrongs: Historical injustices and land reforms in Kenya’
5. Land Development and Governance Institute (LDGI), ‘An Assessment of the performance of the Environment and Land Court, 12th score card report’ Full Report Released: 17th September 2013
6. Migai Akech J.M., ‘The Environment and Land Law Reports’ [2006] Land, The Environment and the Courts in Kenya
7. Muigua Kariuki, ‘ Alternative Dispute Resolution and Article 159 of the Constitution’
8. Ndungu Land Report

< <http://cemusstudent.se/wp-content/uploads/2013/01/Ndungu-Land-Report.pdf>>

9. Institution of Surveyors of Kenya, '*Policy Brief*' Alternative Dispute Resolution (ADR) Mechanisms for Land Disputes

WEBSITE AND BLOGS

1. Dache Joash, 'Reforming Tribunals In Kenya'
<<http://www.klrc.go.ke/index.php/klrc-blog/522-reforming-tribunals-in-kenya-concept-paper-by-joash-dache>>
2. Deo Tumusiime K, 'The African Executive: 'Uganda Land Disputes an Impending Volcano' [2012]
<<http://www.africanexecutive.com/modules/magazine/articles.php?article=4723>>
3. Fingleton Jim and Oliver Norm, 'Settling customary land disputes in Papua New Guinea'
<http://www.usaid.gov/Press/PDF/MLW_VolumeTwo_CaseStudy_11.pdf>
4. Foster Robert W., 'The U.S. Surveyor's Role' [2010] 16 (11) Boundary Disputes
<http://www.fig.net/pub/fig2010/papers/ts10k%5Cts10k_foster_4352.pdf>
5. Harney Coulson Advocates, 'a snapshot of the new land laws in Kenya' [2012]
<<http://www.coulsonharney.com/News-Blog/Blog/A-snapshot-of-the-new-land-laws.>>

6. Kalande Wiliam, 'Kalande paper, 'Kenyan Land Disputes in the Context of Social Conflict Theories' [2008]
<http://www.fig.net/commission7/verona_am_2008/papers/13_sept/kalande_paper.pdf>

7. Land affairs 'Law and justice; the Tanzanian Land Court System'(20 January 2010)
<<http://land-affairs.typepad.com/tanzania/2010/04/law-and-justice-the-tanzanian-land-court-system.html>>

8. Sharma Raghav, 'Green Courts in India: Strengthening Environmental Governance?' [2008] 4 (1) *Law, Environment and Development Journal*, < <http://www.lead-journal.org/content/08050.pdf>>

9. Wamalwa Herbert, 'Governing Land In Kenya: The Problem Just Refuses To Go Away' < <http://www.igi-integrity.comDocumentsKenya-LandReform.pdf>>

10. Yamano Takashi and Deininger Klaus, 'Land Conflicts in Kenya: Causes, Impacts, and Resolutions' [2005] FASID Discussion Paper 2005-12-002
<<http://www3.grips.ac.jp/~yamanota/Land%20Conflicts%20in%20Kenya%20%28FASID%20DP%29.pdf>>