

**The Role of Law in Urban Planning in Kenya:
Towards Norms of Good Urban Governance**

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DECLARATION

I, **John MutingáMativo**, declare that the contents of this thesis are a result of my original contribution to the current body of knowledge in the field of “The Role of Law in Urban Planning for Sustainable Development: Towards Norms of Good Urban Governance,” and that the same has not been presented for award of a degree in any other University.

.....

John MutingáMativo

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Date

I, **Professor MigaiAkech**, confirm that this thesis has been submitted for examination with my knowledge and approval as the University supervisor.

.....

Professor Migai Akech

.....

Date

DEDICATION

This work is dedicated to my daughters **Rebecca NzisaMuting'a**, **Hellen KavataMuting'a** and **Mercy NdanuMuting'a** for their prayers, their unfailing love and encouragement.

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CHAPTER ONE

INTRODUCTION

1.1 Background to the Study

Urbanization is an irreversible global phenomenon and some of its key characteristics are increased population in urban centres, rampant changes in land use and building uses, increased densities and expanding spatial size which if not adequately managed by the law can lead to serious health hazards, poor living and working conditions only to mention but some.¹

Globally, Africa is the least urbanized, yet it has the highest rate of urbanization in the world.² Most cities in Africa are poorly planned and majority of the developments have been erected in total disregard of planning laws. In Kenya, Nairobi the capital city and other rising urban areas are no exception.

Since urbanization is an irreversible and mostly positive development, the issue is how effective are the available urban planning legal mechanisms in managing the process of urban development and mitigating the potential risks?³

Urban planning in Kenya is, in most cases, characterized by unguided spatial expansion and settlement densification, proliferation of informal settlements and deterioration of social services and public utilities.⁴ Kenya is a classic example of a country that either lacks urban planning laws or formulation and enforcement of such laws are shambolic and uncoordinated at best.

¹Vernon J. Henderson (2009). Urbanization in China: Policy Issues and Options. *Brown University and NBER*, Page 36.

²MairuraOmwega, International Society of City and Regional Planers (Isocarp) Coordinator, Africa Chapter, Daily Nation 5/1/2011.

³Othmar S. Mng'ong'o (2004). A Browning Process: The Case of Dar es Salaam City. *Doctoral Dissertation*, Kungl. TekniskaHögskolan, Royal Institute of Technology, Page 8.

⁴Bansal, M., Boyer, A., Cheng, K., Crispin, L., Daniels, R., *et al.* (2006). Nairobi Metropolitan Expansion in a Peri-Urban Area. University of Nairobi, May 10, 2006, Page 34.

1.2 Statement of the Problem

Urban planning and management in Kenya has not effectively offered solutions to the increasing urban decay as evidenced by unapproved buildings in virtually all urban areas in Kenya, poor urban planning, lack of adherence to approved plans, mushrooming of slums and poor liquid and solid waste disposal systems which have led to an environmental crisis. This problem has persisted despite the existence of Physical Planning Laws in Kenya and bodies charged with the responsibility of urban planning. Possible causes of this problem could be deficiency in the existing laws or poor enforcement of planning laws attributed to institutional weaknesses and poor urban governance. This research investigates and discusses the suitability or otherwise of the existing planning laws and regulations focussing on the role of physical planning law in urban planning as a tool of achieving good urban planning. The study will also address good urban governance as a prerequisite to good urban planning. The study will attempt to offer suggestions to remedy the situation.

1.3 Hypotheses

The study proceeds on the following hypothesis:-

- i. Although Kenya has the necessary legislation to regulate urban planning, bodies charged with the responsibility of planning cities, controlling land use and development have underperformed.
- ii. The existing legal framework promotes conflict and competition in the public domain instead of cooperation and coordination in planning and further weakens the planning capabilities of county government.
- iii. Dynamic regulation and firm enforcement mechanisms are required to ensure compliance with urban physical planning laws.

1.4 Research Questions

This study seeks to address the following basic questions:-

- i) What is the current state of the legal, policy and institutional framework for enforcing urban planning laws in Kenya?

- ii) How can urban planning laws be effectively enforced to guide and control urban development in Kenya?
- iii) How can urban governance be used to combat challenges posed by rapid urbanization in Kenya?

1.5 Theoretical Framework

Planning is unique and its uniqueness stems partially from its inability to be explained in a single, narrow definition that fits it all.⁵ This is because planners are not a single entity that could fit into one category, nor can they fully agree on what planning really is. Rather, planners can vary across a continuum of interests, ranging from environmentalists to developers. These aspects of planning appear to differ, or even contradict each other, a great deal. Recognizing the aforementioned difficulty in defining the field of planning, a number of reasons are identified to support the definition of a clear planning theory.⁶ First, the defining differences that strongly characterize planning personify an enduring tension, and sometimes an overlap, between planning and other disciplines. Due to the fact that there is no such thing as indigenous planning theory, planning tends to borrow ideas and principles from other practices, which causes confusion about the very purpose, role, and task of planning as a profession.⁷ This trifecta of tension, overlap, and confusion, calls for the need to develop a sound and independent body of thought as planning theory.

Theories of planning, however, mean different things to different people. Practitioner planners tend to generally view theories as useless in their practical endeavours. Conversely, planning academicians tend to view, and heavily rely on, theories as an integral part of the planning profession. Put differently, academicians seem to be more inclined to employing a great deal of theories, regardless of their practical benefits, whereas practitioners have more propensities towards avoiding theories in general, regardless of how beneficial they could be to their practice. This partially contributed to the gap between theory and practice.⁸

Actually the great challenge of planning is precisely the fact that it is a profession that simultaneously: *i*)uses knowledge rooted in natural sciences – necessary, for example, to plan roads and the physical layout of cities; *ii*)uses knowledge rooted in social sciences – necessary, for example, to understand the social implications of a new road; and *iii*)aims to

⁵Abukhater A. Rethinking Planning Theory and Practice: A glimmer of light for prospects, page 18. of Integrated planning to combat complex Urban Realities. Number 2(11)/May 2009, University of Texas at Austin United States of America. abukhater@mail.utexas.edu, at page 65, Accessed on 1st June 2013, Page 64.

⁶ Ibid page 65.

⁷Allmendinger, P. (2002). Planning Theory. Palgrave, Basingstoke, Macmillan, New York, Pages 21-23.

⁸ Supra note 5 at page 65.

provide a contribution on what to do, when to do it, how to do it, and (last but not the least) why to do it.⁹

Andreas Faludi presents paradigms in planning as the “distinct perspective(s) from which problems and solutions are being defined.” He identified three of these theoretical standpoints in the discipline. These are the ‘object-centred’, the ‘control-centred’, and the ‘decision-centred’ paradigms. This coexistence of standpoints in planning shows that in planning, theoretical revolutions do not take place because quite contradictory theories actually coexist.¹⁰

Planning theory is generally called procedural because it generally concerns itself with the process through which planning occurs and whether or not that process is valid.¹¹ This paper critically examines the idea that planning theory experiences major theoretical shifts. Through a consideration of contributions from several academics, it is shown that different theoretical standpoints in planning persist and coexist.¹²

A fundamental reason for defining planning theory as independent from any other forms of thought is related to the gap between attaining adequate planning processes and desirable outcomes. This tension between means and ends caused planning theory to be narrowly defined as concerned with either procedural or substantive frameworks. Consequently, this instigated planning theory to discuss what planners do, or ought to do, to yield desirable future conditions with little reference to contextual differences confronting them.¹³ For example, planners who focus on the procedural aspects of planning seem unaware of, or disinterested in, the success of the outcome. This procedural tendency disregards the extent to which successful results are achieved as long as the process utilized follows rational justification. The kind of issues that planning tends to address and the kind of methods it opts to utilize suggests the need for a well-defined planning theory. Defining a theory that combines diverse planning traditions and methods into a distinctive body of knowledge is a

⁹António Ferreira, Olivier Sykes & Peter Batey, Planning Theory or Planning Theories? The Hydra Model and its Implications for Planning Education, *Journal for Education in the Built Environment*, Vol. 4, Issue 2, December 2009 pp. 29-54 (26).

¹⁰Faludi, A. (1982). Three paradigms of planning theory. In: Healey, P., McDougall, G. & Thomas, M. J. (Eds.). *Planning theory: Prospects for the 1980s*. Oxford: Pergamon Press, pp. 81-101.

¹¹Lane, M. B. (2005). Public Participation in Planning: An Intellectual History. *Australian Geographer*, 36 (3), 283-299.

¹²Supra note 9 at page 30.

¹³ Supra note 5 at page 65.

necessity to distinguish these traditions from other unrelated paradigms. This makes it easy for planners to identify with, reject, or delimit them, and adopt what they perceive appropriate and useful to accomplish their goals regardless of how diverse they might appear.

Rational planning theory is a procedural theory that focuses on the process of planning rather than on an object or end goal.¹⁴To successfully achieve rational planning, there are steps that must be followed.¹⁵ First, a problem must be defined. Second, there needs to be identification of alternative options to solve this problem. Third, there must be detailed evaluation of each alternative. The fourth step is to implement the best alternative, and the fifth step is to monitor the effects of the chosen alternative. Rational planning does not end with the fifth step. Rational planning takes into consideration new problems arising or the fact that the initial problem or goal was not actually reached with the pre-determined best alternative. Therefore, rational planning may loop back to any step at any time as it is a continuous process.¹⁶ Rational planning is systematic by nature.

Rittel and Webber authoritatively state that town planning is a social problem; social issues are never solved but only resolved time and time again.¹⁷ There isn't an exact formula to answer the problems of town planning. Furthermore, social problems have no clear-cut indication of when adequate understanding has been reached since understanding for a social problem has no exact scientific criteria to be judged by. This indicates that town planners "can always try to do better," as there is no clear-cut stopping point for any planning process.¹⁸

Charles Lindblom, a well-known critic of rational planning theory, disagrees with radical decision-making and believes that any decision made should be closely related to the policies that are currently in place. He proposed a theory of planning referred to as disjointed-incrementalism.¹⁹ He proposed some simple steps for incremental planning: Limit the analysis of alternatives to a few familiar options, focus on the problems rather than end-goals,

¹⁴Faludi, A. (1973). *Planning Theory*. Pergamon Press.

¹⁵Taylor, N. (1998). *Urban Planning Theory since 1945*. SAGE Publications.

¹⁶ Ibid.

¹⁷Rittel, H.W.J. and Webber, M.M. (1973). *Dilemmas in a General Theory of Planning*. *Policy Sciences*. 155-169.

¹⁸ Ibid.

¹⁹Allmendinger, P. (2009) *Planning Theory*. Palgrave, Basingstoke, Macmillan, New York.

and learn through trial and error.²⁰ According to Lindblom, planning cannot be rational if it is not comprehensive, and planning cannot be comprehensive because planners lack the ability to fully absorb all information related to the process.²¹

Tingwei Zhang authoritatively reviewing the evolution of planning theory in the United States of America and comparing it with the Chinese experience in the last fifty years argues that planning is essentially an institutional arrangement between the government, the market place and society in response to social changes in a particular society and a particular period of time.²² Given the pluralistic nature of modern society, the diverse directions of social development, and the uncertainty caused by enforceable social events, the trajectory of planning theory evolution is non-linear and based on diverse approaches.²³ The development of planning theory reveals innovative efforts of planners to meet social changes. Planning theory will continuously evolve with the changing demands of institutional arrangements in a changing world.²⁴

William T. Perks observes that urban planning since 1980's has been characterized by increasingly diverse theoretical perspectives and that contrary to modernist urban theory, which sought universal application, contemporary urban planning embraces particularity, individuality and regional diversity.²⁵ He adds that two contrasting issues dominate recent urban planning theory, first, how to modify existing cities, secondly, how to plan suburbs so as to be more liveable.²⁶

Unfortunately, planning practice has failed to satisfy the above needs, and existing planning theories have failed to come up with a framework to deal with the increasing vulnerabilities of urban areas and cities.²⁷ There has been increasing criticism of planning approach focussed on priority given to process instead of substance and the underlying causes of poor planning.

²⁰ Ibid.

²¹ Ibid.

²² Tingwei Zhang, Planning Theory as an Institutional Innovation: Diverse Approaches and Nonlinear Trajectory of the Evolution of Planning Theory, Published in CITYPLANNING REVIEW, 2006, Vol. 30 (8), pages 9-18.

²³ Ibid page 1.

²⁴ Ibid page 1.

²⁵ William T. Perks, Urban Planning, 1980 to the present, The Canadian Encyclopaedia, www.thecanadianencyclopedia.ca/en/article/urban-and-regional-planning. Accessed on 1.12.2014.

²⁶ Ibid page 1.

²⁷ Christopherson S., Michie J., & Tyler P. (2010). Regional resilience: Theoretical and empirical perspectives. Cambridge Journal of Regions, Economy and Society, 3(1), pages 3-10.

It has been suggested that in the long term current urban planning approaches tend to reinforce the *status quo*.²⁸ These criticisms are not related to the essence of theory but to how it has been put in practice and used. The very recent combination of environmental, economic and social crises, however indicate the need for rethinking and questioning of the basic assumptions of the contemporary planning theories, since it has become increasingly evident that in order to tackle economic, social and ecological risks that increase the vulnerability of urban systems, a new theoretical perspective in planning is a necessity.²⁹

This study adopts the rational planning model described above because it is the process of realizing a problem, establishing and evaluating planning criteria, creating alternatives, implementing alternatives, and monitoring progress of the alternatives.

Theories are presented as tools for good practice, not as something to which planners should commit. The spirit and purpose of planning should predominantly dwell on the issue of the extent to which planning should be a regulatory activity, thereby bringing into focus the relevancy of law in urban planning theories.³⁰ It is well recognized that Law has played an important role in institutionalizing the field of urban planning, as well as in shaping the processes of urban development. The engagement of planning academia with legal scholars has, however, largely been limited to issues of zoning, development controls, and other aspects of land use, though planners' interventions are no longer confined to these domains.

Moreover, planners have not fully engaged with established traditions of legal analysis such as socio-legal studies, legal realism, critical race and feminist legal theory, and a variety of non-European critiques. Instead, planners' engagements with Law have typically followed the liberal model which conflates legal doctrine with the complex relationship between Law and social processes.³¹ Urban planning theories find their rationale in the belief that a controllable future offers more promise than an uncontrollable one, and that a planned environment provides better opportunities for all people to enjoy their setting. Planning law

²⁸Purcell M. & Street (2009). Resisting neo-liberalization: Communicative planning or counter-hegemonic movements? *Planning Theory*, 8(2), pages 140-165.

²⁹AyadaEraydin, Tasan-Kok T, (eds), *Resilience Thinking in Urban Planning*, Geo-Journal Library 106, DOI 10.1007/978-94-007-5476-8_2 at page 18.

³⁰ Ibid.

³¹ Ibid.

ensures the foregoing by establishing rules and procedures by which communities can act on matters affecting their physical environment.³²

1.6 Literature Review

This section presents existing literature relevant to the topic under study. The literature review looks at the various areas of research undertaken on urban planning and development, urban governance, physical planning guidelines, development control in urban areas and challenges caused by urbanization and challenges faced by local authorities in enforcing urban planning regulations. It also looks at the legal and institutional framework and their weaknesses. It further shows how this study relates to, and builds upon the existing knowledge base. The information is derived from text books, journal articles, periodicals, newspaper reports and articles and government reports, UN reports, academic research papers and reliable internet sources.

A salient feature that is gaining growing recognition in human settlements transformation is urbanization. This growth impacts on provision of social services and spatial organization, hence its management is crucial. This growth requires adequate planning and control to ensure harmonious developments and functional efficiency. Aribigbola points out that to achieve the foregoing, layouts of various land uses such as residential, industrial, commercial, recreational and institutional among others are undertaken to standardise and control physical developments.³³ Land use planning takes into consideration certain structural and spatial principles.

Ng'etich J.K. argues that urbanization process is unstoppable, irreversible and is taking place largely in the developing world.³⁴Ng'etich adds that urbanization in Kenya is happening in a disorderly fashion as there is no planned framework defining the desirable national urban structure and form to be promoted.³⁵ The author concludes that what is happening in the

³² Ibid.

³³Aribigbola, A. (2008): "Improving Urban Land Use Planning and Management in Nigeria: The case of Case of Akure" " Theoretical and Empirical Researches in Urban Management, Year 3, Number 9, 2008"ISSN2-5712.

³⁴Ng'etich J. K., Opata G. P., Mulongo L. S., Urban Environmental Planning and Development Control of Medium Sized Towns in Kenya. A Case Study of Eldoret Municipality. Journal of Emerging Trends in Economics and Management Sciences (JETEMS) 5 (3): 351-363.

³⁵ Ibid.

country's urban sector can be summarized as chaotic or rogue urbanization; the kind of urbanization that can only accentuate development, rather than promote development.³⁶

In a concept paper dated 4th December 2008, the Office of the Deputy Prime Minister and the Ministry of Local Government observed that “a notorious characterization of Kenyan urban centres is their spontaneous growth and haphazard development, which has in the main taken place outside the purview of conscious urban planning intervention... The process of urban development in Kenya from its outset was not backed by any robust policy intervention.”³⁷ Even though policy intervention is relevant to the topic under discussion, this research will demonstrate that an effective and functioning legal regime is crucial to proper urban planning and governance in Kenya.

Wapwera, S.D. and Egbu, C.O. have argued that the plethora of planning authorities in most urban areas in most developing countries has contributed to the emergence of more complex problems. Three key elements have been identified; roles are not clear, functions are overlapping, and responsibilities not fully discharged.³⁸

Leitmann J. observes that even though cities are considered to be the ‘engines’ of economic development, failure to manage the impacts of rapid urbanization provides a threat to the health of human beings, as well as environmental quality and urban productivity.³⁹ This has resulted in the degradation of many sensitive resources; occupation of hazard prone areas; loss of open space and prime agricultural land; and also excessive urban sprawl. In most cases, the causes of these problems emerge from inappropriate regulation, lack of secure tenure, inadequate infrastructure, and weak and poorly coordinated actors in the land market.⁴⁰ In most cases land use development in urban areas often cause stress on the environment, leading to degradation of vital natural resources.⁴¹ Urban air pollution is a major environmental issue threatening the health of city inhabitants and beyond.⁴² In

³⁶ Ibid.

³⁷ Government Printer, Office of the Prime Minister and Ministry of Local Government, Department of Urban Development, *Concept Paper for the Preparation of a National Urban Development Policy (NUDA)*, 4TH December 2008.

³⁸ Wapwera, S.D. & Egbu, C.O. (2013) Planning Authorities: A Review of Roles, Functions and Responsibilities in Jos Metropolis, Nigeria, *The Built & Human Environment Review, Volume P.30*.

³⁹ Leitmann, J. et al. (1992), “Environmental Management and Urban Development: Issues and Options for Third World Cities”, *Environment and Urbanization*, Vol. 4 No. 2 P. 1.

⁴⁰ Bernstein, J. (1994) “Land Use Considerations in Urban Environmental Management”, *UNDP/UNCHS/World Bank Urban Management Programme*, Vol. 12.No. 3.

⁴¹ Ibid.

⁴² Ibid.

developing countries like Kenya, air Pollution can be a more serious problem due to poor regulation.

Dr.Okpala authoritatively argues that the fundamental challenges faced by urban areas in Anglophone African countries include the continuing high rate of urban population growth, unplanned and unregulated physical growth and expansion of cities, the challenge of mass poverty, particularly urban poor and weakness of the urban management institutions reflected in their inability to adequately provide basic urban services.⁴³Dr.Okpala correctly points out that the dominant feature and a fundamental challenge to most Anglophone (Sub-Saharan) African countries urban landscape today is that of haphazardly growing shanty-towns and of slum and squatter developments.⁴⁴ Many sections or neighbourhoods of the cities of Sub-Saharan African countries are build-up of un-regulated, congested, ramshackle housing, surrounded by almost indescribable filth. These result in poor infrastructure facilities and deteriorating public utilities such as poor drainage and inadequate sanitation, inadequate water supplies, mounds of garbage and other solid waste, constrained mobility as a result of out-dated physical layouts, or no planned layout, flourishing street trading, overcrowded, inadequate transport systems and inadequate and deteriorated road facilities resulting in overcrowding and congestion and noise pollution.⁴⁵

Prevalence of low levels of social discipline and civic responsibility is a challenge to city planners and administrators in many African countries.⁴⁶ Houses are built without much regard to existing building and health codes or zoning and sub-division regulations. The magnitude of these phenomena naturally overwhelms the efforts of the city planners, city administrators, and health and building inspectors.⁴⁷

Perhaps, the most fundamental and critical challenge faced by urban areas in most developing countries is the crippling weakness of institutions of urban development planning and management while the other challenges are poor governance, corruption and waste of resources⁴⁸

⁴³Dr.Okpala D, Regional Overview of the Status of Urban Planning and Planning Practice in Anglophone (Sub-Saharan) African Countries, Regional study prepared for Revisiting Urban Planning: Global Report on Human Settlements 2009. Available from <http://www.unhabitat.org/hs/2009>. Accessed on 10.1.2015.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Ibid.

Even though the literature reviewed highlights serious challenges caused by urbanization among them serious environmental degradation, the literature reviewed manifests serious gaps in the knowledge base such as insufficient knowledge of the problem or insufficient knowledge about whether or how a policy or action could contribute to more sustainable forms of development. The literature also reveals that the need for sustainable urban planning is recognized and policies and laws are in place but there is a serious gap in that there is lack of evaluation of the magnitude of the problem. Unless the seriousness of the problem is appreciated, there can never be serious efforts to address it. Further, institutional inconsistencies have led to fragmentation and a failure to integrate sustainable urban planning with governance creating a scenario whereby there are policies in place but no action is taken.

Rumi Aijaz correctly points out that urban local government institutions/municipalities are constituted for the maintenance and planned development of urban areas. The objective is to ensure that suitable levels of infrastructure and services are available to the citizens.⁴⁹ The progress of an area depends to a large extent upon the availability of suitable infrastructure and services. There are many developing countries in the world where service levels in urban areas are much below the standards and the citizens lead a difficult life. It is obvious that such conditions also affect adversely the productivity of urban areas. Much of the blame for the prevailing situation goes to the local government institutions, which are the main actors in the governance process at the local level.⁵⁰

Local governments are unable to perform well due to various reasons. Therefore, an important gap exists and requires urgent research. This is the “Challenges facing Urban Local Governments” and their relationship to poor urban planning. There are a number of issues concerning local governments that have not been highlighted adequately in the past literature. The role of good governance in urban planning has not well been addressed in existing literature. Governance has a significant effect on poor planning in urban areas of developing countries. This study intends to chronicle the relevance of good urban governance because good urban governance is a panacea to strengthening compliance of planning laws and ensuring sustainable urban planning. Good governance is linked to rule of law. Good urban

⁴⁹Rumi Aijaz, (2007), Challenges for Urban Local Governments in India, Journal of Asian and African, page 37. Studies, Sage Publications Ltd., PP1-97, Available at <http://www.lse.ac.uk/resources/copyright.htm>, accessed on 9.1.2015.

⁵⁰ Ibid.

governance allows openness, participation, accountability and transparency as its key and germane elements for sustainable urban planning.

Egunjobi believes that, urbanization and environmental problems caused by urbanization are consequences of irresponsible political leadership and urges governments to wake up and endeavour to always put round pegs in round holes, and not in squared holes.⁵¹ Many of the political leaders heading local governments do not have professional experience in relation to the portfolios given to them. In a situation where someone in charge of Housing, Urban Development and Physical Planning is a political scientist or an Accountant, there is no way urbanization will not generate various degrees of problems in this type of governance.

George W. Kanyeihamba argues that laws which govern the city in its planning, social, economic and political affairs assume an importance of the greatest magnitude and that officials should be granted sufficient legal authority to enable them formulate the planning policies.⁵²

T.N. Boob and Dr. Y.R.M. Rao have argued that building regulations and by-laws provide the mandatory techno-legal framework for regulating building activity from planning, design to completion of construction.⁵³ These by-laws and development control rules govern the following aspects namely building permission, zoning, sub-division of land, land use, open space, built-up area and height limitation, floor space index, lighting and ventilation, structural design, materials and methods of construction etc. Due to lack of law enforcement and monitoring, many people violate the plans during the construction stage of their buildings and structures. Success of any law depends on its proper implementation.⁵⁴ Problems arise when the standard rules and regulations intended for guiding the growth of a town, to ensure adequate public services, health and safety measures are violated on a large scale.

Development control rules, regulations and by-laws are made by the councils or development authorities taking in account the larger public interest of the society and it is the duty of the

⁵¹Egunjobi (1999) "Our Gasping Cities" An Inaugural Lecture, 1999, University of Ibadan, Ibadan, Oyo State, Nigeria. Cited in OYELEYE Oyewaleldowu, Challenges of Urbanization and Urban Growth in Nigeria, American Journal of Sustainable Cities and Society, Issue 2, Vol. 1 Jan- Dec 2013, page 19.

⁵²George W. Kanyeihamba, Urban Planning Law in East Africa, Pergamon Press, Oxford- New York, 1973.

⁵³T.N.Boob&Dr. Y.R.M. Rao Violation of Building Bye-Laws and Development Control Rules: A Case Study IOSR Journal of Mechanical and Civil Engineering (IOSRJMCE) ISSN : 2278-1684 Volume 2, Issue 4 (Sep-Oct 2012), PP 48-59 www.iosrjournals.org, accessed on 1st October 2013.

⁵⁴ Ibid.

citizens to obey and follow such rules which are made for their own benefit. Charles M. Haar argues that public interests are predominant, and that land use laws exist to promote the common good rather than the narrower aim of protecting private property.⁵⁵

Reade E. states that development control is the power to decide whether or not specific development takes place on specific sites to control the intensity of development that is permitted and to control its layout and design.⁵⁶ The legitimacy of urban development control is derived from the police power which is exercised by the government.⁵⁷ Abubakari states that development control is a mechanism for ensuring the orderly and progressive implementation or delivery of objectives of the land use plans.⁵⁸ The mechanisms involved include compliance or development that requires planning permission, standards, building codes, and zoning regulations. The scope of development control is wide.

Charles Amooti Koojo, observes that the legislative frameworks of urban planning instruments are contextually irrelevant to the current socio-economic realities.⁵⁹ Isaac Karanja Mwangi has argued that internally, urban development in cities and towns is taking place without an effective municipal policy framework, urban-wide planning management, visions and strategies, or requisite action programs in communities and neighborhoods and that the law has failed to facilitate the linking of strict enforcement in public infrastructure and services provision led urban growth and development as a critical component in development planning.⁶⁰ This paper argues that planning is a multi-disciplinary field, directly and indirectly involving different individuals and institutions.

Commenting on the weaknesses of the past and present planning interventions in Nairobi, the Director of city planning, Nairobi blames the following; (a) planning process has in the past lacked stakeholder participation, (b) poor governance has led to wastage, (c) political patronage and corruption have eroded public confidence, (d) lack of clear policy on

⁵⁵Charles M. Haar, *Law and Land, Anglo-American Planning Practice*, Harvard University Press and the M.I.T Press, Cambridge, Massachusetts, 1964.

⁵⁶Reade E., (1987): *British Town and County Planning*, Milton Keynes, Philadelphia, Open University Press.

⁵⁷ Ibid.

⁵⁸Abubakari A., Romanus D. Dinye,(2011), *Urbanization and the Challenges of Development in Ghana: A case Study of Wa Township*, *Journal of Sustainable Development in Africa* (Volume 13, No. 7, 2011), Pp 210-235.

⁵⁹Charles A. Kooyo, *Implementation of Physical Plans with Reference to Wetlands Land Use in Kampala City-Uganda*, a thesis submitted for the award of the degree of Doctor of Philosophy of Makerere University, Department of Geography, October 2004.

⁶⁰Isaac K. Mwangi, *Planning in Kenya on the Brink of Precipice: Who will save the discipline and the Profession*, article published in the *Planning Issues Magazine*, December 2006, Nairobi. *Mr. Karanja, is a Registered Planner, and holds a PHD in Urban Planning. He is a member of the Kenya Institute of Planners.

implementation and weak institutional structures, (e) in adequate technical and professional staff, (f) problems caused by rapid urbanization.⁶¹ This paper will stress that all development applications must comply with policy guidelines, planning regulations and standards, approved physical development plans, local authority bye-laws as well as other relevant statutes.

Professor J. M. Kiamba argues that effective integrated development is premised on the presence and operationalization of an effective legal framework and that the current legal framework is out of date, uncoordinated and does not provide an appropriate legal foundation for proper urban planning and governance.⁶² McAuslan states that planning, after all, is only as effective as the administrative system supporting it and the political philosophy, willingness and commitment of the state in which it operates.⁶³ Kimani and Musungu have identified multiplicity of laws and regulations as well as multiple institutions as the major impediments to the planning and building sector in Kenya.⁶⁴ Hezron Nyangito and Walter Odhiambo have argued that this multiplicity in laws has created gaps, conflicts and contradictions in the application of the laws, and these have implications on land use and urban planning and development in Kenya.⁶⁵

B.J. Peers opines that laws must match the changing needs of a society,⁶⁶ hence there is a need for planning laws to be reviewed regularly to match the ever changing needs of the society. This position has been well stated by Hagman D. G. who acknowledges that English Planning Law is largely parliamentary responses to emerging challenges⁶⁷ while Cliff Hague advocates for new approaches to urban planning.⁶⁸

⁶¹Rose Muema and Timothy Ndorongo, Concept Paper on Nairobi Metropolitan Growth Strategy, November 2005, Nairobi, page 8.

⁶² Professor J. M. Kiamba, Land Use Policy and Planning for Security and Sustainable Development, a paper presented at stakeholders open forum on 'Land Reform for Sustainable Peace and Development' held at the Grand Regency Hotel, Nairobi on 12.3.2008, page 11.

⁶³McAuslan, Patrick (1985): Urban Land and Shelter for the Poor. (London, Earthscan) (p.66).

⁶⁴Kimani M. and Musungu T., Reforming and Restructuring Planning and Building Laws and Regulations in Kenya for Sustainable Urban Development, 46th ISOCARP Congress 2010, Nairobi, page 7..

⁶⁵Walter O. and Hezron N., Land Laws and Land Use in Kenya: Implications for Agricultural Development; KIPPRA Discussion Paper No. 15 June 2002.

⁶⁶ B.J. Peers, Property Rights vs. Development Control, 1981, Vol 52, Town Planning Review 45; and Instruments for Land Policy, 1980, Vol 3, Urban Law and Policy 115.

⁶⁷Hagman D. G; Urban Planning and Land Development, West Publishing Company, St. Paul, Minnesota, 55102, October 1975 at page 21.

⁶⁸Cliff Hague, (2006) Making Planning Work; A Guide to Approaches and Skills, ITDG Publishing, India.

In addition to the gaps identified earlier in this chapter, the literature reviewed does not dwell on the issue whether or not urban planning lacks a comprehensive legal and integrated framework within which to operate and whether this creates ambiguities that makes effective enforcement of the law difficult. The study will seek to address the said gap and establish whether the greatest impediment in the building industry today is the law enforcement procedures. It is admitted that administration of the various statutes is carried out by several agencies. For instance, the sanitation aspects are the responsibility of the public health officers regulated by the Public Health Act,⁶⁹ fires control regulation is under the fire officers while the construction of buildings was regulated by local authorities under the Local Government Act⁷⁰ which was repealed by the County Governments Act.⁷¹ The new act transferred urban planning functions to County Governments. The multiplicity of institutions in the planning and building industry creates conflicts and confusion that inhibits the proper functioning of the industry.⁷² Malcom Grant states that enforcement has always been the weak link in the chain of planning control.⁷³

The literature reviewed above though relevant in that it explains the role of law in urban planning, does not adequately demonstrate whether urban planning and governance today meets the basic planning principles and governance such as ease of administration, simplicity, effectiveness and flexibility. This study will seek to provide answers for such key issues.

Wamsler Christine observes that urban planning is seldom carried out with a view to reducing disaster risk.⁷⁴ There is a gap between urban planning and disaster management in urban areas. This gap between planning and risk management is demonstrated by existing literature and planning history. The linkage between urbanization and disaster management are poorly theorized⁷⁵ and existing literature focuses on architectural, structural and engineering perspectives and neglects urban planning which is perceived as a physical tool.⁷⁶

⁶⁹Public Health Act, Cap 242, Laws of Kenya.

⁷⁰ Local Government Act, Cap 265, Laws of Kenya (Repealed).

⁷¹ Act no. 17 of 2012.

⁷² Supra foot note 29.

⁷³Malcom Grant, *Urban Planning Law*, London Sweet and Maxwell, 1982, page 2.

⁷⁴Wamsler C., "Managing urban risk: Perceptions of housing and planning as a tool for reducing disaster risk", *Global Built Environment Review* 2004, Vol. 4:2, pp. 11-28.

⁷⁵Pelling, M. (2003) *The Vulnerability of cities*, London, Earthscan.

⁷⁶Zetter, R., White R. (eds.) (2002) *Planning in cities: Sustainability and growth in the developed world*, Urban Management Series, London, ITDG Publishing page 26.

The literature reviewed seems to be in unanimous agreement that there is a serious problem of the existence of irregular developments in Kenya's urban areas. Alain Durand-Lasserve defines the term 'irregular developments' as an area or settlement of development (spatial expansion) and occupancy not conforming to the legal, urban and environmental standards set by the law.⁷⁷ Such irregularities range from irregular sub-division of land, unapproved buildings, extensions added to already approved buildings, squatter settlements, occupation of dilapidated buildings or poorly designed and structurally defective buildings, non-compliance with health and sanitation norms and safety.⁷⁸ Such irregular developments are in the eyes of urban planning law out rightly illegal. However, there have been attempts by the county government to 'regularize' developments which meet approval requirements but are hither to un approved. Existing literature has not addressed the topic of regularization understandably because the law requires that all developments must have approval before being undertaken. Thus, a gap exists whether developments already erected without approval can be subsequently regularized. This study will attempt to provide answers to the said question. The Nairobi County government has published a bill in an attempt to address the said issue.⁷⁹

Marlon G. Boarnet correctly points out that there is an increasing recognition that the built environment, land use and development patterns have a significant effect on public health.⁸⁰ A critical gap exists between urban health and urban planning in that there are no adequate studies by either urban planners or public health officers on the relationship between urban health and urban planning.⁸¹ This paper attempts to bridge the said gap by attempting to link urban planning approaches to urban health.

1.7 Justification for the Study

There is limited number of advanced studies undertaken on the law and policy regulating urban planning, development control and good urban governance as a tool of achieving

⁷⁷ Alain Durand-Lasserve , Urban Management and Land; Regularization and Integration of Irregular Settlements: Lessons From Experience, Working paper no. 6, May 1996, UNDP/UNCHS (Habitat)/ World Bank.

⁷⁸Ibid.

⁷⁹Government of Kenya, Nairobi City County Gazette Supplement No. 1 (Bills No. 1), 9th January 2015, The Nairobi City County Regularization Bill, 2015.

⁸⁰ Marlon G, Boarnet and Lois M. Takahashi, HandBook on Urban Health; Bridging the Gap Between Urban Health and Urban Planning, Chapter 19, pages 379-402., (2005), Springer US, Springer Science Business Media, Inc.

⁸¹ Ibid.

sustainable urban planning in Kenya. In particular, the role of law in Urban Planning as a tool of achieving good urban governance has not been well articulated in the literature reviewed. This study will not only address the said gap but hopes to contribute to enhancing the understanding of the factors affecting the enforcement of urban planning laws and regulations in Kenya.

1.8 Broad objectives of the Research

The aim of the research is to evaluate the role of law in urban planning, good urban governance and critically examine the suitability and effectiveness or otherwise of existing urban planning legal and institutional framework and develop a framework and guidance for addressing challenges posed by rapid urbanization in Kenya. It will also emphasize on the need to develop good urban governance as a tools for sustainable urban planning and development.

1.9 Specific objectives of the Research

- i. To critically analyse the current legal and institutional framework governing urban planning in Kenya.
- ii. To examine the effectiveness of the enforcement of urban planning laws and building regulations in Kenya.
- iv. To critically examine the challenges facing enforcement of urban planning laws in Kenya.
- v. To analyse the consequences of failing to adhere to development control regulations in urban areas in Kenya.
- vi. To examine the challenges caused by urbanization in Kenya and make suggestions on how to mitigate the said challenges.
- vii. To analyse the role of law, urban planning and governance in achieving sustainable urban planning and development.

1.10 Methodology

The study is largely library oriented and is based on analysis of existing literature relevant to the topic. Since urbanization is a global phenomenon and its challenges cut across the globe, the study recommendations will borrow from the best practices in the world. Libraries and resources centres and internet sources will provide the requisite data and information.

1.11. Chapter Breakdown

The study is divided into the following chapters:-

i)Chapter one: Background to the Study

This chapter lays the foundation and serves as a general introduction of the subject of the study. It considers the research background; statement of the problem, research hypothesis, research questions, literature review, theoretical framework and research objectives as a way of laying the foundation for discussion and analysis in the other parts of the study.

ii) Chapter Two: Conceptual issues

This chapter defines key terms and concepts relevant to the study with a view to laying a basis for demonstrating their relationships with the topic under study. The definitions provide a context for interpretation of the study findings and a basis for the recommendations contained in chapter six. The overall purpose of this chapter is to make the research findings meaningful and generalizable.

In discussing the key concepts relevant to the study, it is observed that a legal framework is crucial to manage urbanization to ensure harmonious development. The legal structure under which this development control is to be enforced is crucial and for this reason chapter three examines Urban Planning Laws in Kenya.

Chapter Three: Challenges of Urbanization in Kenya

This chapter identifies some of the key problems facing urban development control in Kenya and also discusses consequences of non-adherence to development control instruments. The chapter also discusses problems and implications of urbanization and identifies some of the

major challenges caused by urbanization. Mushrooming of un planned or informal settlements in urban areas is identified as one of the major challenges facing urban areas in Kenya and the chapter borrows lessons from Johannesburg, South Africa on how the country has formalized informal settlements.

The urban environment is manmade and urban areas have been described as “environmental hot spots”. Urbanization has brought with it serious environmental challenges which is a threat to health and future generations. This threat needs to be countered through the use of law, physical planning and this is the subject of chapters four.

Chapter Four: Urban Planning Law in Kenya

This chapter traces the roots of modern urban planning law and urban planning policy and physical planning law in Kenya by tracing its roots in the United Kingdom. The chapter also explains the objects of urban planning law, discusses planning and building regulations in Kenya, examines key aspects of development permission, practice and procedure in Kenya. The chapter also examines the rationale for urban development planning in addition to discussing urban planning regulations in Kenya, planning agencies, their roles and responsibilities. The crucial aspect of enforcement of urban planning laws has also been discussed. The chapter concludes that effective urban planning is premised on the presence and operationalization of an effective legal framework and proper enforcement of planning laws laying a basis for chapter five which discusses Law, Urban Planning and Good Urban Governance.

Chapter Five: Law, Urban Planning and Good Urban Governance: A Panacea to Sustainable Urban Development in Kenya

Chapter five examines the relationship between good governance, urban planning and the law and environmental sustainability in Kenya and concludes that, with good urban governance, Kenya can reverse the loss of environmental resources and sustain environmental development in urban areas. The chapter also concludes that environmental challenges in urban areas are caused by human activities; hence this calls for social action, on environmental sustainability.

The chapter identifies good urban governance as indispensable in achieving sustainable development in contemporary times and calls for a new approach to combat the menace of

urban sprawl, deteriorating environment, housing shortages and un approved developments. The chapter demonstrates that improved governance is central to sustainable achievement of good urban planning and development.

It is against above scenarios that this chapter seeks to examine the role of law in urban planning as a tool for achieving good urban governance and looks at the linkages between law, physical planning and governance. Law is brought out as a key instrument of regulating urban planning.

The chapter offers a brief critique on the concept of sustainable development and points out that the concept of sustainable development is poorly understood and to a large extent has been perceived as a ‘foreign’ concept.

Chapter Six: Summary of findings, Conclusions and Recommendations

Chapter six gives a summary of the key findings in the study, offers brief conclusions and makes recommendations and proposals for reforms in order to realize effective urban planning and good urban governance in Kenya.

CHAPTER TWO

CONCEPTUAL ISSUES

2.0. Introduction

This chapter seeks to clarify key terms and concepts relevant to the study and to propose their relationships with the topic under study. It also seeks to provide a context for interpretation of the study findings and a basis for the recommendations in chapter six. The overall purpose of the conceptual issues discussed in this chapter is to make the research findings meaningful and generalizable. Theories and conceptual models such as the ones discussed below help to stimulate research and the extension of knowledge by providing both direction and impetus.

A concept abstractly describes and names an object or phenomenon, thus providing it with a separate identity and meaning. It is an intellectual representation of some aspect of reality that is derived from observations made from phenomenon.

2.1 Urbanization: A Conceptual Understanding

Urbanization is defined as the agglomeration of people in relatively large numbers at a particular spot of the earth surface.⁸² Conversely, another school of thought believes that urbanization is not about the population size, but must satisfy certain conditions like modernization, physical and economic development, as well as the heterogeneity in occupation.⁸³ The former definition of urbanization reflects the perspective of what urbanization is in the developing countries, while the latter school of thought reflects what urbanization is in the developed world. Urbanization process in the developed countries is as a result of rapid development, modernization and industrialization, and not agglomeration of people which usually results from rural-urban drift. While the urbanization in most developing nations, is a consequence of the “push” of the rural areas and the “pull” of the urban centres.⁸⁴ The push and pull in this regard are with respect to the population, which can be traced to the effects of regional imbalances.

⁸²Onyemelukwe, J.C. (1977) “Urbanization in a Development Context: Patterns, Problems and Prospects in Nigeria” *Annual conference of the Nigerian Economic Society*, pp.11-37.

⁸³ Wirth, L. (1938) “Urbanism as a Way of Life.” *American Journal of Sociology* 44(January):1-24, Jack Harvey, (2000) “Urban Land Economics” *Palgrave Macmillan, Fifth Edition* pp 256-257.

⁸⁴Aluko, O.E. (2010) “The Impact of Urbanization on Housing Development: The Lagos Experience, Nigeria” *Ethiopian Journal of Environmental Studies and Management* Vol. 3, No. 3.

Ejumudo authoritatively argues that Urbanization is a phenomenon that describes the process of change in the growth of population due to changing conditions in the society.⁸⁵ It is equally a process of demographic, social, economic and physical change, which requires complex governmental action.⁸⁶ It is also associated with social economic and technological process of development. The implication is that urbanization connotes social change on a vast scale especially as it is the introduction into a given culture of elements that were not there before. Precisely, the technical term for this is urbanism, but urbanization is preferred because of its broad applicability and easy cognition.⁸⁷

Urban growth is the rate of growth of an urban population. Urban growth refers to growth that makes intensive use of land for the location of buildings and impermeable surfaces to a high degree. Urbanization is mainly caused by urban growth, which could be due to natural population growth, reclassification of urban and rural system and rural-urban migration.⁸⁸

2.2 The concept of governance

The concept of governance is complex and controversial. First, governance is not government. Governance as a concept recognizes that power exists inside and outside the formal authority and institutions of government.⁸⁹ Many definitions of governance include three principle groups of actors: government, the private sector and civil society. Second, governance emphasizes ‘process.’ It recognizes that decisions are made based on complex relationships between many actors with different priorities. It is the reconciliation of the competing priorities that is at the heart of the concept of governance.⁹⁰

2.3 The concept of good urban governance

UN-HABITAT proposes the following definition of urban governance; Urban governance is the sum of the many ways individuals and institutions, public and private, plan and manage

⁸⁵Ojumudo, Kelly B., (2013) *Urban Development and Renewal in Nigeria: The Potency of Public Private Partnership, Development County Studies, Vol. 3, No. 4, p. 81-85.*

⁸⁶ Green, J. O. (2011), *Urban Administration and Development*, London, Free Press.

⁸⁷Supra note 53 at page 81.

⁸⁸Agbola, T. (2004) “Readings in Urban and Regional Planning” *Published by Macmillan Nigeria Limited, Ibadan, Oyo State, Nigeria.* Pp. 179.

⁸⁹ Supra foot note 35.

⁹⁰ Ibid.

the common affairs of the city.⁹¹ It is a continuing process through which conflicting or diverse interests may be accommodated and cooperative action can be taken. It includes formal institutions as well as informal arrangements and the social capital of citizens.⁹²

Good urban governance is characterized by participation, consensus, accountability, transparency, responsiveness, effectiveness, efficiency and equality. These norms are interdependent and mutually reinforcing.⁹³ Good urban governance is inextricably linked to the welfare of the citizenry. Good Urban Governance must enable both men and women to access the benefits of urban citizenship, affirms that no man, woman or child can be denied access to the necessities of urban life, including adequate shelter, security of tenure, safe water, sanitation, a clean environment, health, education, and nutrition, employment and public safety and mobility.⁹⁴ Through good urban governance, citizens are provided with the platforms which allow them to use their talents to the full to improve their social and economic conditions.⁹⁵ However in the year 2000s, the concept of *Governance* has enjoyed wider usage in the developing world mainly because of the role of UN-HABITAT and its Global Campaign on Urban Governance. In line with HABITAT's experience, rule of law and inclusive planning in decision making processes is the key to good governance and sustainable urban development. Good urban governance has been identified as indispensable in achieving sustainable development in contemporary times particularly in developing world context. With more and more people preferring cities as their choice of settlement, the challenge lies not in stemming this tide of migration, but in managing and governing our cities better, to improve quality of life and living standards. Consequently, urban local bodies are now expected to plan, coordinate and manage a plethora of urban facilities and activities.⁹⁶ These include urban environment and urban transport. Anti-poverty measures facilitate urban economy and productivity and human settlement development. Thus, over the

⁹¹ Ibid.

⁹² Ibid.

⁹³ GaniyuOlalekanBakare, Rule of Law, Physical Planning and Urban Governance in Nigeria: A Panacea to Sustainable Urban Development. Available at <http://www.ssrn.com/link/OIDA-Intl-Journal-Sustainable-Dev.html>, Accessed on 1.6.2013.

⁹⁴ GaniyuOlalekanBakare, Rule of Law, Physical Planning and Urban Governance in Nigeria: A Panacea to Sustainable Urban Development. Available at <http://www.ssrn.com/link/OIDA-Intl-Journal-Sustainable-Dev.html>.

⁹⁵ Ibid.

⁹⁶ Aribigbola, Afolabi, Planning and Urban Governance in Developing Societies: The Example of Akure, Ondo State of Nigeria, Canadian Social Science, Vol. 7, No. 6, 2011, pp. 119-127.

past few years, a consensus has emerged that improved governance is central to successful urban planning and development.⁹⁷

2.4 The Concept of Physical Planning

Physical planning has been defined as concerned with the design, growth and management of the physical environment in accordance with a predestined guide and policies. Its goal is to make provision for the coordination of all forms of development activities at the national, regional and local level.⁹⁸

In the context of the Town and Country Planning Act of the United Kingdom, the word “Planning” denotes design for the beneficial and orderly use of land.⁹⁹ Town and country planning was initially, and is still mainly a means of controlling and guiding the use of land and the process of change in the environment.¹⁰⁰ The Planning system provides a means whereby alternative or competing choices for the use of land can be discussed and informed decisions made. Planning is not, however, an end in itself and explicit statements as to the general objectives which town and country planning should serve are not to be found in the planning legislation.¹⁰¹

One of the most acceptable and popular definitions of physical planning was given by Keeble¹⁰² as the art and science of ordering the use of land and the character and siting of buildings and communication routes so as to secure maximum practicable degree of economy, convenience and beauty. Bruton defined Physical Planning as a physical design of something which already exists or might in the future and this sort of plan is a representation in a geographical or spatial sense, of actual physical structures or elements.¹⁰³ However, Egunjobi¹⁰⁴ observes physical planning to concern with distribution and arrangement in orderly, balanced and consistent forms, or different competing land-use types and structures

⁹⁷ Ibid.

⁹⁸ Michael OloyedeAlabi and Ade Akinbode, Towards Effective Physical Planning in Local Governance in Nigeria, Environmental Research Journal Year: 2010, Volume 4, Issue 2, pages 173-176.

⁹⁹ Lionel A. Bludel and George Dobry, Town and Country Planning, London Sweet & Maxwell, 1963, Chapter 1, page 1.

¹⁰⁰ Eric Young, The Law of Planning in Scotland, William Hodge & Company Limited, Glasgow, 1978, Chapter 1, page 1.

¹⁰¹ Ibid.

¹⁰² Keeble, Lewis (1969). *Principles and Practice of Town and Country Planning*. London: The Estate Gazette Ltd.

¹⁰³ Bruton, M.J. (1974) “General Planning and Physical Planning” in M.J. Bruton (ed.) *The Spirit and Purpose of Planning*. London: Hutchinson & Co.

¹⁰⁴ Egunjobi, Layi (1985). “Physical Planning as Instrument of National Defence”, *Journal of the Nigerian Institute of TownPlanners*, Vols.IV and V, October, pp.93-100.

in space to achieve economy, convenience, beauty, public good and security. Crook¹⁰⁵ observed the task of physical planning as the prevention, the control and the promotion of changes which have, which are and which might occur within the physical environment. Soile sees physical planning as being concerned with the spatial ordering of land use both in the urban and rural settings for the purpose of creating functionally efficient and aesthetically pleasing physical environment for living, working, circulation and recreation.¹⁰⁶

There are two basic responsibilities that are common in physical planning; these are preparation and implementation of development plans and control of development. These two responsibilities centre on the issue of law, how to obey rule of law especially the laws relating to physical planning as enshrined in the Physical Planning Act¹⁰⁷ which explicitly provides for physical planning activities in Kenya. However these two responsibilities harp on inducing and controlling development so as to achieve a sustainable urban physical planning that is anchored on rule of law.¹⁰⁸ From the above, Physical Planning is a conscious but comprehensive approach to orderly and healthy use and management of the natural environment of human settlements. It does this by systematically anticipating and achieving adjustment in the physical environment of part or a whole settlement, given the constraint of social, economic, political and human resources.¹⁰⁹

Wahab¹¹⁰opined that the main purpose of physical planning is to create an improved, protected and sustainable human environment, by which is meant both its appearance and the need to ensure that the living and working condition in settlements are healthy. He further stated that, inclusive and participatory urban planning and management is capable of reinvigorating and revitalizing our existing and future cities.¹¹¹ It can be inferred from this that inclusive and participatory physical planning could be achieved in an environment where

¹⁰⁵Crook, G.R. (1974). "Physical Planning", in M.J. Bruton (ed.) *The Spirit and Purpose of Physical Planning*. London: Hutchinson & Co., P.XXX.

¹⁰⁶Soile, O.A. (1998). "The Role of Town Planning in the Built Environment", in Kadiri, W.A. (ed.) *Reflections on Nigeria UrbanPlanning Issues*. Abeokuta: DESI-GGA Publications, pp121-145.

¹⁰⁷ Cap 286, Laws of Kenya.

¹⁰⁸GaniyuOlalekanBakare, Rule of Law, Physical Planning and Urban Governance in Nigeria: A Panacea to Sustainable Urban Development.Available at <http://www.ssrn.com/link/OIDA-Intl-Journal-Sustainable-Dev.html>.

¹⁰⁹ Ibid.

¹¹⁰Wahab, Bolanle (2004). "Grassroots Participation in Renewal of Slum and Squatter Settlements in Nigeria: A Case Study of UBS Focused Communities in Ibadan", *The Environscope: A Multidisciplinary Journal*, Vol. 1, April, pp.146-154.

¹¹¹ Ibid.

rule of law and good governance play an important role to ensure sustainable urban environment. Good governance in turn promotes accountability, transparency, efficiency, and rule of law in public institutions and public lives at all levels.

2.5 The Concept of Sustainable Development

Basically the concept of sustainable development is an attempt to articulate and incorporate environmental and human needs in the pursuit of economic growth and development. It is a process of change in which the exploitation of resources, investments, application of technology and institutional change are in harmony and enhances both current and future potential to meet human needs and aspirations.¹¹² The World Commission on Environment and Development (WCED, 1987) known as “Our Common Future” defines sustainable development as one that meets need of the present without compromising the ability of the future generations to meet their own needs.¹¹³ More prominence was given to the concept of sustainable development due to its emergence as one of the key resolutions of the United Nations Conference on Environment and Development (UNCED) held at Rio de Janeiro in 1992 and seconded by the Habitat Conference at Istanbul, 1996, whose emphasis were on the need for sound environmental management in order to achieve the objectives of sustainable development.¹¹⁴ At the global level Agenda 21 of the Earth Summit concern for sustainability of cities is at two levels, first at the global level it involves a range of issues concerning long term sustainability of the earth. Secondly, at the local level it involves the possibility that urban life may be undermined from within because of congestion, pollution, waste generation and their accompanying social and economic consequences.¹¹⁵

Therefore sustainability in the broad area of physical development particularly, human settlements goes beyond conventional concerns as better social conditions, equity and better environmental standards, to issues such as concern for the impact of city-based production

¹¹²Adeyinka, S.A. (2005). The challenges of global planning legislation for sustainable urban development in Nigeria in A. Fadare et al (eds), A Conference proceeding in Globalisation Culture and the Nigeria built environment. Vol. II Ile-Ife: O.A.U. 389 – 394.

¹¹³WCED (1987).World Commission on Environment and Development (WCED).Our City Common Future.Oxford University Press.

¹¹⁴Oduwaye L., Challenges of Sustainable Physical Planning and Development in Metropolitan Lagos, Journal of Sustainable Development, Volume 2, no. 1, March 2009, page 159.

¹¹⁵Ibid.

and consumption activities within and outside of the city¹¹⁶ In the area of human settlement basic yardsticks of sustainability as established by the United Nations Centre for Human Settlements (UNCHS), 1996 are quality of life of inhabitants, scale of non-renewable resource use, extent of recycling and re-use, the scale and nature of renewable resource use, waste emanating from production and consumption activities as well as the impact of these wastes on environmental health and ecological systems.¹¹⁷ It adopts equity, socially responsive policies at both local and regional levels.

City Journal¹¹⁸ opines that sustainable development seeks to deliver basic environmental, social, cultural and economic services to all residents of the community without threatening the viability of the natural, built and social systems upon which the delivery of these services depends.

Sustainable development involves a process of change in which the use of resources, the management of investment, the general direction of technological development and changes in institutions are harmonized with both future needs and present needs.¹¹⁹ Sustainable development requires improving the integration of three interdependent dimensions of development: economic, social and environmental.¹²⁰

The definition of sustainable urban development is significantly loaded and open to different interpretations. In some cases four terms - sustainable, integrated, participative, and urban- have been assumed by policy-makers in a “unitary” and interdependent way, while in others they have been employed as “complementary” but not necessarily connected issues.¹²¹

“Sustainability” is variably employed to indicate the fulfilment of life chances and needs in the present, without compromising the future of generations to come; the reinforcement of the

¹¹⁶Adeniji, J. (1998). *Future challenges of sustainable physical development in Nigeria* in K. Adeniji and V.I. Ogu (eds) *Sustainable physical development in Nigeria*. Ibadan: NISER pp 227 – 279.

¹¹⁷ *Supra* note 78 at page 160.

¹¹⁸City Journal, (1996). *Analysis of Urban Trends, Culture, Theory, Action. Special Edition For Habitat II in World Health Organization (1999). Towards a new planning Process: A guide to Re-orienting Urban Planning Towards Local Agenda 21* pp:17.

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*

¹²¹ *Sustainable Urban Development, STUDY COMMISSIONED BY European Commission - DG Regional Policy Directorate C.: 'Policy development' Unit C2: 'Urban development, territorial cohesion', Władysław Piskorz, head of the C2 Unit, AUTHOR(S) Dr Laura Colini, coordinator Dr Lorenzo Tripodi, collaborator, completed in April 2010 and reviewed in June 2010.*

environment and the regeneration of natural resources; the territorial balance in terms of a fair redistribution of advantages; the achievement of a country's competitiveness in financial terms.¹²²

A sustainable (urban centre) city is defined as a city in which the population enjoys a high quality of life and which takes care not to transfer socioeconomic and environmental health problems to other places or future generations.¹²³ To achieve this stated goal, some agreed new principles and processes of sustainable urban planning need to be developed based on an inter-sectorial approach that incorporates spatial and environmental aspects as well as health, social and economic elements.

City Journal,¹²⁴ states that the aim of sustainable urban centre should be able to build a new urban culture in which rich people and poor people can enjoy a sustainable and congenial lifestyle that leads to a viable urban structure. Kadiri,¹²⁵ observes that awareness-raising and capacity-building are crucial to achieving sustainable development. Citizens in all walks of life need to become more aware of the consequences of their lifestyle and the means for change, at both personal and community levels. The basic challenges are how to strike a balance between various urban needs, the challenges from these needs and how to sustain a modern city that would be environmental friendly, technologically in tune with current innovations, without such technology constituting nuisance to the environment.¹²⁶ This is necessary because the cities are the centres of economic growth, political hotbed, and a place where technological innovations and human achievements are displayed.

Sustainable development is one of the most fundamental challenges confronting humanity. Although specialists, scientists, academic professionals, politicians etc. are constantly defining the term and seeking ways to achieve sustainability, the concept is still theoretically based in most African cities as they lack adequate measures and initiatives to ensure the

¹²² Ibid.

¹²³ Girardet, H., (1992). *Cities: New Directions for Sustainable Urban Living*. London, The Gaia Atlas in World Health Organization (1999) *Towards a New Planning Process: A Guide to Reorienting Urban Planning Towards Local Agenda 21* pp: 17.

¹²⁴ Supra foot note 255.

¹²⁵ Kadiri K.O (2006) "Planning Sustainable and Livable Cities in Nigeria" in *Research Journal of Social Sciences*, INSInet Publication, pp 44-45.

¹²⁶ Ibid.

successful implementation thereof. Sustainable development is a fine balancing act¹²⁷ as it is not merely development that can be sustained, but development that would allow the achievement of a state of sustainability.

Sustainable urban development has been one of the biggest challenges facing less developed countries. Many countries in Africa are exhibiting ineffective and unsustainable nation-urban, regional-urban and intra-urban planning practices in their past and contemporary urban planning practices due to the lack of ability to provide strategies to attain sustainable urban development.¹²⁸ This has been compounded by the complexity of the development arena which presents a myriad of systems (economic, social, spatial, political and cultural). These systems exhibit a number of problems including inappropriate institutional structures and instruments; rapid urbanisation; unemployment, underemployment and poverty in general; inadequate shelter; inadequate and poorly maintained physical infrastructure; environmental degradation and poor land management and allocation methods.¹²⁹

Recognising the long-term realities and implications of the current actions, the development challenge is to come up with strategies that promote sustainable urban development, to meet the needs of the present generations and improve their quality of life without compromising the ability of future generations to meet their own needs.¹³⁰ From this perspective this chapter aims to link urban planning with sustainable development measures identifying ways in which urban planners can contribute and ensure the realization of sustainable development in Kenya. The reality is that most of the urban environments in Kenya are characterised by urban sprawl, fragmentation and unsustainable development patterns.

Sustainability in this context relates to the ability of the environment to meet the basic requirements for the sustenance of the living and non-living components of the ecological, economic and socio-cultural systems in a manner that does not limit the possibility of meeting the present and future needs of the various components and aspects of the

¹²⁷Emmett, A. 1998. Sustainable development: A fine balancing act. (In Focus Form, 6(1). p4-8) Stevenson-Hamilton Knowledge Resource Centre. September 1998.

¹²⁸Reassessment of Urban Planning and Development Regulations in African Cities, United Nations Centre FOR Human Settlements (Habitat) habitat@unhcr.org URL: <http://habitat.unhcr.org/home.htm>, Accessed on 1.10.2013.

¹²⁹ Ibid.

¹³⁰ Ibid.

environment. It can also be viewed as the carrying capacity of the supporting ecosystems.¹³¹ Evidence suggests that the prevailing global environmental degradation poses serious threat to sustenance of carrying capacity of the ecosystem;¹³² hence environmental sustainability have taken priority position in housing, infrastructure provision, planning, land use and urban development among others.¹³³

The future of urban planning has been the object of lively debate in recent years. For a long time, urban planning was considered an inefficient tool, unable to address development effectively. However, renewed attention to urban planning has recently emerged. Shifting dramatically from its initial ambition to command and control the city, planning has started reassessing itself in the new context of urbanization. In many cities around the world urbanisation has become synonymous with slum formation. A global environmental crisis under the guise of climate change is questioning the development model planning has been promoting across the world. The global financial crisis questions the market suitability to drive development and take care of public interest.¹³⁴ Urban planning must recognise these changes and develop new approaches to tackle the challenges facing cities.

Sustainable development recognizes the interdependence of environmental, social and economic systems. There are two fields within the Urban Planning perspective that currently guide sustainable development and can provide the framework for implementation. These are; (1) Environmental Management and (2) Spatial Planning, serving as important portals through which sustainable development can be enhanced and ensured and thus forms the point of departure for rethinking sustainable development from an urban planning perspective in Kenya.

2.6 The Concept of Development Control

Mchoughlin defines control in general system as that which provides direction in conformance of variations from system objectives within allowable limits.¹³⁵ Hence, development control is the process, laid down in legislation, which regulates the development

¹³¹Marcuse, P. (1998). "Sustainability is not Enough" Environment and Urbanization Vol.10 (2) , Pages 103-111.

¹³²Peters, William (ed.) (2000). Green Cities- Urban Environmental Solutions, Global Issues-An Electronic Journal of the U.S Department of State, March 5(1) 1-39.

¹³³Salama, A. M. and Alshawaikhat, H.M. (2005). "A Trans-Disciplinary Approach for a Comprehensive Understanding of Sustainable Affordable Housing" Global Built Environment Review 5 (3) 35-50.

¹³⁴Planning Sustainable Cities, UN-HABITAT Practices and perspectives.

¹³⁵Mchoughlin B.J. (1973),"Urban and Regional Planning.A Systems Approach."London Press.

and use of land and buildings. Development control serves as a way, whereby, policies are being implemented and unauthorized growth prohibited, promotes local authorities to prevent incompatible land use.¹³⁶

Development control is an attempt to ensure that what is arranged beforehand is carried out to the letter or decisions are made to reconcile conflicting interests. Development control is to ensure compatibility of various land uses in rural and urban areas.¹³⁷ Development control involves conscious efforts that are geared towards the actualization of proposed land uses on the ground. Development control facilitates appropriate development, recognizes its significance in building and protecting a healthy economy and a sustainable environment. It also examines the potential impact of the proposed development, protects the public interest from inappropriate development and also involves compliance of all procedures, building codes, standards to ensure that physical plans conform to approved plans.¹³⁸ Development control is the executive arm of the planning process. It is the means whereby policies are implemented, specific land use proposals brought to fruition and unlawful development prevented.¹³⁹ It is a process laid down in legislation, which regulates the development and use of land and buildings. It is a professional activity carried out by town planners in order to ensure compliance with approved master plan thereby ensuring orderliness.¹⁴⁰ It reduces the negative effects that accompany physical development. It can either be pre-development, during development or at post-development stage of a project which is sited in an unapproved location.¹⁴¹ It is a highly sensitive exercise which must be done with precaution, precision, firmness and with deep sense of responsibility by the authorities concerned. Fairness, justice and equity should be the watchdogs in development control programmes.

2.7 Physical Planning, Governance and Sustainable City Development

Having examined the meaning and components of urban governance and particularly good urban governance that has been identified as pre-requisite for sustainable urban development

¹³⁶Abubakari A., Romanus D., (2011) Urbanization and the Challenges of Development Controls in Ghana: A case Study of Wa Township, *Journal of Sustainable Development in Africa*, Volume 13, No. 7. At page 216.

¹³⁷Boakye-Boateng K. (1997), "Environmental Issues in Urban Management," "National Development Planning Bulletin, No. 1."

¹³⁸Ibid at page 216.

¹³⁹Groves Daniel (2000), "Development Control in Introduction to Planning Practice." "West Sussex, John Wiley and Sons Limited, London.

¹⁴⁰Supra note 91 at page 217.

¹⁴¹Ibid at page 217.

on the one hand and physical planning on the other hand, it becomes incumbent to determine the relationships between the three in context of the study area. This is because as demonstrated good governance will imply instituting structures and practices to plan and monitor socio-economic and physical development of the city.

Good governance and sound public management are preconditions for the implementation of sustainable development policies.¹⁴² This shows that sustainable development and urban governance have to be combined for sustainable cities.

In urban planning, the important role of law within governance structures is stressed once again.¹⁴³ Urban governance networks require an organisational framework which provides incentives for co-operations. This framework also needs to be able to structure the framework and to ensure that all relevant interests, especially the common welfare, are dealt with appropriately. This leads to the design of structures of regulation and also modifies the view of administrative law which is not only executing but above all providing, structuring and enabling.

Law is different to other social norms, for example moral principles, because it can be tracked back to a public actor with a certain level of democratic legitimacy and because it can be enforced with public means.¹⁴⁴ The legal system provides forms of organisation, action, and procedures for the enforcement and the implementation of legal norms. These forms open and design the scope of actions for the participants. Therefore law has a structuring function.¹⁴⁵ From the governance view, this is a key aspect. The concept of the structuring function of law is able to capture the aspect of steering through law, especially of steering through administrative (organisational) law. This shows that organisational law is framework law. It becomes the base for forms of social coordination of actions. The rules of law are necessary elements in urban governance and democratic political institutions. Law is an indispensable asset for good urban planning.

¹⁴²Organisation for Economic Co-operation and Development (OECD), *Improving Policy Coherence And Integration for Sustainable Development: A checklist* (Paris 2002) <<http://www.oecd.org/dataoecd/60/1/1947305.pdf>> accessed on 28 November 2014.

¹⁴³Baerenbrinker, Verena(2011) *Sustainable development using urban governance instruments*. LL.M(R) thesis.University of Glasgow<http://theses.gla.ac.uk/2973/>Accessed on 28.11.2014.

¹⁴⁴ Ibid.

¹⁴⁵ Ibid.

2.8 Conclusions

As rural settlements grow and become urban centres, and urban centres do so and become large Municipal areas, there is always increased competition in the demand for land for different purposes. This requires adequate planning and control in the settlements to ensure harmonious development and functioning efficiency. To achieve this fundamental activity, layouts of various land uses such as residential, commercial, industrial, open spaces and recreation, circulation and institutional uses among others are undertaken to standardise and control physical developments and ensure harmonious growth.¹⁴⁶ The forms and patterns of distribution of structures in general to promote the good health, accessibility, convenience and harmonious land use are a function, to a large extent of the rights and methods of dealing with land development.¹⁴⁷

Effective urban land control and management to tackle the attendant land use problems such as formation of slums, incompatible use, unapproved or sub-standard developments for the purpose of achieving a sustainable city development is absolutely necessary. Also necessary is a dynamic regulation and firm enforcement mechanisms to ensure compliance of planning laws.¹⁴⁸ The legal structure under which this development control is to be enforced is crucial and for this reason the next chapter examines Urban Planning Laws in Kenya.

¹⁴⁶Arigbola, A (2008): "Improving Urban Land Use Planning and Management in Nigeria: The case of Akure," "Theoretical and Empirical Research in Urban Management, Year 3, Number 9, 2008," ISSN: 1842-5712

¹⁴⁷ Ibid

¹⁴⁸ See Hypothesis statement in chapter 1, 1.3 (iii).

CHAPTER THREE

CHALLENGES OF URBANIZATION IN KENYA

3.0 Introduction

Today more than ever before, urbanization has become a critical part of the affairs of any country in the world. With massive movements of peoples to urban centers, coupled with unprecedented growth and mushrooming of existing and new urban realities, new challenges on how urban centers are managed are going to rise exponentially. The traditional paradigm that left urban management exclusively in the hands of the state has been rendered obsolete and cannot address the emerging needs and realities of a more complex and sophisticated urban reality. This calls for an urgent examination of new models that are representative of the true cosmopolitan nature of our cities.¹⁴⁹

Compared to the countryside, cities are places of higher risks (due to factors such as population density, air and water pollution, insecurity and inequality). They are also places of higher opportunities (thanks to better education and health services, solidarities, rights and, above all employment).¹⁵⁰ This explains why rural-urban migrations have not been influenced by public policies anywhere in Africa.¹⁵¹

Any urban governance and development policy should aim at guiding the urbanization process by reducing the risks and maximizing the opportunities.¹⁵² The question that arises is: how can the law be used to organize, manage and guide urbanization which has been rather chaotic for several decades. Recent demographic trends reveal a pattern of urban growth which most urban authorities are ill equipped to cope with.¹⁵³

Kenya is rapidly experiencing urbanization process which is among the highest in the

¹⁴⁹ Ibid.

¹⁵⁰ UN-HABITAT, Urbanization Challenges and Opportunities in Kenya Statement by Mr. Daniel Biau, Director, Regional and Technical Cooperation Division, Nairobi, Alliance Française 24th November 2008.

¹⁵¹ Ibid.

¹⁵² Ibid.

¹⁵³ Nairobi Water and Sewerage Company Limited, Water Guidelines for Improving Water and Sanitation Services in Nairobi's Informal Settlements, 2009. www.awsboard.go.ke, accessed on 10th December 2013.

world.¹⁵⁴ Unfortunately, the rapid growth is taking place without corresponding capacity of the city and town planning and management institutions to guarantee sustainable urban livelihoods.¹⁵⁵ The existing urban planning and implementation tools have failed to provide an orderly and attractive urban environment in Kenya.¹⁵⁶ This is evidenced by a myriad of environmental problems including, the proliferation of slums, squatter's settlements, incessant collapse of buildings, traffic congestion, competing land uses, ribbon pattern of development and urban sprawl.¹⁵⁷

This study identifies the various corpuses of laws that are used for urban development control in Kenya highlighting their efficacy and Achilles heels. It is pointed out that various factors facilitate non adherence to urban development control instruments including, the domiciled nature of laws and regulations, poverty, weak institutional frameworks which facilitate inordinate delays, bureaucratic ambience and corruption, lack of capacity of urban development control institutions including shortage of personnel and niggardly available resources. The constitution of Kenya 2010 underscores the need for re-engineering and realignment of urban development control system for better urban planning and development.

3.1 Problems facing Urban Development Control in Kenya

Ndegwa opines that the reason why physical planning in Kenya is ineffective is because local government bodies can ignore it because in almost all states, plans are developed by or under the aegis of local government bodies.¹⁵⁸ It is suggested that there ought to be a legal requirement that the local governing bodies adopt plans. If they are officially adopted it can be expected that the local governing bodies would make sure that they are kept up to date and properly administered.¹⁵⁹ UN-Habitat in their re-assessment of urban planning and development regulations in African cities outlined many factors which contribute to non-compliance of urban development control regulations, among them the following:-¹⁶⁰

¹⁵⁴Opata G, Mulongo L., Omuterema S., Ngetich J., (2013), Urbanization and Urban Environmental Development Control Policies and Practices in Kenya, Research Journal in Organizational Psychology and Educational Studies 2(3) 132-138.

¹⁵⁵Ibid at page 132.

¹⁵⁶Ibid at page 132.

¹⁵⁷Ibid at page 132.

¹⁵⁸Ndegwa E. N., (2001), Making Kenya a Planning Society; Challenges and Opportunities. A paper presented during the Launch Workshop of the Kenya Institute of Planners held at Nairobi Safari Club on 8th March 2001, unpublished.

¹⁵⁹ Ibid page 132.

¹⁶⁰UN-Habitat (1999); Re-Assessment of Urban Planning and Development Regulations in African cities, UN Habitat, Nairobi.

a) Restrictive building regulations

The existing standards, by-laws, codes and regulations pertaining to construction of buildings are restrictive and do not take into account the available local materials which are cheaper. There has been insufficient dissemination of appropriate building technology for low income groups. This has resulted in mushrooming of squatter settlements and illegal developments.¹⁶¹

b) Laxity in approving plans

The law requires that all developers must submit their development proposals to Local Authorities for approval. This has been reported to take unnecessarily long period of time thus delaying developments in most Local Authorities.¹⁶² Developers had in many cases been forced to commence their developments after experiencing unreasonable delays, and sometimes approvals or disapprovals are communicated long after the development has taken place.¹⁶³

c) Restrictive Planning regulations

The various Acts regulating urban development seem to be out dated and not conforming to the countries current social, economic and political circumstances.¹⁶⁴ Planning regulations and standards have been considered to be too static and inflexible, e.g. the developments control code and the building and zoning regulations.¹⁶⁵

d) Poor policy Implementation

Implementation of urban development policies has been characterized by failures. These have their roots in remote bureaucratic decisions, delays and poor execution of projects by specialized bodies, ineffective local institutions and staff, lack of institutional and inter-sectorial coordination framework for development planning and lack of or inadequate participation of beneficiary population.¹⁶⁶

¹⁶¹ Ibid.

¹⁶² Supra note 243 at page 132.

¹⁶³ Ibid.

¹⁶⁴ Supra note 243 at page 134.

¹⁶⁵ Ibid note 243 at page 135.

¹⁶⁶ Supra note 37.

e) High poverty levels

The proportion of the population has increased in most developing countries to as much as 50% of the population in some cases. With a large proportion of urban population in poverty struggling to make a living, compliance with urban development regulations is not in their scheme of priorities. Lack of comprehensive urban development policy that would guide regulations that are in line with the needs of the people and the current social-economic realities such as urban poverty has contributed to the high degree of non-compliance with urban development and planning regulations.¹⁶⁷

f) Weak financial position

Most counties have limited finances for development control.¹⁶⁸ This is aggravated by mismanagement of the few available resources.¹⁶⁹

g) Weak institutional and legal framework¹⁷⁰

Presently, Town and Urban Planning Department in all the counties in Kenya suffer from inadequate staff in terms of professional planners, technical staff and secretarial staff.¹⁷¹ Unavailability of logistics in terms of vehicles and modern computer software like Geographic Information System (GIS) is the bane of the department. This has resulted in inability of the department(s) to ensure effective plan preparation and implementation. The implication is the resultant high spate of unauthorized development and encroachment on public open spaces and government land.¹⁷² In Nairobi, the planning department has been forced to regularize some of these developments which are a prelude to even more indiscipline on the part of developers.¹⁷³ Regularization, as observed in the literature review in chapter one is not provided for under the Physical Planning Act and there is a need for the law to be introduced to guide such a process. In Nairobi and in deed in most counties, record keeping is very poor in that available computers are old and need replacement while presently the system of record keeping is by the use of cabinets, files and folders. This has led to a situation whereby

¹⁶⁷ Supra note 243 at page 135.

¹⁶⁸ Supra note 37.

¹⁶⁹ Ibid.

¹⁷⁰ See Hypothesis statements in chapter 1, 1.3 (i), (ii).

¹⁷¹ Supra note 87 at page 226.

¹⁷² Ibid.

¹⁷³ Ibid.

development applications have gotten missing. Even more distressing is the cumbersome process one has to go through to retrieve files.¹⁷⁴

The Physical Planning Act has several shortcomings which need to be addressed.¹⁷⁵ The Act is not clear on classification of land use particularly on mixed developments in residential areas. The Act is not flexible enough and it is unresponsive to address the dynamics of development.¹⁷⁶ It centralizes the administration of the Act in the office of the National Director of Physical Planning. There is a need to review and amend the Act to be consistent with the current devolved governments. The Act does not promote undertaking of studies that should inform planning policy formulation in the country. The Act does not provide clear guidelines on urban renewal, urban conservation and heritage.

The Building Code is prescriptive and necessitates constant policing of development implementation. The Code is based on foreign building technologies and values and ignores cheaper locally available materials and innovation.¹⁷⁷ There is lack of statutory provisions for regularization of unauthorized developments and the Physical Planning Act considers all unapproved developments in urban areas as illegal. The Nairobi County Government introduced a bill in the Nairobi County Assembly whose aim if passed will be to provide for the regularization of unapproved developments and connected purposes.¹⁷⁸

The County Governments Act envisages an integrated development plan to be a 5 year, a 10 year planning framework that integrates economic, physical, social, environmental and spatial planning and a 10 year sectoral planning but lacks clarity. There is no clear process for formulating the various plans stipulated in the County Governments Act and how to synchronize them into the integrated county development plan. Though the new Act envisages public participation, there is no clear framework providing for it. Significantly, the County Governments Act¹⁷⁹ lacks provisions for Metropolitan or Regional Planning.¹⁸⁰

¹⁷⁴ Ibid.

¹⁷⁵ Nairobi City County, Planning, Land and Housing Laws and Regulations, Available at http://www.academia.edu/4909473/Nairobi_City_County_Urban_Panning_Regulations, accessed on 23rd December 2014.

¹⁷⁶ Ibid.

¹⁷⁷ Ibid.

¹⁷⁸ Government Printer, Nairobi County Gazette Supplement No. 1 (Bills No. 1), The Nairobi City County Regularization of Developments Bill, 2015.

¹⁷⁹ Act No. 17 of 2012.

¹⁸⁰ Supra note 320.

The laws regulating building are in some instances in conflict. For example the Public Health Act enjoys more latitude over the other laws. The Act gives the Minister for Health powers to approve by-laws proposed by the local authority. It is important to note that the Act is specific on, *inter alia*, areas such as construction and materials to be used; space around buildings, lighting and ventilation of buildings, and sizes of rooms to be used for human habitation; repairs or demolition of unsafe, dilapidated or dangerous buildings, etc.

h) Political interference

Political interference in the urban development control systems has limited the local Authorities ability to fully regulate and control development. Powerful government officials have been known in the past to enforce approvals which do not meet the stipulated requirements.¹⁸¹

i) Poor enforcement machinery and corruption¹⁸²

The building inspectorate unit in Nairobi is poorly staffed with only 22 planning compliant and enforcement officers¹⁸³ expected to cover an area in excess of 684 square kilometers.¹⁸⁴As a consequence many buildings have been constructed up to completion without the necessary approval. The magnitude of the problem is exemplified by reports that 5 out of every 10 buildings in Nairobi alone do not meet the approval standards.¹⁸⁵ Some buildings in Nairobi just exist because owners have managed to bribe the city officials who in turn grant them occupation certificates for unapproved buildings.¹⁸⁶

The incessant collapse of buildings in Nairobi has been blamed on failure to enforce building laws¹⁸⁷ while the Nairobi County Town Planning and Housing Executive observed that there are adequate laws to govern housing and property development but the challenge was in enforcing them.¹⁸⁸

¹⁸¹ Supra note 37.

¹⁸² See Hypothesis statement, chapter 1, 1.3 (iii).

¹⁸³ Tom Odongo, Nairobi County Housing Executive officer quoted in the Standard, Thursday 29th January 2015 at page 9.

¹⁸⁴ <http://www.standardmedia.co.ke/archiveprint.php?id=2000016055&cid=>. Accessed on 1.1.2015

¹⁸⁵ The County Weekly, May 5th to 11th 2012, page 8, quoting Mr. Steve Oundo, Chairman, Architectural Society of Kenya.

¹⁸⁶ Ibid.

¹⁸⁷ Engineer Muchemi quoted in the Daily Nation, 2nd December 2015 at page 15.

¹⁸⁸ Tom Odongo quoted in the Daily Nation, 2nd December 2015 at page 15.

j) High professional fees

High professional fees charged by various professionals like planners, Architects, land Surveyors and Engineers have been identified as a serious hindrance to development within the legal framework in Kenya. These have discouraged developers from engaging professionals in making building plans, thus leaving room for quacks to ruin the built environment. In Kenya, the effect of this situation is manifested in incessant collapse of buildings especially in the urban areas.¹⁸⁹

k) Lack of awareness of the existence of urban development and planning regulations.

In examining the degree of compliance with the required regulations, the extent to which people are aware of the existence of these regulations is important because it partly determines the extent to which the public will comply with the regulations, A large portion of people in the urban areas are not aware of the regulations.¹⁹⁰ The level of awareness of planning law and development control initiatives is low.¹⁹¹

The large number of unapproved buildings in Nairobi and the haphazard manner in which developments have taken place is a confirmation of the level of public awareness and understanding of the legal requirements governing urban development.¹⁹² Concerned about the complexity of the legal requirements and procedures for obtaining approvals, the Nairobi City Planning Department published two simplified documents explaining the necessary steps in a less complex language.¹⁹³

3.2 Consequences of Non-Adherence to Development control instruments

Article 42 of the Constitution of Kenya 2010 provides that every person has a right to a clean and a healthy environment including the right to have the environment protected for the benefit of present and future generations. If there is no development control, a right to a clean and healthy environment as recognized and protected under the constitution is derogated.¹⁹⁴

¹⁸⁹Supra note 243 at page 136.

¹⁹⁰ Supra note 245.

¹⁹¹ Ibid.

¹⁹²Daily Nation, Thursday January 15th 2015, Daily Living at page 2.

¹⁹³City Council of Nairobi, Department of City Planning, A guide to Nairobi City Development Ordinances and Zones and City Planning Department Development Applications Awareness Guide (January 2010).

¹⁹⁴ Supra note 250 at page 136.

The failure to ensure proper development control process in Kenya has led the rise in disasters such as collapsing of buildings and its attendant losses.¹⁹⁵ More than 35 buildings have collapsed in Kenya in the last five years burying at least 350 people with them and injuring hundreds of people.¹⁹⁶ Three out of every four buildings in Nairobi are said to be likely to sustain serious damage in case of an earth quake.¹⁹⁷ The presence of the National Construction Authority, which has been mandated to oversee the construction industry, is yet to be felt by a sector that has been proliferated by rogue contractors who use short cuts to save on costs.¹⁹⁸ The urban scene in Kenya has in the recent past witnessed disasters as outlined below:-

NO.	DISASTER	PROBLEM
1.	In May 1996, 35 people were killed when a Nairobi Super Market collapsed during a heavy downpour.	The Architectural Association of Kenya blamed the incidence on failure by the authorities to condemn the aged building. ¹⁹⁹
2.	In October 2001, a building under construction collapsed at Kiambu killing 7 people and injuring many others.	Experts blamed the accident on poor construction standards. ²⁰⁰
3.	The planning department at the city council of Nairobi was extremely damaged in an overnight fire in March 2004. Efforts to extinguish the fire were hampered by the absence of fire hydrants in the vicinity.	A survey later revealed that there were no fire hydrants anywhere in the city's central business district. ²⁰¹

¹⁹⁵Kioko Jackson Musyoka, Causes of building failures in Africa: A case study on collapsing structures in Kenya, IOSR Journal of Mechanical and Civil Engineering, Volume 11, Issue 3 (May-June 2014) pages 9-10, Available at www.iosrjournals.org, accessed on 23rd December 2014.

¹⁹⁶The Standard, January 6th 2015 at page 10.

¹⁹⁷ Ibid.

¹⁹⁸ Ibid.

¹⁹⁹ Supra note 338.

²⁰⁰ Daily Nation Wednesday October 21st 2001 at page 2.

²⁰¹ Ibid.

4.	In April 2009, a building under construction collapsed in Majengo, Mombasa, killing 2 people and injuring tens of others,	The incident that was blamed by experts of poor building standards and non-adherence to the building regulations. ²⁰²
5.	In June 2009, another building collapsed in Kisii killing 1 person.	It was alleged that the building was being constructed on a wet land. ²⁰³
6.	In October 2009, a building collapsed in Nairobi killing 6 and injuring 13.	Experts blamed the accident on poor construction. ²⁰⁴
7.	In May 2011, a building under construction collapsed at Embakasi area of Nairobi killing four people and 6 others.	Following this incidence, the Nairobi City Planning department resolved to commence an exercise aimed at marking unapproved buildings. The then area Member of Parliament marshaled hundreds of people to block the exercise. ²⁰⁵
8	In June 2011, a six-story building under construction in Kenya's capital collapsed killing at least two people and leaving 14 missing.	An official with the Architectural Association of Kenya toured the site of the collapsed building and said it was being constructed illegally because it didn't follow standards. ²⁰⁶

²⁰²Daily Nation April 10th 2009 at page 2.

²⁰³Sunday Nation, June 7th 2009 at page 2.

²⁰⁴Tuesday October 20th 2009, The Gaea Times, news.gaeatimes.com, accessed on 3rd June 2014.

²⁰⁵ The Standard May 12th 2011 at page 12.

²⁰⁶The Standard, Saturday July 21, 2012 at page 6.

9.	In 2011, a building which was under construction in Luanda, Vihinga County also collapsed.	The collapse of the building was attributed to the revival of construction of a building which had stalled and exposed for many years. ²⁰⁷
10.	On 4 th April 2012, 9 people were killed in Mathare 4A when boulders flattened tin shacks after a heavy downpour.	The un approved structures had been dangerously erected at Mathare Valley contrary to building regulations. ²⁰⁸
11.	In June 2012, a building collapsed in Mlolongo killing 8 people and injuring many others.	The incident was blamed on poor building standards. ²⁰⁹
12.	In January 2013, a building under construction in the central business district in Nairobi collapsed killing at least 11 people and injuring many others.	The incident was also blamed on poor building standards. ²¹⁰
13.	In 2011, many building were demolished at Syokimau on grounds that they had been constructed on land owned by Kenya Airports Authority.	Some of the developments had been approved by the relevant authorities notwithstanding the fact that they were dangerously near the airport.
14.	In December 2014, a building collapsed at Makongeni in Nairobi killing 7 people.	The incidence was blamed on poor building standards. ²¹¹

²⁰⁷Supra note 277.

²⁰⁸Daily Nation 5th April 2012 at page 4.

²⁰⁹Daily Nation 11th June 2012 at page 2.

²¹⁰ Ibid.

²¹¹Daily Nation, 2nd January 2015 at page 15.

15.	In December 2014, tenants in building at Baba Dogo in Nairobi were forced to vacate the building after the Nairobi County government earmarked it for demolition after the building was found to be structurally unsafe. ²¹² Several other buildings were also found to be structurally unsafe in Zimmerman in Nairobi in a survey conducted by the Nairobi County. ²¹³	The building inspectorate department has a duty to ensure that un approved building are not constructed at all and that those that are approved are constructed strictly in accordance with the required standard.
16.	On January 4 th 2015 a building collapsed at Huruma, Nairobi, killing three people and injuring twenty eight others. ²¹⁴	It was reported that the building had approval for construction up to fourth floor but the owner decided to add three more floors. ²¹⁵ The Nairobi County official in charge of planning said the upper floors were built in quick succession putting pressure on the lower floors. ²¹⁶
17.	Between 2009 and January 2015, a total of 34 incidences of buildings collapsing in various parts of Kenya were reported leaving a total of 99 persons dead and 346 others seriously injured. ²¹⁷	

²¹²Daily Nation, Wednesday 24thDecember 2014 at page 56.

²¹³ Ibid.

²¹⁴Ibid at page 11.

²¹⁵ Ibid.

²¹⁶ Ibid.

²¹⁷The Standard, Tuesday, January 2015 at page 10.

3.3 Problems and implications of Urbanization

Many cities in the world just grew organically and did not plan for the number of citizens who would depend on the city as a place for trade, jobs, education, transport, healthcare, residence and specialized services.²¹⁸ Furthermore, former master plans focused more on engineering streets, connections and highways, than a vision directed towards enhancing a neighborhood's quality of life.²¹⁹ Exceptions can be found in cities that were designed to provide a full range of services for a large population, such as Barcelona or Berlin (designed in the 19th century). These cities envisage offering a centre, complete with services, universities, commercial and public spaces and recreational centres for a population to live and work.²²⁰ In contrast, in Kenya, urbanization is a phenomenon that is associated with colonization since the urban centres were created to facilitate the administration and exploitation of the colony.²²¹ In 1970, Kenya had a total population of 11.3 million inhabitants out of which 10 % were living in towns and cities. In 1990, the total population reached 23.4 million out of which 18 % lived in urban areas.²²² In 2008, the total population had reached 38.6 million out of which only 21.5 % lived in towns and cities. As at 2008, the urban population was 8.3 Million and is expected to increase to 13.7 Million in 2020. At present, Nairobi has an estimated population of over three million and two hundred thousand (3.2 M) which is expected to double in the next 20 years and be close to 7 Million in 2030.²²³

The population growth has been witnessed in the entire major urban centres in Kenya.²²⁴ The unprecedented urban growth has contributed to a myriad of

²¹⁸United Cities and Local Governments; (2010) Policy Paper on Urban Strategic Planning: Local Leaders preparing for the future of our Cities. Cities without slums, Barcelona.

²¹⁹Ibid.

²²⁰Ibid.

²²¹Gichohi D. N., Informal Land and Housing Development in Kenya: the Dilemma, a thesis submitted in partial fulfillment of the requirements for the award of Masters of Science in urban Studies, School of Planning, Oxford Polytechnic, September 1988

²²²Rakodi, C. (1997). "The Urban Challenge in Africa: Growth and Management of its Large Cities". United Nations University Press, Tokyo, <http://www.unu.edu/unupress/unupbooks/uu26ue/uu26ue00.htm>. (Accessed on 29 November 2008).

²²³ Ibid

²²⁴Government of Kenya, Office of the Deputy Prime Minister and Ministry of Local Government Department of Urban Development (DUD) Concept Paper for the preparation of a National Urban Development Policy (NUDP) 2008.

problems. Some of the main problems include noise and air pollution,²²⁵ water pollution,²²⁶ inadequate sanitation facilities,²²⁷ poor liquid and solid waste disposal management,²²⁸ poor urban management capacities, the growth of slums and unauthorized and uncontrolled developments, environmental degradation, poor traffic management, congestion and communication systems, unemployment, delinquency, crime, inadequacy of clean water, inadequate drainage and sanitation, ill managed informal trading activities, poor location of industries, residential and commercial facilities,²²⁹ increase in the demand for more urban land and drastic land use changes, inadequate shelter, infrastructure, social facilities, pressure on the existing infrastructure, housing and social amenities.²³⁰ Some of these challenges are discussed in detail below.

3.3.1 Air Pollution.

Motor vehicle traffic is an important source of harmful emissions of particulate pollution in cities of the developing world, where economic growth, coupled with a lack of effective transport and land use planning is resulting in increasing vehicle ownership and traffic congestion. These factors combine to create air pollution hotspots in urban areas.²³¹ Urban growth is expected to continue at a rapid pace in the developing world, particularly in sub-Saharan Africa as rural populations continue to migrate to cities in search of employment and expectations of better living conditions. If nothing is done to reduce emissions and to better plan for urbanization, this trend can be expected to further exacerbate already serious air quality problems in sub-Saharan African cities as well as the health impacts that accompany them. Fine particulate matter (PM_{2.5}), generated by fuel combustion (e.g., in motor vehicles)

²²⁵Obudho, R. A;(1993a) The Role of small and intermediate urban centres in economic recovery and regional development in Kenya. Paper presented to the Research Workshop on the Role of Small urban Centres n Economic Recovery and Regional Development in Africa, 1-7th December 1993, Nyeri, Kenya.

²²⁶Government Printer(1986), Economic Management for Renewed Growth, Sessional paper no. 1, Government of Kenya.

²²⁷WafulaNabutola, Financing Urban Infrastructure Development and maintenance with particular reference to Nairobi,Kenya. <http://www.fig.net>. Accessed on 25th September 2013.

²²⁸Syagga, P.(1992), 'Problems of solid waste management in urban Residential areas in Kenya.' In the proceedings of African Research network for urban Management (ARNUM) Workshop: Urban Management in Kenya, (ed J. Malombe) University of Nairobi.

²²⁹WinnieMitullah,(2003), The case of Nairobi, Nairobi Habitat Report.

²³⁰Kimani M. and Musungu T.,*Reforming and Restructuring Planning and Building Laws and Regulations in Kenya for Sustainable Urban Development*, 46th ISOCARP Congress 2010

²³¹United Nations, Department of Economic and Social Affairs. World Urbanization Prospects: The 2009 Revision. New York: United Nations; 2010.

has been linked to a wide range of health effects, including more than 800,000 deaths in cities around the world.²³² However, little information exists on levels of particulate air pollutants currently experienced by urban residents in Africa²³³ This data gap hinders health impact assessments, the development of cost-effective strategies to reduce the health burden due to outdoor air pollution and the ability to influence urban transportation and planning policies in relation to air quality and health.

Nairobi, Kenya is in many ways typical of the fast growing cities of sub-Saharan Africa. This growth, combined with a lack of investment in public transport and slow rate of urban road infrastructure has resulted in increasing road deterioration, numbers of motor vehicles and congestion.²³⁴ Spatially, the growth is taking the shape of urban sprawl which, along with growing urban air pollution exacerbates a number of other health risks. Commercial and industrial activities remain concentrated in a central area where traffic congestion has become the norm. In an attempt to alleviate congestion, large-scale road infrastructure projects are currently underway in and around Nairobi and others are being planned. Considerations for long-term improvements in air quality and health must be taken into account as these projects are planned and implemented. Thus, the results of this study come at a crucial time.

Increasing road congestion, along with a high prevalence of old, poorly-maintained vehicles and of low quality fuels, contributes to this problem. It is projected the number of vehicles in the Nairobi Metropolitan Area will increase by 148% and that the average speed will decrease from 35km/hr to 11km/hr as congestion increases which makes it reasonable to assume that if nothing is done, urban air quality will worsen.²³⁵

²³²Cohen A, et al, Comparative Quantification of Health Risks: Global and Regional Burden of Disease Attributable to Selected Major Risk Factors, Volume 1. Geneva, Switzerland: World Health Organization; 2004. pp. 1353–1434.

²³³Gatari MJ, et al , Elemental composition of tropospheric aerosols in Hanoi, Vietnam and Nairobi, Kenya. *Science of the Total Environment*. 2005;341:241–249. [[PubMed](#)]

²³⁴Ministry of Transport and Communications. Recommendations on Integrated National Transport Policy: Moving a Working Nation. Nairobi: Government of Kenya; 2004.

²³⁵Japanese International Cooperation Agency (JICA) Final Report. Tokyo: JICA; 2006. The Study on a Master Plan for Urban Transport in the Nairobi Metropolitan Area in the Republic of Kenya.

The findings of a recent study on air pollution levels in Nairobi are shocking.²³⁶ The study shows contamination scale of air inhaled by city residents is five times higher than the recommended international levels. Experts attribute the dangerously high toxic levels to extreme concentration of diesel-consuming vehicles and high-rise buildings that hold the polluted air while blocking out cleaner air.²³⁷ But with excessive air pollution usually associated with myriad health conditions, this is an environmental hazard we cannot afford to harbour anymore.

3.3.2. Water

Water in the context of urbanization is gaining increasing attention. One of the largest challenges of rapid urbanization, particularly in developing countries, is constructing and maintaining the necessary infrastructure to meet essential needs such as sanitation. City infrastructure has often not kept pace with the massive urban growth, leaving many people, above all those in informal settlements and slums without adequate access to drinking water and sanitation.²³⁸ This challenge is particularly poignant in slums, which can arise when municipalities fail to plan for rapid rural-to-urban migration. Governments often classify slums as illegal settlements due to their informal nature, and deny any government accountability for sanitation services. Kibera, Kenya - Africa's largest slum - is such a case.

Nairobi faces severe water scarcity. Water demand exceeds water supply by about 200,000 cubic meters per day. Up to 50% of drinking water is lost due to insufficient, out-dated infrastructure and illegal connections.²³⁹ Only 50% of households have access to piped water. Nairobi still has inadequate capacity to manage the increasing demand for water, especially in Nairobi's informal settlements where water is sold at water kiosks or by vendors, often at a higher price than piped water.²⁴⁰

²³⁶ The Standard, 20th March 2012.

²³⁷ Ibid.

²³⁸ Katalina Engel, (August 2011) , Big Cities, Big Water, Big Challenges, Water in an Urbanizing World. WWF Germany, Berlin,

²³⁹ Ibid at page 36.

²⁴⁰ Ibid at page 36.

Old infrastructure causes leaks and losses. In 2003, about 50% of drinking water from the Aberdare range did not reach the city.²⁴¹ Currently only 50% of Nairobi's inhabitants have access to piped water and 40% receive water on a 24 hour basis.²⁴²

Over the last decade, water legislation and management have improved significantly in Kenya. The water Act 2002 provides a comprehensive framework of regulations, institutions and management bodies for water supply and wastewater treatment National, regional, and local boards have been established for service, management and supervision. However, although the water sector reform puts new management rules in place that provides a legislative framework for sustainable approaches, implementation challenges still persist in Nairobi and other urban areas. Unplanned construction, limited resources, high costs of operation and maintenance, local political interference, sewage used by farmers with subsequent health implications, uncontrolled industrial waste discharge further endanger water security in urban areas in Kenya.²⁴³

3.3.3. Unplanned and Unregulated Growth and Expansion of the Cities in Kenya

In many developing countries, effective and efficient land use planning and management is not well established.²⁴⁴ The most patent manifestation of this is the chaotic state of land use activities in the cities.²⁴⁵ The physical, economic and social conditions of many African cities have been well documented.²⁴⁶ Rapid rates of urbanization have resulted in unplanned and unregulated growth on land. Significantly, the acquisition and development of land is associated with economic growth. The development control process is subject to plans, regulations and laws. The manifestation of ineffectiveness of the control process in cities derives to a large extent from the planning, the regulatory and administrative frameworks within which physical development and environmental sanity takes place.²⁴⁷ Although

²⁴¹ Dudley N., Salton S., (2003), *Running Pure: The importance of forest protected areas to drinking water.* World Bank/WWF Alliance for forest Conservation and Sustainable Use.

²⁴² *Supra* note 277 at page 37.

²⁴³ Muiruri J., Kaseve C., (2008) *Strategic Guidelines for Improving Water and Sanitation to the Urban Poor.* Paper Presented at the Seminar on " Urban Development In Kenya: Towards Inclusive Cities." Nairobi, Kenya, November 25, 2008.

²⁴⁴ Abubakari A., Romanus D., (2011) *Urbanization and the Challenges of Development Controls in Ghana: A case Study of Wa Township,* *Journal of Sustainable Development in Africa,* Volume 13, No. 7. At page 1.

²⁴⁵ *Ibid* at page 1.

²⁴⁶ UN-HABITAT (2008), "The State of African Cities, 2008," Nairobi, Kenya.

²⁴⁷ Owei O., Obinna E., (2010), "The Challenges of Sustainable Land Use Planning in Nigerian Cities: Case of Port Harcourt," 46th ISOCARP Congress 2010.

conscious efforts at ensuring harmonious spatial development and environmental sanity in Kenya's urban areas date back to the colonial era, there is not much to physically show for the efforts made. This has resulted from the poor enforcement of the existing legislations and institutions set up to control development in urban areas in Kenya.

Urbanization in Kenya has not been accompanied by the necessary and proper use of laws to control developments. Of particular concern is the construction of unplanned buildings or illegal extensions that have been added to the already approved buildings.²⁴⁸ In terms of planning, only 30% of urban towns in Kenya are planned.²⁴⁹ It is currently estimated that about 50 percent of Kenya's urban population live in unplanned (and therefore unapproved) settlements lacking in basic infrastructure provision and services.

In Nairobi, the period after independence witnessed a rapid transformation occasioned by unprecedented urban growth. This growth emanated from poor regional development policies adopted by the post independent state which encouraged imbalanced developments consequently promoting rural-urban migration.²⁵⁰ This has accentuated influx into Nairobi resulting into an increased demand for residential houses and business opportunities among others. This boom has been accommodated through various *ad hoc* measures e.g. densification without proper infrastructural activities, proliferation and colonization of way-leaves and open spaces by informal sector traders and informal settlement dwellers, traffic congestions and snarl ups, poor waste management system which all have a negative impact on the environment and some such as traffic congestion and other land uses contribute significantly to global warming and ground level ozone.²⁵¹

3.3.4.Failure to adhere to Building Regulations

Building regulations and by-laws provide the mandatory techno-legal framework for regulating building activity from planning, design to completion of construction.²⁵² These by-laws and development control rules govern the following aspects, namely; building

²⁴⁸Patrick Odongo, Director of City Planning quoted in the Standard Newspaper, 7th April 2010.

²⁴⁹Kenya Country Report to 4th World Urban Forum, 2008.

²⁵⁰ Ibid

²⁵¹Odera K. (1988), Some Implications of Redevelopment on the CBD, Proceedings of 1st Conference on Urban Growth and Spatial Planning in Nairobi.

²⁵²T.N.Boob, Dr. Y.R.M. Rao, Violation of Building Bye-Laws and Development Control Rules: A Case Study *IOSR Journal of Mechanical and Civil Engineering (IOSRJMCCE) ISSN : 2278-1684 Volume 2, Issue 4 (Sep-Oct 2012), PP 48-59* www.iosrjournals.org, Accessed on 29th November 2014.

permission, zoning sub-division of land, land use, open spaces, built-up area and height limitation, floor space index, lighting and ventilation, structural design materials and methods of construction etc.²⁵³

Due to lack of law enforcement and monitoring, many developers in urban areas violate the plans during the construction stage of their buildings and structures.²⁵⁴ The problems arise when the standard rules and regulations intended for guiding the growth of a town, to ensure adequate public services, health and safety measures are being violated on a large scale. Success of any law depends on its proper implementation.²⁵⁵ Urban developers need to recognize infringement of the law and disregard of city's town planning and building control regulations often lead to depletion of limited resources to provide basic services to the areas.²⁵⁶ Any construction which happens without following proper town planning processes will have a negative impact on the provision of, sewerage, water and electricity supply to residents in the neighboring areas.²⁵⁷

Population growth and rising immigration from the rural areas, combined with increased unemployment, means that most people looking for housing and shelter in these urban centres are poor and cannot afford the cost of building materials prescribed under the building code to conform to building bye-laws. Most people end up in established informal settlement areas. The density in these settlements averages 750 persons per hectare, compared with 50 to 180 persons in the middle- and upper-income areas.²⁵⁸ Such settlements do not meet the necessary building standards and cannot be approved by the relevant authorities, hence the term illegal settlements.

The Building Code defines the quality of construction, types of materials including sizes of spaces in a building.¹³⁴ Developers find the Building Code to be too restrictive because of the following reasons; (i) it increases the cost of housing by specifying materials

²⁵³ Ibid.

²⁵⁴ Ibid.

²⁵⁵ Eran Ben Joseph, "Innovating regulations in Urban Planning and development", Journal of Urban Planning and Development ASCE/December 2005/Pg. 201. www.bmtpc.org, Accessed on 1.10.2013.

²⁵⁶ Ibid.

²⁵⁷ Md. Akter Mahmud, "Corruption in Plan permission process in RAJUK A study of violations and proposals. August 2007, www.tibangladesh.org www.joburg.org.za. Accessed on 1.10.2013.

²⁵⁸ Ibid.

and building techniques that must be used in the construction. (ii) in most cases, the requirements exceed what is necessary to ensure that buildings are safely occupied (ii) specification of materials to be used denies developers the opportunity to use locally available materials which are cheaper. (iv) the bureaucratic red tape and endless petty regulations frustrate and impede construction (v) the standards stipulated in building codes are costly and negatively affect the provision of low cost housing for the target group.(vi) the building code defines the quality of construction, sizes of spaces and types of materials including standards to be maintained in a building.¹³⁵ Because of the above restrictions, many developers in urban areas avoid complying with the provisions of the Building Code and the end result is the construction of substandard buildings.²⁵⁹ The current Building Code and bye-laws have been an impediment to delivery of housing and the entire building and construction sector.²⁶⁰

As discussed earlier in this chapter, cases of buildings collapsing in urban areas in Kenya are common and every time a building collapses, various reasons are offered ranging from substandard construction, lack of supervision by local authorities, corruption and impunity.

Physical development planning is not a prerequisite of any building construction in urban areas in Kenya. This has led to location of developments in areas that are poorly served with infrastructural services and with incompatible and conflicting developments.

With the continued high rate of urbanization, the County governments have duty to use planning controls to ensure that development is allowed only where it is needed, while ensuring that the character and amenity of the areas are not adversely affected. The planning system plays an important role in modern society. It is meant to protect amenity and the environment in the public interest. How we live our lives is shaped by where we live.²⁶¹ Planning regulations therefore have to cover many different situations that influence the shape of lives of every city resident and help protect the urban environment.²⁶²

²⁵⁹ Ibid.

²⁶⁰ Ibid.

²⁶¹ Ibid.

²⁶² Ibid page 64.

3.3.5. Environmental Pollution and Degradation

Pollution and degradation of the environment is one of the most prominent challenges of urbanization. Urbanization leads to a rise in pollution levels. The increased number of vehicles on the roads and industrial waste are the main source of air and water pollution.²⁶³ Pollution problems in urban areas are due to lack of appropriate planning, inadequate political will and poor urban governance, weak enforcement of existing legislation as well as absence of economic and fiscal incentives to promote good practices.²⁶⁴ Lack of adequate sanitation facilities in many urban areas in Kenya and poor sewage disposal and refuse collection have contributed to water pollution and environmental degradation. In many urban areas in Kenya, sanitation has not received the priority it deserves. Before the promulgation of the Constitution of Kenya 2010 which established 47 counties, Kenya had 172 of local authorities out of which only 32 had sewerage systems.²⁶⁵ Pollution problems in Kenya are mainly due to lack of appropriate planning; inadequate, political will, poor urban governance, weak enforcement of existing legislation,²⁶⁶ public ignorance on the importance of safeguarding the environment, illegal disposal of waste, failure by industries to adhere to the polluter pay principle and lack of adequate government support to conserve the environment. The use of open dump sites for solid waste disposal makes environmental pollution highly probable.

Since no section of the country's urban environment is immune to environmental effects, there is urgent need to seek workable solutions by the application of planning, economic, legal, institutional and educational tools as have been suggested in the final chapter of this work. It is hoped that if these tools are properly adopted it will result in the enculturation of the right environmental management practices that would prevent the further deterioration of our physical urban environment; hence the possibility of achieving sustainable development in urban areas in Kenya.

²⁶³Bondi D. Ogolla and J. B. Ojwang; *International Encyclopaedia of Environmental laws in Kenya*, Kenya section, Kluwer Law international 1999 P. 20.

²⁶⁴Syagga, P. (1992). 'Problems of Solid Waste Management in Urban Residential Areas in Kenya' In the proceedings of Africa Research Network for Urban Management (ARNUM) Workshop: Urban Management in Kenya (ed J. Malombe) University of Nairobi.

²⁶⁵ Ibid.

²⁶⁶ Ibid.

3.3.6. Informal Settlements

A high proportion of urban poor in Kenya live in unplanned informal settlements in the urban centres.²⁶⁷ Kenya is facing an increasing growth of informal settlements in her urban centres. As rapid urbanization takes its toll, so has the development and growth of slums.²⁶⁸ More than 34% of Kenya's total population lives in urban areas and of this 71% is confined in informal settlements.²⁶⁹ In Nairobi, three out of every five or 60 percent of the population live in informal settlements, occupying only 5 per cent of the residential land.²⁷⁰ This number will continue to increase unless a serious and concerted action by all relevant stakeholders is undertaken.

Kenya's annual informal settlements growth rate of 5%, is the highest in the world and it is likely to double in the next 30 years if positive intervention measures are not put in place.²⁷¹ These unprecedented rates of urbanization can be linked to massive migratory massive migratory movements as well as natural growth, challenging urban planning and thereby causing environmental problems with far reaching effects. The low quality housing in the slums and general lack of basic infrastructure especially sanitation, drainage, access to energy and clean water supply result in poor social and environmental conditions.²⁷² The situation is not helped by lack of supporting policies for effective urban planning improvement.

Slums in Nairobi have existed since the cities inception, but the government has failed to respond to the flight of slums even after being classified as illegal.²⁷³ Informal settlements in Kenya exist in all major towns. They mostly comprise of dwellings put up on Government or private land without authority of the owner of the land, usually without a formal design and without conforming to any specifications as to laid down rules and regulations, planning

²⁶⁷Urban Poverty and Vulnerability In Kenya Background analysis for the preparation of an Oxfam GB Urban Programme focused on Nairobi, September 2009 http://www.irinnews.org/pdf/urban_poverty_and_vulnerability_in_kenya.pdf accessed on 29.9.2013.

²⁶⁸Mutisya Emmanuel, Masaru Yarime, (2011), Understanding the Grassroots Dynamics of Slums in Nairobi: The Dilemma of Kibera Informal Settlements, International Transaction Journal of Engineering, Management, & Applied Sciences & Technologies, Volume 2 No. 2, pp. 197-213, Online Available at <http://TuEngr.com/VO2/197-213.pdf>, Accessed on 2.1.2015.

²⁶⁹ Ibid.

²⁷⁰ Ibid.

²⁷¹UNDP (2007). Human Development Report 2007/2008 Fighting Climate Change: Human Security in a Divided World. United Nations Development Programme: New York.

²⁷²Beatly T. (2000), Green Urbanism. Island: Washington.

²⁷³Mitullah W. (2003), "Understanding Slums: Case Studies for the Global Report on Human Settlements, 2003-The Case of Nairobi, Kenya."

standards, generally accepted methods of workmanship, construction and are more often than not temporary.²⁷⁴ These settlements are characterized by lack of access to public utilities like electricity, clean running piped water, sewerage and drainage systems. Social services (schools, hospitals, entertainment, churches, mosques, markets) and other public amenities like access roads also lack.²⁷⁵

The growth and expansion of slums is alarming and needs more attention. The inability of city authorities to plan effectively as well as enforce urban planning and land laws have given rise to haphazard development of settlements and proliferation of slums.²⁷⁶ Sustainable development being a major component of urban planning calls on planners to view slums as an aspect of urban development. Therefore the question of slums is not marginal to urban development but is at its very heart.²⁷⁷ The study recommends that an urban planning framework for slums be incorporated in urban planning. This should take into consideration the existing nature of the slums and provide for measures that are tailored for the slums.

Informal settlements in Nairobi are the consequences of both explicit government policy and decades of official indifference.²⁷⁸ In particular informal settlements were excluded from city authority planning and budgeting processes.²⁷⁹ Lack of good governance and proper leadership in urban areas has worsened the situation.²⁸⁰

The largest slum settlement in Africa, Kibera is located in Nairobi and occupies over 2.5 square kilometers and is home to close to 1,000,000 people.²⁸¹ There is an urgent need for a development plan for slum areas and gradual implementation of services – settlements are planned and surveyed, lots allocated and occupied, and infrastructure gradually

²⁷⁴UN HABITAT Participatory Slum Upgrading Programme (PSUP) Financed by the European Commission http://www.urbangateway.org/sites/default/ugfiles/participatory_slum_upgrading_programme_psup_mtwapa_project_concept_note_0.pdf Accessed on 29.9.2013.

²⁷⁵ Ibid.

²⁷⁶David Mathenge, The Challenges of Infrastructure Planning In Urban Slums: Case Study of Kosovo, Mathare 4b, And Gitathuru Slums In Mathare Valley, A Thesis submitted in partial fulfilment of the requirements for the degree of Masters of Arts in Urban and Regional Planning, School of Built Environment, University of Nairobi, June 2013.

²⁷⁷ Ibid.

²⁷⁸Supra note 360 at page 201.

²⁷⁹ Ibid.

²⁸⁰ Ibid.

²⁸¹ Ibid at page 201.

implemented.²⁸² There is also a need to create serviced sites in large schemes for resettlement of urban squatters, usually in peripheral land in city outskirts and with basic starter housing units²⁸³ and an urgent comprehensive upgrading of existing settlements involving different types of infrastructure according to predefined area plan and redevelopment of degraded existing structures.²⁸⁴ This concept referred to as slum up-grading has successfully been undertaken in South Africa and for this reason, Johannesburg, South Africa, has been discussed below with a view to learning useful lessons which can be applied in Kenya.

3.4 Lessons from Johannesburg, South Africa: Formalizing Informal Settlements in Urban Areas

The Constitution of South Africa sets out a broad framework for local government. In accordance with this framework the objectives of local government are to provide democratic and accountable government for local communities, ensure the provision of services to the community in a sustainable manner for the benefit of present and future generations, promote social and economic development, promote a safe and healthy environment and encourage the involvement of communities and community based organizations in the matters of local government.²⁸⁵

In addition to providing traditional services such as water and sanitation, municipalities have an expanded role to play. They must also initiate, plan, lead and manage development. The developmental role of municipalities is described in the Municipal Systems Act (Act 32 of 2000) of South Africa. The Systems Act has resulted in the development of the Integrated Development Plan (IDP) as a key strategic planning document. The IDP guides and informs all planning and infrastructure development activities.²⁸⁶ The Division of Revenue Act (DORA) makes provision for assisting municipal (and provincial) governments by transferring

²⁸²Mungai E. N. (2011), The challenges of Housing Development for Low income market, Management Research Project submitted in partial fulfilment for the requirements of the degree of Bachelor of Commerce (Microfinance and Business Administration majors) Strathmore University, 4.1.2011

²⁸³ Ibid

²⁸⁴ Ibid

²⁸⁵Luther Williamson and Willie Nel Johannesburg City Parks expanded public works programme policy framework and implementation roll out plan (Revised 12 Jan 2005)http://www.jhbcityparks.com/pdfs/epwp/epwp_policy.pdf, Accessed on 23.1.2015.

²⁸⁶ Ibid.

funds to them for specific purposes. This can include funding for construction, maintenance or rehabilitation of municipal infrastructure and for developing and improving municipal systems. Funding is provided to build the capacity of municipalities to perform the functions assigned to them under the law.²⁸⁷

In 2011, the City of Johannesburg lodged a policy document entitled 'Consolidated Town Planning Scheme, 2011.'²⁸⁸ The Town Planning Scheme applies to all properties within the municipal boundaries of the City of Johannesburg, as determined by the Municipal Demarcation Board. The purpose of a town planning scheme is to *inter alia* guarantee the right to sustainable cities, (understood as the right to urban land, housing, environmental management, urban infrastructure and service delivery, transportation and public services, to work and leisure for current and future generations; democratic administration by means of participation of both the individual property owner and representative associations of the various segments of the community in the formulation, execution and monitoring of urban development projects, plans and programs; cooperation between governments, private initiative and other sectors of society in the urbanization process, planning and sustainable development of the Municipality, correcting the distortions of historical planning systems and their negative effects on the environment without negating the complexities of the City; management of land use, in order to enable and facilitate efficient, effective and compatible urban development, effective environmental management, simplification of the legislation concerning subdivisions, land use, occupation and building regulations.

In order to deal with the problem of informal urban settlements, the City of Johannesburg adopted an "Informal Settlement Formalization and Upgrading Program" in April 2008.²⁸⁹ The regularization approach addresses elements such as legal recognition, land use, lay out plans, building structures, desirable harmonious development of the built environment, provision of services, elimination of dangerous nuisance uses and protection of value of the land.

²⁸⁷ Ibid.

²⁸⁸ Consolidated Town Planning Scheme, 2011, City of Johannesburg Metropolitan Municipality.

²⁸⁹ Development of an approach for the recognition of informal settlements and tenure in South Africa with the potential for regional applicability, City of Johannesburg Approach, December 2009.

At the City of Johannesburg, the responsibility for urban planning rests with the Department of Development Planning and Urban Management. The department is the city's lead department in spatial and settlement transformation. It is the responsibility of the department to ensure that the spatial and other decisions taken will contribute to the best pro-poor outcome for the future of Johannesburg.²⁰⁷The Department also has a significant regulatory responsibility for processing town planning, outdoor advertising and building plan applications, and for attending to the post-decision legal administration of approved development applications to ensure that the City receives the revenue that it requires to deliver services. Its regulatory function extends further to the daily enforcement of town planning and building control bye-laws and regulations to ensure that the rules of development are adhered to. The Department renders an urbanmanagement and service delivery monitoring function, whose primary concern is to ensure the maintenance of acceptable service levels across the City.²⁹⁰

The programs address critical policy areas such as sustainable human settlements; transit oriented development (including non-motorized transport), urban management, energy efficiency in land use and building design, growth management, spatial information maintenance and dissemination and area-based regeneration.²⁹¹The strategic urban planners look to the long term. They are the authors of the City's city-wide, regional and local area spatial policies which will guide urban development and investment over the medium to long term. The land use planners, legal administrators and building control officers operate mainly within a medium-term time horizon and manage the development of the built environment. The Department's urban management function deals with operational issues on a day-to-day basis, coordinating the activities of the City's regions to ensure that town planning and building control laws are enforced. In addition the City's municipal entities address visible service delivery issues such as the repairing of potholes, street lighting and refuse collection.

Daily urban management ensures that the quality of the public environment encourages sustained investment and development in the long term. All of these tasks are underpinned by a world class spatial information system to inform development

²⁹⁰ Ibid.

²⁹¹ Ibid.

decisions and support the City's revenue stream.²⁹²

The City of Johannesburg, in an attempt to give recognition to informal settlements and incorporate them within the legal framework of the City and make residents' full citizens, has developed an innovative and untried approach of rezoning the areas as 'special for transitional residential settlement.'²⁹³ It puts the settlements on a trajectory towards full legalization of tenure rights, while recognizing their occupational rights. It introduces land use management rules for urban governance.²⁹⁴ Most importantly, it is inclusionary and will remove illegality to make residents' legal citizens of the City.²⁹⁵

Some of the key lessons Kenya can borrow from Johannesburg are the need for a pro-poor approach to urban land management and tenure regularization and that while upgrading an informal area with the ultimate aim of making the area an integral part of the city, one needs to apply flexible zoning and land use requirements. Also, the system applied allows an informal area to be recognized and brought into the ambit of the city through urban management and provision of services and facilities.²⁹⁶ More important, Johannesburg has adopted an approach that avoids relocation of informal settlements. Public participation is placed high on the agenda of upgrading through structures such as committees and real responsibilities given to these structures. There is a deliberate recognition of tenure by the municipality and provision of infrastructure services and social services. Local planning offices are maintained within the settlements for ease of service delivery to the residents.²⁹⁷

The policy framework for planning the city of Johannesburg is based on the Constitution of the Republic of South Africa 1996; the Municipal Structures Act 1998 which regulates how local government should work and the Municipal Systems Act 2000 which goes into details describing some of the planning procedures and an emphasis on community participation and the introduction of intergraded development. In view of the need to address racial-spatial segregation and empower formerly disadvantaged populations, there has been a variety of

²⁹²Ibid.

²⁹³Gemey Abrahams, From Land Rights to Property Markets-Lessons Learnt From Providing Support to the City of Johannesburg, page 16. Paper submitted to Urban Landmark Conference, August 2008, Johannesburg, South Africa. Available at https://za.linkedin.com/pub/Tanya-zack/13b_abrahams_pdf. Accessed on 29th September 2014.

²⁹⁴ Ibid page 16.

²⁹⁵ Ibid page 16.

²⁹⁶ Ibid page 15.

²⁹⁷ Ibid page 15.

legislation passed to guide planning and land use practices under local authorities.

The main comprehensive planning instrument decreed by national legislation is the Intergrated Development Planning (IDP) whose framework has largely been informed by the internationally agreed Agenda 21 Policies with stakeholders' participation and multidimensional sustainability as key principles.

In terms of governance, the City of Johannesburg has a long term strategy called Johannesburg 2040 Strategy that recognizes the importance of sound governance practices which supports the City in the attainment of its long term objectives and goals.²⁹⁸ One of the key aims of Johannesburg 2040 Strategy is 'A high performing metropolitan government that pro-actively contributes to and builds a sustainable, socially inclusive, locally integrated and globally competitive Guateng City Region.'²⁹⁹ The said strategy is further supported by the following five points, namely; an active and effective citizen focused Guateng City Region, a responsive, accountable and productive metropolitan government, financially and administratively sustainable and resilient city, meaningful citizen participation and empowerment and guaranteed customer and citizen care and service.³⁰⁰

The governance cluster, through the above five points, envisages a future where the City will focus on driving a caring, responsive, efficient and progressive service delivery and developmental approach.³⁰¹ The cluster has the responsibility of leading and guiding the city in ensuring that at all times, every aspect of the City is well managed and governed through appropriate structures, systems and processes.

3.5 Conclusions

A look at cities, towns and urban centres in Kenya shows that the country is faced with a serious problem of uncontrolled and unplanned growth and development, notwithstanding the existence of urban planning laws, a confirmation that the first hypothesis statement is correct.³⁰²

²⁹⁸City of Johannesburg: 2012/16 Integrated Development Plan (IDP), Page 266, www.joburg.org.za/index.php?option=com_content&task. Official Website of the City of Johannesburg accessed on November 29th 2014

²⁹⁹ Ibid page 266.

³⁰⁰ Ibid page 266.

³⁰¹ Ibid page 266.

³⁰² Supra note 255.

The legal and institutional framework discussed above identifies serious weaknesses and conflict in the existing planning laws and institutions charged with urban planning. It also calls for a dynamic regulation and firm enforcement of planning laws and the need for the public to comply with urban planning laws.³⁰³

Urban planning in Kenya requires the county and national governments to anticipate urban growth rather than simply react to the challenges posed. Urban planning in Kenya should not only be inclusive and pro-poor, but must also find ways to improve the living conditions of slum dwellers and provide adequate alternatives to new slum formation.

In terms of governance, the Urban Areas and Cities Act 2012, enacted to give effect to chapter 11 of the Constitution details rights of citizens as far as governance of their urban areas is concerned. The Act provides for conditions to enable effective participation of citizens in planning such as development of integrated plans, review of performance of management, preparation of budgets and making strategic decisions relating to service delivery.

Urbanization processes will for many years to come continue creating continued pressure on infrastructure and other services as well as degrading environmental conditions. Urban areas are environmental "hot spots", which require special attention not only from a local perspective but also from a global perspective. The overall picture in Nairobi and indeed in all urban areas in Kenya projects a system in crisis. The urban system is not only failing to meet the demands of the rapid population growth, but planning for sustainable development is in jeopardy. Concentration of people and economic activity change environments dramatically.³⁰⁴ Due to the importance of law in planning, the next chapter discusses Urban Planning Law in Kenya and points out that law is an indispensable tool in planning to achieve the needs of the present and future generations.

³⁰³See Hypothesis statements in chapter 1, 1.3 (i), (ii) & (iii).

³⁰⁴ Cliff Hague, (2006) Making Planning Work; A Guide to Approaches and Skills, ITDG Publishing, India.

CHAPTER FOUR

URBAN PLANNING LAW IN KENYA

4.0 Introduction

Urban development and planning laws and regulations as applied in many developing countries of Africa, Asia and Latin America have seemed to fail to provide orderly and sustainable urban development.³⁰⁵ The result is that un-approved buildings, squatter settlements and informal sector developments have continued to predominate in spite of officially approved urban development plans.³⁰⁶ Several factors account for this among them the complicated and inflexible legal and regulatory development control requirements and frameworks for urban development, which in many instances have little practical relevance to the prevailing socio-economic realities of everyday living, and therefore difficult to enforce.³⁰⁷ Cognizant of this situation, the Habitat Agenda has urged countries to review restrictive, exclusionary and costly legal and regulatory processes, planning systems, standards and development regulations; to re-evaluate, and if necessary, periodically adjust planning and building regulatory frameworks, taking into consideration and balancing their human settlements and economic, social and environmental policies.³⁰⁸

A notorious characterization of Kenyan urban centres is their spontaneous growth and haphazard development largely outside the purview of conscious urban planning intervention.³⁰⁹ Lack of clearly-stated policies is another factor that has had a bearing on their growth and development in addition to the absence of urban planning instruments, processes and capacities. In addition the performance of even those urban centres for which a series of plans have been prepared is stifled due to the absence of an integrated urban development policy that will otherwise facilitate the implementation of these plans. After all, the process of urban development in Kenya from its outset was not backed by any robust policy intervention.³¹⁰

³⁰⁵United Nations Centre for Human Settlements (Habitat), habitat@unchs.org, accessed on 1st October 2013.

³⁰⁶ Ibid.

³⁰⁷ Ibid.

³⁰⁸ Ibid.

³⁰⁹ Office of the Deputy Prime Minister and Ministry of Local Government Department of Urban Development, Concept paper for the preparation of a National Urban Development Policy (NUDP) 2008, Printed and Published by the Government Printer Nairobi.

³¹⁰ Ibid.

4.1 The Roots of Modern Planning Law

Modern land use planning is entirely the product of statutory legislation.³¹¹ In the United Kingdom, the common law regulated private rights, but did not recognize supervision of public or governmental interest in the private use of land. Land use regulation was instead the product primarily of tenure and restrictions on use and new buildings were imposed as conditions upon which the land was held from the superior landlord.³¹² A limited extension of that doctrine emerged in the mid-nineteenth century as the break-up of the large estates and the spread of freehold ownership loosened the traditional controls, and made it necessary to allow the enforcement of similar restrictive conditions between the freehold owners of adjacent land.³¹³ The leading case in the development of this doctrine was *Tulk vs. Moxhay*³¹⁴ where the defendant had purchased the open garden of London's Leicester Square with the knowledge of a covenant against development entered into by the former owners, and now asserted a right to build there. They had, after all, no contractual nexus with the original owners who now sought to enforce the covenant. But despite this, the court refused to contemplate that a subsequent purchaser might violate such a condition imposed by a prior vendor, for 'if that were so, it would be impossible for an owner of land to sell part of it without incurring the risk of rendering what he retains worthless' and further the value of the land would be affected by whether there existed an unrestricted right to build.³¹⁵

Thus was born the doctrine of enforceability of restrictive covenants between freehold owners, a device which continues today to provide a powerful means both of regulating development of land upon its subdivision, and also, through a further extension to the doctrine, of exerting continuing control between purchasers of various plots of development schemes.³¹⁶

Also relevant is the common law of nuisance.³¹⁷ The courts came to insist that the full right of enjoyment and exploitation of land which the common law recognized as a benefit of ownership was nonetheless subject to some limitation in order to preserve the enjoyment and

³¹¹ Supra note 35.

³¹² Ibid.

³¹³ Ibid.

³¹⁴{1849} 2 PL. 774, 41 E.R. 1143.

³¹⁵Ibid, Per Lord Cottenham L.C.

³¹⁶Ibid.

³¹⁷Supra note 35.

exploitation rights of adjoining occupiers. Many of the early rulings in nuisance dealt with the everyday problems of an essentially rural society, such as the diversion of streams, failure to repair bridges, the stopping up of way across meadows, interference with markets and fairs and damage caused by pigeons. But by the late eighteenth century an urban element was clearly discernible in cases dealing with adjoining dwellings and industrial nuisance in towns.³¹⁸

Nuisance and common law proved increasingly inadequate to deal with problems of an increasing urban and industrial society, particularly the industrial revolution led to the massive influx of population from the country to the cities.³¹⁹ Some scholars have held the strong view that the blame lies not with the instruments of the common law, but in the failure by the judiciary to develop and adapt to the changing social needs.³²⁰ Further, the law of nuisance offered no means of overcoming established nuisances in order to improve badly polluted and unhealthy urban areas because it was a means of primarily preserving the *status quo* and what would be a nuisance in one place may not necessary be a nuisance in another area.³²¹

New laws were necessary and parliamentary legislation offered the only realistic possibility for reform.³²² This led to the legislation of public health laws in the United Kingdom in the mid-nineteenth century but the most dramatic reform in terms of both effect and purpose was undoubtedly that of the Town and County Planning Act of 1947 which substantially strengthened the control by the state over the use and development of privately owned land and which provided the basic framework through which planning is still undertaken today in the United Kingdom.³²³

The evolution of English planning law is a fabric woven from Parliamentary responses to emerging urban problems since the industrial revolution.³²⁴ Prior to the rapid industrial expansion in cities with its influx of workers and intense concentration of housing and shops near the factories, there was little need for control of development and land use.³²⁵ But the appalling human environment resulting from the unguided meshing of man and machine in

³¹⁸ Ibid.

³¹⁹ Ibid.

³²⁰ Supra note 39.

³²¹ Ibid.

³²² Supra note 41.

³²³ Ibid.

³²⁴ Supra note 41.

³²⁵ Ibid.

the Industrial Revolution provoked the remedial health and housing laws that restrained the right of landowners to use land as they pleased. The cholera epidemic of 1831-33 heightened concerns with disease in cities and led to legislation³²⁶ and bylaws regulating housing, water, drainage and privies. The Artisans' and Labourers' Dwelling Acts of 1868, which dealt with in-sanitary housing and other acts were consolidated in 1875 in the Public Health Act which regulated sewerage, the size of rooms, space about houses, including rear open space, and street width and led to the beginning of slum clearance. The builders took the numerous minimum standards as their norm and the result was the nearly identical row houses and grid street patterns that are familiar in some areas of England.³²⁷

The first Act dealing with planning was the 1909 Housing, Town Planning Act which empowered local authorities to prepare planning schemes for lands being developed or likely to be developed by private builders.³²⁸ The statute gave power to the towns to plan not only to secure proper sanitary conditions but for amenity and convenience as well. Unlike earlier health bye-laws, the planning law allowed regulation of use and appearance, as well as the creation of zones separating types of buildings such as factories and houses, or requiring permission for certain development.³²⁹ In 1909 planning schemes were made compulsory for boroughs and urban districts. The law provided that unless a developer obtained an interim development control permit, his building could be removed without compensation if it conflicted with the scheme finally approved.³³⁰ It was out of these development permits that the current English system of planning permission grew.

In 1932, the Town and County Planning Act repealed all former planning laws, and re-enacted and consolidated them. In 1947, the said Act and all related planning legislations were replaced with the Town and Country Planning Act, 1947 which stirs the souls of traditional planning professionals.³³¹ This act was broad and comprehensive unlike the previous Acts. Other notable amendments were enacted in 1962 which further consolidated all planning laws and 1968 which sought to simplify the planning process, increase the speed

³²⁶Public Health Act of 1848.

³²⁷Hagman D. G; Urban planning and land development, West Publishing Company, St. Paul, Minnesota, 55102, October 1975 at page 21.

³²⁸ Ibid.

³²⁹ Ibid.

³³⁰ Ibid.

³³¹ Ibid.

and broaden the goals and policy of planning and also increased citizenry participation in the process.³³²

Because of the crucial role played by the local authorities in planning and land use control, it was felt that it was necessary to have effective local governments which are rationally organized. This resulted in massive reforms in the local government system in the United Kingdom leading to the enactment of the 1958 Local Government Act, revised in 1963, 1972 and 1974.³³³ One crucial point is notable in these legislations, namely; the exercise of any power must be founded on a statute.

4.2 Urban Planning Law in Kenya

In Kenya, the earliest planning policy efforts began with the establishment of coastal urban settlements and construction of the Mombasa-Kisumu-Kampala Railway in the colonial times.³³⁴ There were also the early colonial policies that alienated the high potential land in the central highlands for the exclusive settlement and commercial use by European settlers. Markets and towns as well as appropriate local authorities were established in the highlands as administrative units and trading centres to support the settler economy.³³⁵ Various planning initiatives during this period were institutionalized among them the 1926 Mombasa Municipal Council Plan which provided the initial spatial land use structure. It was a development control tool that outlined the procedural zoning and development control principles.³³⁶ This plan was followed by the 1962 Mombasa master plan.

The 1948 Nairobi master plan spelt out the preparation procedure, scope, and content and approval procedures of plans and followed the 1947 Town and Country Planning Act of Britain.³³⁷ In 1973 the Nairobi Metropolitan Growth Strategy of 1973 was adopted. It consisted of a series of policies envisaged to guide the development of the city for 30 years.³³⁸

³³² Ibid

³³³ Ibid.

³³⁴ Supra note 30

³³⁵ Ibid

³³⁶ Ibid

³³⁷ Ibid

³³⁸ Director of City Planning and Director of Physical Planning, City Council of Nairobi, Concept paper, Nairobi Metropolitan Growth Strategy, November 2005.

In 1978 the Human settlement strategy of 1978 was adopted providing *inter alia* an overall framework for the management of future urban growth.³³⁹ Other interventions included the development of water and sewerage master plans, the 1993 Convention of “The Nairobi We Want” the first ever bold step to involve the residents in visioning and participating in the planning for the future of Nairobi and the Omamo Commission of 1994 which recommended the sub-division of Nairobi into boroughs for efficient management and service delivery among other recommendations.³⁴⁰

Though master planning became the standard planning method in major townships and municipalities, this was found to be rigid, time consuming and lacked an implementation framework.³⁴¹ The postcolonial era witnessed the development of urban and regional planning through deliberate development of policy documents aimed at achieving national development goals. Sessional Paper No. 10 of 1965 on African Socialism and its application to Planning in Kenya³⁴² provided the main policy framework for development in all sectors of the economy in the country.³⁴³ It spelt out the need to correct development imbalances created by earlier policies, recognize the role of urban, regional, local and rural levels of development in the national economy and decentralize and redistribute development and planning.³⁴⁴

The Economic Recovery Strategy for Wealth and Employment Creation policy document was published in 2003.³⁴⁵ This strategy outlines a vision for housing and urbanization in “an adequately and decently housed nation in a sustainable environment.” The vision envisages legal and administrative reforms in order to meet the demands of housing and urbanization in the future.

The Environment Management and Coordination Act 1999 requires that development plans embrace the preparation of Participatory National Environment Plans that have sectorial coordination and linkages as well as environmental conservation measures. It also requires that environmental impact assessment be carried out for all development projects that are

³³⁹ Ibid

³⁴⁰ Ibid

³⁴¹ Supra 33

³⁴² Government Printer, Nairobi, 1965

³⁴³ Supra note 30

³⁴⁴ Ibid

³⁴⁵ Government Printer, Nairobi, 2003

likely to pose negative environmental impacts. For completed projects, the Act requires that yearly environmental audits be carried out with clear mitigation measures.

Since independence, Kenya did not have a single and clearly defined National Land Policy. This together with the existence of many land laws, some of which were incompatible, resulted in a complex land management and administration system. To address these problems, the government embarked on the formulation of a National Land Policy through a widely consultative process with the aim of producing a policy whose main vision is “*to guide the country towards efficient, sustainable and equitable use of land for prosperity and posterity.*” The key principle in the policy is land use planning which is recognized as essential for the efficient and sustainable utilization and management of land and land based resources.³⁴⁶ Sessional paper number 3 of 2009³⁴⁷ was formulated to provide an overall framework and define the key measures required to address *inter alia* the critical issues of land administration, access to land, land use planning, unplanned proliferation of informal urban settlements, out-dated legal framework, institutional framework.³⁴⁸ The paper provided that national, regional, urban, per-urban, spontaneous settlements planning principles and guidelines will be formulated and implemented in a transparent, sustainable, comprehensive, participatory and accountable manner.³⁴⁹ Chapter 5 of the Constitution of Kenya 2010 heavily borrowed from this sessional paper particularly on the principles of national land policy, land use and planning.

Article 184 (1) of the Constitution of Kenya 2010³⁵⁰ provides for the enactment of national legislation to provide for the governance and management of Urban areas. Pursuant to the said article Parliament enacted the Urban Areas and Cities Act³⁵¹ and the County Governments Act.³⁵² The fourth schedule of the Constitution of Kenya 2010 places the role of planning on County governments.

Before the promulgation of the Constitution of Kenya 2010 and the enactment of the above legislations, the institution that was charged with the responsibility of Physical Development

³⁴⁶ Ibid

³⁴⁷ **Government printer**, sessional paper no. 3 of 2009 on National Land Policy

³⁴⁸ Ibid

³⁴⁹ Ibid

³⁵⁰ **The Constitution of Kenya 2010**, Government Printer Nairobi

³⁵¹ Urban Areas and Cities Act, Act no. 13 of 2011, Government Printer Nairobi.

³⁵² County Governments Act, Act no. 17 of 2012 Government Printer Nairobi.

Planning was the Department of Physical Planning in the Ministry of Lands which had the legal mandate of physical development planning. However, there are other multiple institutions that were involved at various levels in the country. These included the local authorities under the Ministry of Local Government, Regional Development bodies under the Ministry of Regional Development and the Ministry of Nairobi Metropolitan Development and the Ministry of Northern Kenya.

The legal, policy and institutional framework for planning in Kenya is the overall mechanism through which laws for the enforcement of Physical plans are implemented, monitored, supervised and coordinated. The Constitution of Kenya 2010 which is the supreme law of Kenya forms the apex of this legal framework. The fourth schedule of the Constitution assigns various elements of development planning to the national and county governments. Functions assigned to County governments include county planning and development, land survey and mapping. County governments under article 176 of the constitution are responsible for county planning. The Urban Areas Act number 13 of 2011 establishes principles of governance and management of urban areas and cities.

Prior to 1996 the main planning legislation was the Land Planning Act. Enacted in 1968 it aimed at controlling the development of the urban land. It provided for the preparation of town plans. The contents of the plans and the machinery of preparation were however not clearly spelt out and its use in rural areas was limited. This act was repealed in 1996 when the Physical Planning Act of 1996 was enacted. The Physical Planning Act of 1996 (Cap 286) provides for the formulation of National, Regional and Local physical planning guidelines, policies and strategies. It further provides for the preparation of regional and local physical development plans in its section 16 and 24 respectively.

The Act also empowers the local authorities to prohibit or control the use and development of land and buildings in the interests of proper and orderly development of an area and to control or prohibit the subdivision of land or existing plots. Under the County Governments Act,³⁵³ Chapter XI the above functions will be undertaken by the county governments.

³⁵³ County Governments Act, Act no. 17 of 2012.

The County Governments Act³⁵⁴ repealed the Local Government Act Cap 265 which empowered the Municipal, County and Town Councils to prohibit or control the use and development of land and buildings in the interests of proper and orderly development of their areas. All developers under the repealed Act were required to obtain development permission from their respective local authorities. It also empowered the councils to regulate sewerage and drainage construction and connection.

The Building Code (Adoptive by- laws) Building Order, 1968, grants the local authorities powers to approve or reject building plans.³⁵⁵ The Code provides that a person who erects a building or develops land or changes the use of a building or land, or who owns or occupies a building or land shall comply with the requirements prescribed in the said code.³⁵⁶ The Code also gives specifications for *inter alia* siting buildings, foundations, building materials to be used and specifications on walls and foundations.³⁵⁷

The Environmental Management and Co-ordination Act (No. 8 of 1999) provides for the establishment of an appropriate legal and institutional framework for the management of the environment. To manage the environment in a holistic manner, the Act establishes two administrative bodies: the National Environment Council (NEC) and the National Environment Management Authority (NEMA). While NEC has the responsibility of formulating policies, setting national goals, and promoting cooperation among stakeholders, NEMA's role is to supervise and coordinate all matters relating to the environment. It is instructive to note that the Act creates NEMA as the body charged with implementing the provisions of the Act.³⁵⁸

Despite the existence of the above Act, urban areas in Kenya continue to face serious environmental challenges caused by air pollution, poor garbage disposal, lack of sanitation in some areas or poor sanitation where it exists, noise pollution, ineffective liquid and solid waste disposal methods. All these challenges are discussed in detail in Chapter Four.

³⁵⁴ Ibid.

³⁵⁵ Government of Kenya, Government Printer, Nairobi

³⁵⁶ Ibid, Rules 3,4,5,6,7,8 of the Bye-Laws

³⁵⁷ Ibid part 11 and 111

³⁵⁸ See Section 7

The National Construction Authority Act,³⁵⁹ establishes the National Construction Authority, whose functions include overseeing the construction industry and coordinating its development. However, the existence of the above authority has not had noticeable impact in the construction industry and newly constructed buildings continue to collapse and in most cases experts cite poor building standards and poor enforcement of building laws as the cause.³⁶⁰ Cases of building failures and consequent collapse of structures in Kenya have reached alarming levels.³⁶¹ Ironically, the National Construction Authority, the body charged with ensuring that all buildings comply with the health and safety and other statutory requirements has been quoted attributing cases of collapsed buildings to failure to adhere to statutory and other requirements and poor workmanship.³⁶²

4.3 Objectives of development control

The development control process is a continuous flow between measuring and action.³⁶³ All development control policies are to ensure coordination and compatibility of land uses to bring about improvement in the general welfare of people.³⁶⁴ This ultimate goal is achieved through the attainment of the following set of objectives, namely, take corrective action, avoid overcrowding, protect natural environment, ensure physical efficiency and cleanliness of settlements, safe guard life and property; ensure harmonious location of land uses, and reduce or avoid exposure to pollution.³⁶⁵ Through development control, measures are instituted to regulate activities that pollute the natural and built environment. These activities are located at places where their effects could be minimized.³⁶⁶

The broad objective of urban development and planning regulations is to ensure the orderly development of urban areas. Land use planning is deciding in advance what to do, where, when, with what, how, on or under the land. It is a thought process that guides land use

³⁵⁹ Chapter 449A, Laws of Kenya, Act no. 41 of 2011.

³⁶⁰ Daily Nation, Friday December 19 2014 at page 9, The Standard, January 6, 2015 at page 10-11, The Standard, Wednesday 7th January 2015 at page 12.

³⁶¹ Kioko Jackson Musyoka, Causes of building failures in Africa: A case study on collapsing structures in Kenya, IOSR Journal of Mechanical and Civil Engineering, Volume 11, Issue 3 (May-June 2014) pages 9-10, Available at www.iosrjournals.org, accessed on 23rd December 2014.

³⁶² Daily Nation, Thursday January 15th 2015, Daily Living at page 4.

³⁶³ Supra note 91 at page 217.

³⁶⁴ Ibid.

³⁶⁵ Ibid.

³⁶⁶ Ibid.

activities on space. This process has to be guided by a set of rules, regulations and standards. These can be in the form of a Parliamentary statute or a subsidiary legislation.³⁶⁷

By its nature town and country planning law cannot be static. It must advance with the condition of the society which it is designed to serve.³⁶⁸ The range of purposes for which statutory planning powers can now be employed is extremely wide but it can be said with certainty that planning law is the key discipline in the integrated science of urban governance and that the range of objectives which town and urban planning is expected to serve has steadily widened.³⁶⁹

The Physical Planning Act,³⁷⁰ in the preamble states that its objective is *“to provide for the preparation and implementation of Physical development plans and for connected purposes.”*³⁷¹ The foregoing objective cannot be said to be wide enough to cover all the areas connected with planning. As society’s demands increase, planning legislation needs to increase its scope and complexity.

Until 2007, Planning in Kenya was undertaken without any guidelines. Prior to the Gazettement of the Physical Planning Handbook in 2007, lack of gazetted planning standards and guidelines meant that development continued to take place in a haphazard and uncoordinated manner lacking both form and character.³⁷² There were no harmonized and detailed planning standards, guidelines, measurement and considerations leading ultimately to inaccurate and not uniform land use decisions.³⁷³

Even after the preparation of the Physical planning handbook cited above, which is indispensable for guidance and standardization of both process and practice, uncontrolled and unapproved developments have continued to flourish in urban areas in Kenya raising concerns as to whether the law and the said guidelines do serve the desired objectives.

³⁶⁷Ministry of Lands, Physical Planning Department, *Physical Planning Handbook*, Government Printer, Nairobi, 2007.

³⁶⁸*Ibid.*

³⁶⁹ *Ibid.*

³⁷⁰ Cap 286, Laws of Kenya.

³⁷¹The Physical Planning Act, Chapter 286, Laws of Kenya, Printed and Published by the Government Printer Nairobi.

³⁷²The Standard, 19th June 2011, page 8.

³⁷³ *Ibid.*

Discussing the objects of Planning, Lionel and Blundel lists three main objectives of urban planning law.³⁷⁴ These are prevention of development of land along lines contrary to public interest; planning for the enlightened and orderly arrangement on the available land of such things necessary to the community, as houses, roads, open spaces, industries, shops, offices, schools and places of recreation and entertainment and by stages to bring the use of land into conformity with the planned arrangement.³⁷⁵ These objectives are achieved by the statutory requirement that planning permission is necessary before any development may be carried out; and this brings into focus the role of law in urban planning.

Despite the various planning legislations in Kenya, urban planning has been haphazard and disjointed and has not achieved the objectives of planning discussed above.³⁷⁶ As a result, unapproved developments have continued to mushroom mainly attributed to inadequate and incompetent development control mechanisms, poor and outdated planning standards and planning laws.³⁷⁷ Planning consists of comprehensive plans to regulate land use, with the purpose of ensuring the health, safety and welfare of society as a whole, taking into account environmental factors and having regard to social, commercial, transport and economic factors.³⁷⁸ Planning has certain basic attributes. First, it is future oriented in that it establishes ends, goals or objectives which have not yet been reached. Secondly, planning is continuous in that goals are continuously revised, new data is evaluated, and resources being used are shifted, removed or added to accomplish the changing goals. Thirdly, Planning requires a determination of facts. Planning is comprehensive and provides an opportunity for coordination.³⁷⁹

The role of law is to ensure a process that underlies various kinds of controls and inducements that are used to shape future land development and to preserve existing land development without chaotic change.³⁸⁰ Physical Planning Law, Building and Planning Codes and regulations are some of the legal tools used to control land use and planning.

³⁷⁴Supra note 98

³⁷⁵Ibid

³⁷⁶Government of Kenya, Government Printer, Nairobi; Report of the commission of inquiry into the Land Law System of Kenya on Principles of National Land Policy framework, constitutional position of land and new institutional framework for land administration, 2002.

³⁷⁷ Ibid.

³⁷⁸Supra note 28.

³⁷⁹Supra note 33.

³⁸⁰Ibid.

4.4.Planning and Building Regulations in Kenya

It is imperative at this stage to examine the historical origin of building by-laws in Kenya in order to appreciate the context under which they were introduced in the country and possibly why they have remained “foreign” to many urban developers in Kenya. In the early years of colonial rule in Kenya, a British colonial administrator in Nairobi, Kenya's capital decided that the city needed a set of by-laws. A native of the Lancashire town of Blackburn, a resourceful civil servant wrote home requesting for a copy of the by-laws in use there. "Copy these out just as they are," he directed a typist, adding "except whenever you see the word 'Blackburn', type Nairobi'. Thus Nairobi acquired its first by-laws.³⁸¹

Apparently no one found much fault with these regulations even though tropical Nairobi - less than 200 kilometres from the equator - rarely has temperatures of below 15 degrees Centigrade, in summer or winter, while the residents of Blackburn have to endure with weeks, if not months, of below-freezing temperatures, harsh winter winds, snow, etc. Not until the 1970s was it pointed out that Nairobi roofs need not be strong enough to withstand six inches of snow!³⁸² Obviously, these imported regulations were based on the British concept of what constituted a satisfactory dwelling, which was largely influenced by the environment and climate back home.³⁸³

Kenya has changed a great deal since then. But even though the colonial administrators quit about 52 years ago, the building by-laws, standards and planning regulations have remained pretty much the same. The above by-laws were applied to the then Nairobi Town Council. These were later replaced by the Nairobi City Council By-laws (Building) in 1948 which incorporated town planning and zoning requirements. In 1968, the Ministry of Local Government adopted for use the Building Regulations which were a replica of the British Building Regulations of 1948.

In 1995, a set of new building regulations, commonly referred to as code 95, were developed through the Government/private sector initiative.³⁸⁴ The main objective of this was to

³⁸¹Elijah Agevi, (2004).Kenya:Building Standards and Planning Regulations - The Kenyan Experience. Coordinator, Shelter Forum, Nairobi, Kenya.

³⁸² Ibid.

³⁸³ Ibid.

³⁸⁴ Ibid.

promote housing standards and procedures aimed at reducing building costs, use of innovative designs and encouraging use of local materials. No significant success was realized through this initiative due to the failure by the local authorities to adopt this code.³⁸⁵In tandem with the changing social economic dynamics of the country, there was a growing need for a comprehensive review of the rules and development regulations and this led to the planning and development regulations of 2009.³⁸⁶

After the collapse of the Sunbeam building in Nairobi in 1996, the Government established a Commission of inquiry to investigate and determine the cause of the disaster.³⁸⁷ The Commission was also mandated to examine existing Building Laws, by-laws and regulations and make regulations with a view to prevent similar incidents.³⁸⁸

Many years have lapsed since the completion and handing over of the Commission report to the Government and the same is yet to be implemented. Many buildings have since collapsed, some while still under construction killing and maiming many people.³⁸⁹ Thus there is an urgent need to review the existing building regulations.

On 20th April 2009, the Government launched a review committee whose terms of reference included *inter alia* 'to identify and review impediments to the current building regulations, legal and institutional arrangements in the building and construction industry and to propose an institutional framework for achievement of sustainable, well planned, safe and healthy built environment.'³⁹⁰The said committee identified the following weaknesses among others:- lack of national, regional and local physical development plans and where local physical development plans exist implementation has been inadequate. It also identified lack of effective implementation and enforcement mechanisms of the existing physical planning and building laws and regulations and lack of harmonized and coordinated development control mechanisms amongst the city, municipal and county councils. Others are lack of effective provisions in the existing rules and regulations for dealing with emerging challenges in the built environment, lack of meaningful public/private sector joint initiatives and collective

³⁸⁵ Ibid.

³⁸⁶ Ibid.

³⁸⁷ MathengeGuthui, Ethical Issues in the Construction Industry in Kenya: A Critical Analysis of the Professional Conduct in Engineering Technology Management, Available at www.academia.edu Accessed on 11.2.2015.

³⁸⁸ Government Printer, Planning and Building Regulations, 2009.

³⁸⁹ Daily Nation 10th Aril 2009 at page 2.

³⁹⁰ Daily Nation 20th April 2009 at page 2.

participation in efficient delivery of services in the built environment and lack of priority on environmental concerns in Physical Planning Development.

To overcome the above challenges, the said committee came up with proposals on comprehensive Planning and Building Laws and Regulations covering *inter alia* the following areas, namely; national and regional physical planning, design and siting of buildings, building materials, registration and inspection of buildings, maintenance, fire, safety and dispute resolution mechanisms.

The committee felt that the above challenges could not adequately be addressed within the then existing legal framework and proposed a bill known as the Planning and Building Act of 2009. The bill sought to **inter alia** harmonize Physical Planning and building works. The Bill proposed the creation of a National Planning and Building Authority with mandate to coordinate and oversee the implementation of the provisions of the Act. The authorities' responsibilities would include undertaking national development and regional physical development plans preparation while local authorities will prepare the local physical development plans and take the responsibility of implementing the same.

It is crucial to mention that the proposed bill recommended the repealing of the Physical Planning Act, Cap 286, Laws of Kenya and the amendment of the Local Government Act, Cap 265 to facilitate integration and harmonization in the sector. Cap 265 was repealed and replaced by the County Governments Act³⁹¹ which places planning functions under the county governments established under Article 176 (1) of the Constitution of Kenya 2010. The territory of Kenya is now divided into 47 counties listed in the first schedule of the constitution.³⁹²

4.5 Development Permission, Practice and Procedure

The basic premise of the planning system is that planning permission is required in order to carry out any development in urban areas.³⁹³ The Physical Planning Act³⁹⁴ defines 'Development permission' as a permission granted under Section 33 by a local authority to an applicant to develop land. The Act defines development "as the making of any material change in the use or density of any buildings or land or the subdivision of any land and the

³⁹¹ Act number 17 of 2012.

³⁹² Article 6 (1) of the Constitution of Kenya 2010.

³⁹³ D. E. Howell James, Notes on the need for planning permission, London Oyez Publishing, 1977 page 1

³⁹⁴ Cap 286, Laws of Kenya.

erection of such buildings or works and the carrying out of such building operations, as the Minister may from time to time determine.”

Unless a particular action comes within the statutory definition of development it never requires planning permission. The definition under the Act includes many things which do not come within the everyday meaning of the term, and excludes some which do. Proposed development must fall within the said statutory definition.³⁹⁵

A great deal of literature has been generated by the above definition and a good knowledge of its scope is essential, since in many cases it is not necessary to make an application for planning permission.³⁹⁶ Thus, no ‘development’ takes place in the cases not covered under the Act. If any act of development is carried out without a grant of planning permission where such a grant is required, or if development takes place in breach of a condition or limitation attached to a grant of planning permission then, the developer is in breach of planning control and the local authority may take an enforcement action by issuing an enforcement notice or a breach of condition notice.³⁹⁷

The Physical Planning Act³⁹⁸ provides that each local authority shall have the power to prohibit or control the use and development of land and buildings in the interests of proper and orderly development of its area. The Act also grants the Local Authority power to control or prohibit the subdivision of land or existing plots into smaller areas and powers to consider and approve all development applications and grant all development permissions and ensure the proper execution and implementation of approved physical development plans. Under the Local Government Act, local authorities had powers to formulate bye-laws to regulate zoning in respect of use and density of development; and to reserve and maintain all the land planned for open spaces, parks, urban forests and green belts in accordance with the approved physical development plan. The Local Government Act was repealed by the County Governments Act.³⁹⁹

The powers under the repealed Local Government Act were not utilized properly because many buildings in Nairobi (and indeed in many urban areas in Kenya) are unapproved or do

³⁹⁵Supra note 123.

³⁹⁶Clive Brand, Planning Law, second edition, Longman Group Limited 1994, London.

³⁹⁷ Ibid.

³⁹⁸ See Section 29 of the Act.

³⁹⁹ Act no 17 of 2012.

not meet approval requirements and even many of those which were properly approved have had unapproved extensions added to them thereby altering the original approved plans.⁴⁰⁰ Numerous buildings have been erected in land previously reserved as open spaces, road reserves or public utility plots contrary to the above provisions indicating laxity or failure to enforce the said provisions.⁴⁰¹

The law provides that no person shall carry out development within the area of a local authority without a development permission granted by the local authority and failure to comply with the said provision is a punishable offence.⁴⁰² The local authorities were, until the enactment of the Urban Areas and Cities Act⁴⁰³ and County Governments Act⁴⁰⁴ the agencies principally responsible for execution of planning policy and for local control of planning. The council of each local authority was the local planning authority for its area and controlled development by ensuring that development applications comply with policy guidelines, planning regulations and standards, approved physical development plans, Local Authority Bye-laws, as well as other relevant statutes. This also included enforcement and implementation of the approved plans to guarantee sustainable development.

The Constitution of Kenya 2010 and the County Governments Act⁴⁰⁵ have vested all the powers relating to urban planning in the county governments. The County Government Act provides *inter alia* that for each city and municipality there shall be the following plans; namely; city or municipal land use plans; city or municipal building and zoning plans; city or urban area building and zoning plans; location of recreational areas and public facilities.⁴⁰⁶ The Act further provides that a city or municipal plan shall be the instrument for development facilitation and development control within the respective city or municipality. However, all the counties in Kenya are yet to establish the necessary structures and have continued to rely on the systems that existed, hence the risk of inheriting the inherent weaknesses that have hitherto persisted.

⁴⁰⁰Patrick Odongo, Director of City Planning in Nairobi, quoted in the Standard newspaper, 7th April 2010.

⁴⁰¹Government Printer, Government Printer, Nairobi; Report of the commission of inquiry into the Land Law System of Kenya on Principles of National Land Policy framework, constitutional position of land and new institutional framework for land administration.

⁴⁰² See Sections 30 and 33 of the Physical Planning Act.

⁴⁰³ Act no. 13 of 2011.

⁴⁰⁴ Act no. 17 of 2012.

⁴⁰⁵ Ibid.

⁴⁰⁶ See section 111.

The Physical Planning Act provides development control process in that it prescribes the authorities involved, the procedures, penalties and the various forms to be used in administering development control. The general objectives of this development control are to **inter alia** ensure that implementation of physical development projects conform to approved physical development plans and to recommend enforcement actions in case of contravention of plan proposals and/or development standards.

Development applications are evaluated so as to eliminate applications that may have injurious implications to man, the physical and biological environment and socio-economic activities. It is also necessary to ensure that planning regulations, standards, and procedures are reviewed from time to time in order to manage emerging concerns and resolve conflicts and to secure optimal use of land and ensure that planning decisions are rational.⁴⁰⁷

In addition to the above legal provisions, the Ministry of Lands developed a planning guide hand book giving clear guidelines for consideration of development Permission.⁴⁰⁸ The main objective of the guidelines was to allow for flexibility in planning due to changing circumstances.⁴⁰⁹ Guidelines for approval of building plans are also provided. These guidelines are stipulated in the Physical planning regulations 1998. They include zoning regulations, existing physical development plan, building lines, setbacks, plinth area, canopies, height of buildings, access and parking, loading bay, density, plot coverage, and liquid waste disposal methods. The guidelines further provide that on solid waste disposal, garbage collection sites must be environmentally friendly. Regarding water lines and storm water drainage, the guidelines provide that storm sewers be used to collect and carry rain or surface water to some natural watercourse or body of water in such way as to prevent flooding.⁴¹⁰ However, the flooding witnessed in Nairobi after heavy rains is a clear testimony of a failed storm water management system.

The Physical Planning Act⁴¹¹ defines development application and development permission as “an application made for permission to develop land” while development permission is

⁴⁰⁷ Supra note 97.

⁴⁰⁸ Ibid.

⁴⁰⁹ Ibid.

⁴¹⁰ Ibid.

⁴¹¹ This act is yet to be amended to accord to the new legislation enacted under the Constitution of Kenya 2010.

defined as “development permission granted under section 33 by a county government to an applicant to develop land.” Section 31 of the Physical Planning Act, provides that any person requiring development permission is required to make an application in the prescribed form to the county government responsible for the area in which the land concerned is situated.

The county government⁴¹² to which a development application has been made is required within not later than thirty days after receipt of the application to refer it to the Director of Physical Planning for his/her comments. The county government consults any or all of the following officers or authorities, namely the Director of Survey; the Commissioner of Lands; the Chief Engineers (Roads), Ministry of Public Works and Housing; the Chief Public Health Officer of the Ministry of Health; the Director of Agriculture; the Director of Water Development; the Director of Livestock Development; the Director of Urban Development; the Chief Architect, Ministry of Public Works and Housing; the Director of Forests; and such other relevant authorities as the county government deems appropriate.⁴¹³

Upon receiving the comments the application is forwarded to the technical committee of the county government for approval. The comments from the various offices form the basis for approval of the development permission application. The county government is required when considering a development application to be bound by any relevant regional or local physical development plan approved by the Minister; have regard to the health, amenities and conveniences of the community generally and to the proper planning and density of development and land use in the area; have regard to any comments received from the Director, officers or authorities, and in the case of a leasehold, have regard to any special conditions stipulated in the lease.

The law states that the county government must have regard to the provisions of the development plan so far as it is material to the application and also to any other material considerations. However, problems may arise where there is no development plan, the plan is out dated or the county government disregards the development plan. Considering the mushrooming of unapproved buildings in Nairobi and haphazard construction of buildings, it is doubtful that the Nairobi County Planning Department pays due regard to the above legal procedures.⁴¹⁴

⁴¹² This should be construed to mean the County.

⁴¹³ See section 32.

⁴¹⁴ Supra note 29.

The law also provides that if in connection with a development application a county government is of the opinion that proposals for industrial location, dumping sites, sewerage treatment, quarries or any other development activity will have injurious impact on the environment, the applicant shall be required to submit together with the application an environmental impact assessment report.⁴¹⁵

Environmental Impact assessment (EIA) is a critical examination of the effects of a project on the environment. An EIA identifies both negative and positive impacts of any development activity or project, how it affects people, their property and the environment. EIA also identifies measures to mitigate the negative impacts, while maximizing on the positive ones. EIA is basically a preventive process. If a proper EIA is carried out, then the safety of the environment can be properly managed at all stages of a project-planning, design construction, operation, monitoring and evaluation as well as decommissioning.

The goal of an EIA is to ensure that decisions on proposed projects and activities are environmentally sustainable. EIA is conducted in order to identify impacts of a project on the environment, predict likely changes on the environment as a result of the development, evaluate the impacts of the various alternatives on the project, propose mitigation measures for the significant negative impacts of the project on the environment, generate baseline data for monitoring and evaluate impacts including mitigation measures during the project cycle and highlight environment issues with a view to guiding policy makers, planners, stakeholders and government agencies to make environmentally and economically sustainable decisions.

EIA is a legal requirement in that a proponent or investor shall not implement a project likely to have a negative environmental impact, or for which an EIA is required by the Environment Management and Coordination Act⁴¹⁶ or regulations issued under it unless an EIA has been concluded and approved in accordance with the law. Further no licensing authority under any law in force in Kenya shall issue a trading, commercial or *development permit* or license for any project for which an EIA is required or for a project/ activity likely to have cumulative significant negative environmental impacts unless the applicant produces an EIA license issued by the authority.

⁴¹⁵ See Section 36.

⁴¹⁶ Chapter 387, Laws of Kenya.

EIA considers the following issues, namely *ecological considerations including*: biological diversity, sustainable use and ecosystem maintenance. It also considers *social considerations* including economic impacts, social cohesion or disruption, effect on human health, immigration or emigration, communication-roads opened up, closed, rerouted and effect on culture and objects of cultural value. Other considerations include *landscape*, visual impacts; compatibility with surrounding area and amenity opened up or closed e.g. recreation possibilities. *Land uses considerations* are also taken into account.

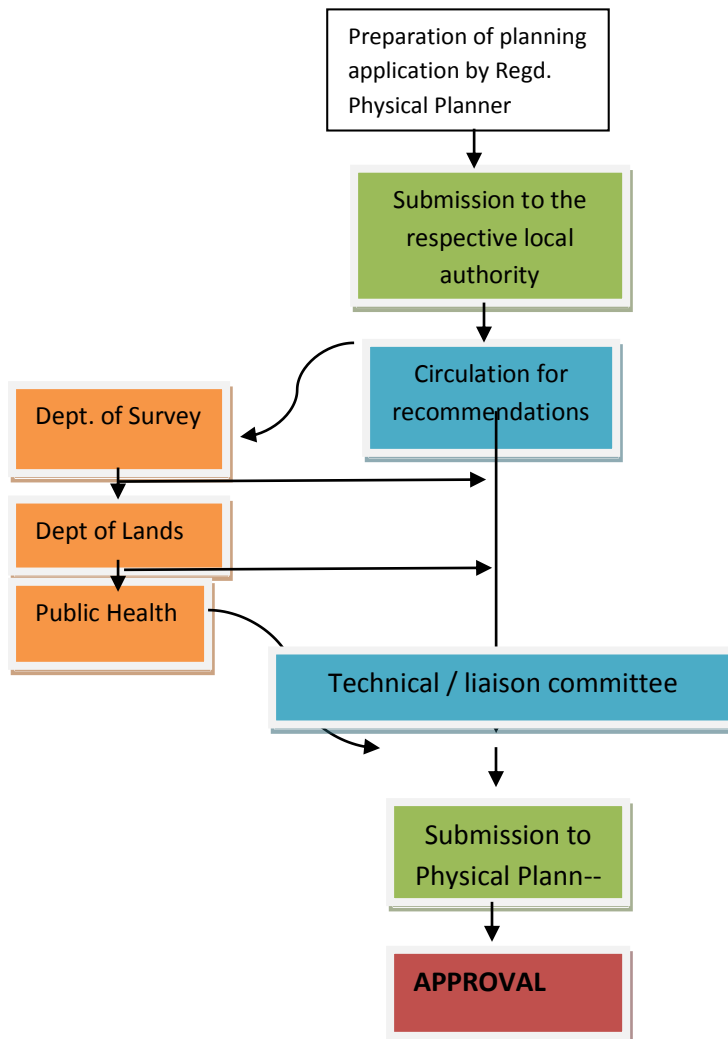
The report must also confirm that the intended project conforms to approved plan and zoning regulations. The law requires that during the EIA process a proponent shall in consultation with the Authority seek the views of persons who may be affected by the project or activity through posters, newspapers and radio; hold at least three public meetings with the affected parties and communities. The public participates by either submitting written or by making oral comments.

In Kenya development control process is governed by various pieces of Legislation and Sessional Papers including; the Local Government Act Cap 265 which has been repealed by the Urban Areas and Cities Act 2011, Land Control Act Cap 302, the Physical Planning Act Cap 286, the Constitution of Kenya 2010, the Environment Management and Coordination Act 1999, the National Land Commission Act, the Land Act 2012, the Land Registration Act 2012 and the Sessional Paper No. 3 of 2009 on the National Land Policy. The application process entails submission of a drawing or a design which is attached to various prescribed forms which were previously administered by the defunct local Authorities of; the City Council, Town Council or the County Council. In Kenya Local Authorities collapsed after the 4th March 2013 General elections, and currently urban development control is under the armpit of the 47 County Governments in Kenya.

Under the County Government, the Sub-County Administrators receive the application forms from the applicants or proponents with sufficient copies for circulation to various institutions for comments. Figure 1 below shows the procedures of development control process in Kenya.

FIGURE 1

MODEL OF PHYSICAL PLANNING APPROVAL PROCESS



The type of applications or drawings which are normally processed range from land subdivision or amalgamation, building plans, change of user, and extension of user and extension of leases or renewals. Development permission is granted by the County Government upon receipt of favourable comments from the institutions to which the applications are circulated to. A decision by the County Government's Technical committee led by the Sub-County Administrator is made within a period of one month and that decisions can either fall within four categories notably; (a) Unconditional permission or approval; (b) Conditional approval; (c) Refusal of permission; (d) Refusal to take a decision or deferment.

If planning permission is refused or the applicant is aggrieved by any conditions imposed or the County Government refuses to make a decision within one month, the applicant may

appeal to the District/Municipal planning Liaison Committee, the National Physical planning Liaison committee or the High Court.

4.6 Rationale for urban Development and Planning regulations

The broad rationale for urban development and planning regulations is to ensure the orderly development of urban areas.⁴¹⁷ In particular it aims at providing a good living environment for all by ensuring safety, amenity, accessibility, energy conservation and environmental protection; providing a safe, healthy, useable, serviceable, pleasant and easily maintained environment for all commercial, industrial, civic and community land users.⁴¹⁸ In addition, it is aimed at preventing disturbance to neighboring environment particularly by the industrial land users. It also ensures that any conflicting requirements of different land uses are reconciled particularly among mixed land users; and provides orderly and progressive development of land in urban areas and preserves amenities on that land as well as promoting environmental control and socio-economic development.⁴¹⁹

Urban law, development and planning regulations are meant to ensure that no person develops any land within a planning area without planning consent or otherwise than in accordance with planning consent and any conditions specified there in.⁴²⁰ Day to day design and planning activities are guided and shaped by established use of design and improvement standards and guidelines. The guidelines and regulation are meant to be used by planners, designers, developers and planning boards in plans and designs preparation and reviewing and evaluation of developments. The objective of standard application is to plan, design and develop the proposed project in light of data collected about site dimensions, its environs and the character of the surrounding area. In addition the intent in applying standards is to promote quality development.⁴²¹

4.7 Planning agencies, roles and responsibilities

Planning is a multi-disciplinary field, directly and indirectly involving different individuals and institutions. The focus of urban planning and development is largely set in place by

⁴¹⁷Republic of Botswana, Ministry of Lands, Housing and Environment, Department of Town Planning and REGIONAL Development, Physical Development Manual , PDGM Services (Pty) Ltd. 2002.

⁴¹⁸ Ibid.

⁴¹⁹ Ibid.

⁴²⁰ Ibid.

⁴²¹Republic of Botswana,Ministry of Lands, Housing and Environment, Department of Town Planning and REGIONAL Development, Physical Development Manual , PDGM Services (Pty) Ltd. 2002.

national goals and development policies of urban planning and management which is decentralized through a complex institutional framework in which roles and responsibilities for planning, management and development control are delegated to various agencies. These different institutions and agencies charged with the responsibility of urban planning have largely been blamed for the poor enforcement of urban planning laws because of poor linkage and integration caused by lack of coordination among them.⁴²²

The Physical Planning Act has not yet been amended to accord with the constitution of Kenya 2010 and the new county legislations. The Act provides that there shall be appointed a Director of Physical Planning and such other officers who shall be public officers as may be deemed necessary for the purposes of the Act.⁴²³ The Director is vested with wide powers among them he is the chief Government adviser on all matters relating to physical planning and performs such other functions as may be conferred upon him under the law. Some of his key functions include formulating national, regional and local physical development policies, guidelines and strategies; preparation of all regional and local physical development plans; undertaking studies and research from time to time into matters concerning physical planning; and advising the Commissioner of Lands on matters concerning alienation of public land.⁴²⁴

The Act also establishes the Physical Planning Liaison Committee comprising of the Permanent Secretary, the Director, the Permanent Secretary for the time being in charge of the Provincial Administration; the Commissioner of Lands; the Director of Medical Services; the Director of Surveys; the Director of National Environmental Secretariat; Director of Urban Development; Director of Housing; Director of Agriculture; Director of Industry; Director of Education; Director of Water Development; Chief Engineer (Roads), Ministry of Public Works and Housing; Director-General of the Kenya National Highways Authority; Director General of the Kenya Rural Roads Authority; Director-General of the Kenya Urban Roads Authority; Chief Architect, Ministry of Public Works and Housing; and a Registered Physical Planner in private practice duly appointed by the Minister on the advice of the Physical Planners Registration Board.⁴²⁵ Similarly Nairobi City and each

⁴²²Kimani M. and Musungu T., *Reforming and Restructuring Planning and Building Laws and Regulations in Kenya for Sustainable Urban Development*, 46th ISOCARP Congress 2010.

⁴²³ See section 4.

⁴²⁴ See section 5.

⁴²⁵ See section 7.

District⁴²⁶ have their own Physical Planning liaison committees to undertake matters relating to planning in their respective areas of jurisdiction. For every Municipal Council, the Act establishes Municipal Physical Planning Liaison Committees to undertake Physical Planning in the Municipality.⁴²⁷

The National Physical Planning Liaison Committee has wide powers which include hearing and determine appeals lodged by persons or local authorities aggrieved by the decision of any other liaison committee; determines and resolves physical planning matters referred to it by any of the other liaison committee. It advises the Minister on broad physical planning policies, planning standards and economic viability of any proposed subdivision of urban or agricultural land; and studies and gives guidance and recommendations on issues relating to physical planning which transcend more than one local authority for purposes of co-ordination and integration of physical development.⁴²⁸

The functions of other liaison committees include inquiring into and determining complaints made against the Director in the exercise of his functions under the Act or local authorities in the exercise of his functions under the Act or local authorities in the exercise of their functions under the Act; to enquire into and determine conflicting claims made in respect of applications for development permission; and to determine development applications for change of user or subdivision of land which may have significant impact on contiguous land or be in breach of any condition registered against a title deed in respect of such land. They also determine development applications relating to industrial location, dumping sites or sewerage treatment which may have injurious impact on the environment and to hear appeals lodged by persons aggrieved by decisions made by the Director or local authorities under the Act.⁴²⁹

4.8 Enforcement of urban planning regulations

Enforcement of urban planning laws is just as important a governance tool as are land laws. In fact, there are those who believe that the problem in Kenya is one of lack of enforcement

⁴²⁶The 2010 Constitution has replaced Districts with Counties. The Physical Planning Act is yet to be amended to conform with the new administrative areas.

⁴²⁷ See Section 8 of the Act.

⁴²⁸ See section 10.

⁴²⁹ See section 10 (2).

of the hitherto existing laws rather than the absence of good urban planning laws. For urban planning law to be effective, enforcement must be credible and repetitively consistent.⁴³⁰Section 38 (1) of the Physical Planning Act provides “when it comes to the notice of a local authority that the development of land has been or is being carried out after the commencement of this Act without the required development permission having been obtained, or that any of the conditions of a development permission granted under this Act has not been complied with, the local authority may serve an enforcement notice on the owner, occupier or developer of the land.”

An enforcement notice specifies the development alleged to have been carried out without development permission, or the conditions of the development permission alleged to have been contravened and such measures as may be required to be taken within the period specified in the notice to restore the land to its original condition before the development took place, or for securing compliance with those conditions, as the case may be, and in particular such enforcement notice may require the demolition or alteration of any building or works or the discontinuance of any use of land or the construction of any building or the carrying out of any other activities.⁴³¹ Unless an appeal has been lodged under Section 38(4) an enforcement notice takes effect after the expiration of such period as may be specified in the notice.

A person aggrieved by enforcement has a right of appeal to the relevant liaison committee under Section 13 of the Act. Appeals against the decision of the liaison committee lies to the National Liaison Committee under Section 15 after which appeals can be made to the High Court. The above process is fairly long and can be time consuming and expensive.

If a local authority considers that any development has been carried out without the grant of planning permission, or that any condition or limitation to which such permission was subject has not been complied with, an enforcement notice can be served in accordance with the above provisions. The notice must be served upon the owner, occupier or developer of the

⁴³⁰Walter Odhiambo,HezronNyangito,Land Laws and Land Use in Kenya: Implications for Agricultural Development,Productive Sector Division, Kenya Institute for Public Policy Research and Analysis KIPPRA Discussion Paper No. 15 June 2002.

⁴³¹ Physical Planning Act, section 38 (2).

land.⁴³²It is important to note that the notice can only be served if the local planning authority considers it expedient to do so, having regard to the development plan and to any other material considerations.⁴³³ The law leaves it to the discretion of the local authorities officers to decide whether or not to issue the notice. As a consequence many buildings have been constructed up to completion yet they do not meet the approval standards.⁴³⁴Even where approval has been granted, it is necessary to ensure that the buildings are constructed strictly in accordance with the approved plan and that the laid down building code is adhered to.⁴³⁵

Many building in urban areas in Kenya have collapsed leaving behind a trail of loss of life and destruction of property.⁴³⁶Commenting on one such incidence a news feature appearing in the Standard blamed poor workmanship and lack of enforcement of planning laws⁴³⁷ and failure by engineers and Architects to verify the quality of the work done, and rogue contractors.⁴³⁸

The contents of the enforcement notice are stipulated under the law which provides that any notice or order shall be made in writing and any notice or order shall be served or given to any person or his agent or shall be sufficiently served if left at the last known postal, residential or business address of the person to be served or if it is so sent by registered post addressed to the person, and in the latter case the notice or order shall be deemed to have been received by the person in the ordinary course of post.⁴³⁹

The law also grants right of entry to persons authorized to perform functions under the Physical Planning Act and declares it an offence for any person to hinder such entry. Thus the law grants wide powers to enforcement officers to perform their duties effectively.⁴⁴⁰

Contents of the enforcement notice must be clear and specific. The notice must specify the development which is alleged to have been carried out without the grant of a planning permission or, as the case may be, the matter in respect of which it is alleged that any

⁴³²See Section 38 (1) above.

⁴³³Lionnel A. Blundell, *Town and Country Planning*, London Sweet & Maxwell, 1963, page 489.

⁴³⁴Supra note 109.

⁴³⁵Ibid.

⁴³⁶See Chapter 4 part 4.2 on Consequences of Non-Adherence to Development control instruments

⁴³⁷The Standard, 14th June 2012.

⁴³⁸The Standard Tuesday 6th January 2015 at page 10.

⁴³⁹See Section 45.

⁴⁴⁰See Section 46.

condition or limitation has not been complied with. The notice will be invalid if it is based upon an allegation that development was carried out without permission, if in fact permission was later granted and had expired. This was the decision in the case of *Francis vs. Yiewsley and west Drayton U.D.C.*⁴⁴¹ In such a case the notice must be based upon the breach of the condition requiring discontinuance of the use or removal of buildings. Further, an enforcement notice which contains a false statement of fact as the basis on which it is served will be a nullity. This was the holding in the case of *Findlow vs. Lewis*.⁴⁴²

The Physical Planning Act provides that an enforcement notice shall specify the development alleged to have been carried out without development permission, or the conditions of the development permission alleged to have been contravened and such measures as may be required to be taken within the period specified in the notice to restore the land to its original condition before the development took place, or for securing compliance with those conditions, as the case may be, and in particular such enforcement notice may require the demolition or alteration of any building or works or the discontinuance of any use of land or the construction of any building or the carrying out of any other activities.⁴⁴³

If the person upon whom a notice is served in accordance with the foregoing provisions does not lodge an appeal to the liaison committee or the high court, such a person will not be entitled to question the validity of the said notice.⁴⁴⁴ The law also grants immense enforcement powers to the Minister to ensure compliance with the provisions relating to control of development. The Minister may, in writing, direct a local authority to take such action as he considers appropriate in order to ensure that the provisions of the law are complied with without undue delay on the part of any person. With the forgoing wide ranging powers to enforce planning regulations in urban areas, it is difficult to understand why unapproved and substandard buildings continue to mushroom in urban areas. It raises convincing reasons to suggest that those charged with the responsibility of enforcing the forgoing provisions have miserably failed or have underperformed.

⁴⁴¹{1958}1Q.B. 478.

⁴⁴²{1962} 3 WLR 429, 1 {1962} 3 ALL E.R.7.

⁴⁴³ See Section 38(2).

⁴⁴⁴ See Section 39(1).

Admittedly there are numerous challenges facing enforcement of urban planning laws in Kenya. Some of these challenges among them institutional and legal weaknesses have been discussed in chapter four.

4.9 Conclusion: The need for a new approach in urban planning

Towns and cities are centres of social development and cultural change that have impacts far beyond their boundaries.⁴⁴⁵ They are hubs of national and regional service provision, namely education, health, security, centres of intellectual and technical advancement, political development and artistic expression.⁴⁴⁶ They are places of cultural and social exchange and places for generation of new ideas and building networks between people and institutions. The movement of people, goods and ideas, and the networks that connect cities and towns across the globe are the energy that sustains an economy and fosters life opportunities.⁴⁴⁷

However, the way that urban growth is currently happening cannot ensure an acceptable quality of life, let alone an improvement in it, for the vast majority of urban citizens. Increased demand for land means less housing or congestion, lack of infrastructure, services and amenities. Traffic congestion poses an irreversible damage to the environment. Concentration of people and economic activity change environments dramatically. The challenges that are presented by contemporary urbanization must become a cause for international concern or they will become insuperable.⁴⁴⁸ Urban planning demands approaches and skills that must be backed by a proper and well enforced legal framework and participation of all the professionals involved in planning and building and all the stakeholders.

Urban planning and governance in Kenya has failed to provide orderly and sustainable development resulting in numerous unapproved buildings, informal settlements and poor infrastructure. As observed in the hypothesis, Kenya has the necessary legislation to regulate urban planning, but bodies charged with the responsibility of planning cities and controlling

⁴⁴⁵Cliff Hague, Patrick Wakely, Julie Crespin & Chris Jasko, *Making Planning Work, a Guide to Approaches and Skills*, International Technology Publications limited, UK, 2006.

⁴⁴⁶ Ibid.

⁴⁴⁷ Ibid.

⁴⁴⁸ Ibid.

land use and development have underperformed.⁴⁴⁹ Further, the legal framework regulating urban planning as analysed in this chapter is inflexible, complicated and scattered in several legislations and at times has little practical relevance to the needs of the city dwellers. Urban planning demands approaches and skills that must be backed by a proper and well enforced legal framework and participation of professionals and the public. The Constitution of Kenya 2010 and the County Governments Act have addressed some of these concerns but the enforcement of planning laws by the county governments will notably be the greatest challenge. Admittedly, there are numerous challenges caused by rapid urbanization, which if not well managed by law and proper urban planning and governance can pose serious potential risks and these together with weaknesses of the existing legal framework and policy and institutional weaknesses are discussed in detail in the next chapter.

⁴⁴⁹ See chapter one 1.3 (i).

CHAPTER FIVE

LAW, URBAN PLANNING AND GOOD URBAN GOVERNANCE: A PANACEA TO SUSTAINABLE URBAN DEVELOPMENT IN KENYA

5.0 Introduction

Many of the generally acknowledged global environmental problems (greenhouse warming, ozone depletion, soil erosion, chemical management, acidic rain and water pollution, among other things) are directly or indirectly caused by the creation, operation, or disposal of the built environment undertaken by man.⁴⁵⁰ If man is responsible for many environmental disasters in which humankind is threatened, can his activities be regulated and conditioned by law? This question poses a view towards what should be the role of the regulating authority (government) in urban planning to preserve and achieve environmental sustainability. The answer to this critical explanation lies in good urban governance.

This chapter examines the relationship between good governance, urban planning and the law and environmental sustainability. It concludes that good urban governance reverses the loss of environmental resources and sustains environmental development in urban areas. Because many of the environmental challenges in urban areas are caused by activities by men, those charged with the responsibility of managing urban areas must deliberately apply the law to control such activities in order to address the challenges.⁴⁵¹

5.1 Good Urban Governance and Sustainable Urban Planning

Good urban governance has been identified as indispensable in achieving sustainable development in contemporary times particularly in developing world context.⁴⁵² With more and more people preferring cities as their choice of settlement, the challenge lies not in stemming this tide of migration, but in managing and governing our cities better, to improve quality of life and living standards.⁴⁵³

⁴⁵⁰Oyefara J. Lekan, Good Governance and Environmental Sustainability in Lagos State, Nigeria: Can The State Achieve Goal Seven of the Millenium Development Goals (MGGs)?, European Scientific Journal, February 2013 edition, Vol. 9 No. 5, ISSN: 1857-7881.

⁴⁵¹Ibid at page 43.

⁴⁵²Aribigbola, Afolabi, Planning and Urban Governance in Developing Societies: The Example of Akure, Ondo State of Nigeria, Canadian Social Science, Vol. 7, No. 6, 2011, pp. 119-127.

⁴⁵³Ibid.

The world's urban population has been growing rapidly from under 300 million in 1950s to 2.7 billion in 2000. Currently the urban growth rate stands at 2.5 per cent annually adding around 55 million people to urban areas.⁴⁵⁴ The cities in developing countries have been witnessing rapid and spontaneous growth in recent times resulting in a myriad of problems. The menace of urban sprawl and deteriorating environment, housing shortages, unemployment and other socio-economic and environmental issues prevalent in most developing countries have made new thinking and approaches to solving them indispensable if the security and welfare of city dwellers are to be guaranteed. Thus, the urban crisis in developing countries has attracted the attention of scholars, decision makers, donors and multilateral agencies globally and consequently the design of policies and programmes to combat it.

Besides, extant literature indicates that the capacity of the nations to pursue their economic and social goals has begun to depend more and more on their ability to govern their cities.⁴⁵⁵ This is as a result of the realization that cities are engines of economic growth and hub of political and cultural fusion. Consequently, urban local bodies are now expected to plan and coordinate and oft times manage a plethora of urban facilities and activities. They include urban environment, urban transport, anti-poverty measures; facilitate urban economy and productivity and human settlement development. This makes formal planning indispensable and this is why it has been instituted and widely practiced in most societies. In many cases planning can allow cities to avoid the cost of slum upgrading, citywide development strategies and participatory planning.⁴⁵⁶

Thus, over the past few years, a consensus has emerged that improved governance is central to the sustainable achievement of development goals.⁴⁵⁷ UN-HABITAT launched the Global Campaign on Urban Governance in 1999 to support the implementation of the Habitat Agenda goal of "Sustainable Human Settlements Development in an urbanizing world." The campaign's goal is to contribute to the eradication of poverty through improved urban

⁴⁵⁴ Ibid.

⁴⁵⁵ Ibid.

⁴⁵⁶ Ibid.

⁴⁵⁷ Millennium Project (2005). Taskforce on Improving the Lives of Slum Dwellers: A Home in The City (p.104). UK: Earthscan. Rertived from <http://www.unmillenniumproject.org> Accessed on 27th December 2014.

governance. There is a growing international consensus that the quality of urban governance is the single most important factor for the eradication of poverty and for prosperous cities.⁴⁵⁸

The major impediments to grassroots development of physical planning in many countries have been associated with the recurring problems in the local government administration and particularly blamed on poor urban governance. This assertion has been made purely on the premise that the local government as the third tier government, is in the best position to deal with development and planning functions at the grassroots. These functions are very essential for both physical and socio-economic development of any nation.⁴⁵⁹ In sum, the new paradigms are centred on the principles of community participation through extensive consultation at all stages of the planning process; involvement of all stakeholders including women and other disadvantaged groups in the city, and Horizontal and Vertical coordination. Therefore, the focus in recent urban planning and management practices have gradually shifted from measuring success primarily in terms of economic growth to giving equal considerations to environmental and social costs and benefits.⁴⁶⁰

It is against above scenarios that this research seeks to examine the role of law in urban planning as a tool for achieving good urban governance. The overriding concern is to determine the linkages between law, physical planning and governance as well as suggest how to improve sustainable city development in the Kenya through programmed planning and development of the city.

The recent focus on improved governance in cities has raised some concerns about the role of urban planning.⁴⁶¹ Over the last decade or so, there has been growing international agreement on the notion that good governance is a crucial prerequisite for good urban planning. More recently, the term ‘urban governance’ has gained currency. In the 1980’s, improved urban management was said to hold the key to sustainable urban development.⁴⁶² The concept of urban governance, however, added another crucial dimension to this process. It introduced

⁴⁵⁸Supra note 371 at page 120.

⁴⁵⁹Mba H. Chike (1998). Local Government Autonomy and the national Physical Planning Policies and Laws: Towards Complementarity of Governmental Objectives. *Journal of the Nigerian Institute of Town Planners*.

⁴⁶⁰UNCHS (1996). *An Urbanising World: Global Report on Human Settlement*. Oxford, London, New York: UN-HABITAT.

⁴⁶¹Shipra N. and Lars R., Improved governance and sustainable urban development; Strategic planning holds the key, *European Journal of Spatial Development*, April 2006 <http://www.nordregio.sjsDe/E>, Accessed on 27th December 2014.

⁴⁶²Ibid.

the relationship between stakeholders and put citizens and the private sector as equal partners of the state in terms of decision making.

The Organisation for Economic Co-operation and Development (OECD) stated that: “Good governance and sound public management are preconditions for the implementation of sustainable development policies.”⁴⁶³ The Sustainable Development Commission (SDC) also maintained in its work that sustainable development needs to provide an operational tool which should, among others, consist of rules for policy making, certain management systems, and procurement.⁴⁶⁴ This shows that sustainable development and urban governance have to be combined for sustainable cities.

In physical planning, good urban governance plays an exceptional role in the advancement of sustainable development. Good urban governance promotes accountability where government and its representatives can be held responsible if it errs in physical planning matters.⁴⁶⁵ Good urban governance promotes transparency, where government and its agencies in local and national level conducts its activities as it affects physical planning in a transparent manner to benefit the good of the general urban residents.

Good Urban governance should ensure strict and religious compliance to the rule of law in public institutions at all levels. All manners of issues related to physical planning should be handled with total respect to the rule of law; this should be applicable to both the government in carrying out its statutory obligations and citizens in compliance to rule of law in carrying out physical infrastructural development.⁴⁶⁶ Hence everybody should be equal before the law in matters related to physical planning. Good urban governance should ensure public

⁴⁶³Organisation for Economic Co-operation and Development (OECD), *Improving Policy Coherence and Integration for Sustainable Development: A checklist* (Paris 2002) <<http://www.oecd.org/dataoecd/60/1/1947305.pdf>> accessed on 21 May 2011. Cited in Baerenbrinker, Verena (2011) *Sustainable development using urban governance instruments*.LL.M(R) thesis.University of Glasgow.

⁴⁶⁴J. Porritt, ‘The standing of sustainable development in government’ (2009) 28.Cited in Baerenbrinker, Verena (2011) *Sustainable development using urban governance instruments*.LL.M(R) thesis.University of Glasgow.

⁴⁶⁵GaniyuOlalekanBakare, Rule of Law, Physical Planning and Urban Governance in Nigeria: A Panacea to Sustainable Urban Development.Available at <http://www.ssrn.com/link/OIDA-Intl-Journal-Sustainable-Dev.html>, accessed on 1.10.2013.

⁴⁶⁶Ibid.

participation, civil society participation/advocacy group participation in physical planning activities. Since, they are the end beneficiaries of these infrastructural provisions they should be allowed to have their say, contributions and inputs on issues and matters that affect their lives and the cities they reside in.

Governance is an interdisciplinary concept.⁴⁶⁷ There is hardly a discipline in which governance does not play an important role. One could almost say that the concept has experienced a meteoric rise. One of the reasons for this rise is probably the function of governance as an interdisciplinary cross-concept. It has the ability to couple different disciplinary discourses, for example law with sociology and political science. In a very broad definition, the term governance is used “to describe structures and practices of coordination and control without a sovereign power, i. e., an institution competent to make and enforce binding decisions.”⁴⁶⁸

5.2 Law as an Instrument of Regulation in Urban Planning

Urban law is the collection of policies, laws, decisions and practices that govern the management and development of the urban environment.⁴⁶⁹ Legal systems are among the major impediments preventing innovative urban managers from creating reforms and overcoming the pressing challenges of their cities and urban systems.⁴⁷⁰ Many cities are burdened by laws that do not match the prevailing reality.⁴⁷¹ Worse still, the capacity to enforce laws and regulations that are already in place is often lacking. County governments in Kenya have limited access to specialist legislative expertise.

Looking at urban planning, the important role of law within governance structures cannot be ignored. Urban governance networks require an organisational framework which provides incentives for cooperation.⁴⁷² This framework also needs to be able to structure the framework and to ensure that all relevant interests, especially the common welfare, are dealt

⁴⁶⁷Baerenbrinker, Verena (2011) *Sustainable Development Using Urban Governance Instruments*. LL.M(R) thesis. University of Glasgow.

⁴⁶⁸ Ibid

⁴⁶⁹ UN-HABITAT, unhabitat.org/urban-themes/urban-legislation/, accessed on 18th October 2015

⁴⁷⁰ Ibid.

⁴⁷¹ Ibid.

⁴⁷² Supra note 467.

with appropriately. This leads to the design of structures of regulation and also modifies the view of administrative law which is not only executing but above all providing, structuring and enabling.⁴⁷³

The legal system provides forms of organisation, action, and procedures for the enforcement and the implementation of legal norms.⁴⁷⁴ Therefore law has a structuring function.⁴⁷⁵ From the governance view, this is a key aspect. The law aims at the resolving of social or societal problems, and tries to avoid normatively undesirable effects. This structuring function of law is also evident in context with legal instruments in urban planning.⁴⁷⁶ The law is still the central instrument for steering. Hence, it represents a system of values, framework for actions and for decisions. The rules of law are necessary elements in urban governance and democratic political institutions. As stated above, the rule of law in the urban process is an indispensable asset for good urban planning, development and governance.⁴⁷⁷

Law and physical planning like other areas of human endeavour have a credible role to play if sustainable urban development is to be achieved in any society. Urban planning has a central role in achieving sustainability.⁴⁷⁸ Though urban planning is a service and does not necessarily result directly into goods, it is judged by its product i.e. the outcome of the implementation of the planning provisions and programmes.⁴⁷⁹ It provides a plan-document to be used for physical development of the human habitat. By implication urban planning law provides the lead system for “building” the environment which is fundamental for the attainment of sustained control and development of the environment. Law and Physical planning are vehicles for environmental development in the immediate term and set the direction of future growth.⁴⁸⁰ This is achieved through the use of a plan diagram backed-up with many legislative guidelines and administrative policies.

⁴⁷³ Ibid.

⁴⁷⁴G. Schuppert, ‘Grenzen und Alternativen von Steuerung durch Recht’ in D. Grimm (ed), *Wachsende Staatsaufgaben – sinkende Steuerungsfähigkeit des Rechts?* (1st edition, Nomos 1990) 233. Cited in Baerenbrinker, Verena (2011) *Sustainable Development using Urban Governance Instruments*. LL.M(R) thesis. University of Glasgow.

⁴⁷⁵ Ibid.

⁴⁷⁶ Ibid.

⁴⁷⁷ Ibid.

⁴⁷⁸ Supra note 78 at page 5 160-161.

⁴⁷⁹ Ibid at page 161.

⁴⁸⁰ Ibid.

Therefore sustainable physical development and management of human settlement hinges greatly on the effectiveness of physical development plans. This involves the reconciliation of land uses, provision of the right site for the right use, control of development, provision of facilities, services and public goods, preservation, protection and conservation of resources, preservation of heritage among others.⁴⁸¹ Planning law has a positive catalytic role to play towards achieving sustainable development. Planning provides a plan-led system. Such plans provide sustainable and best sites for various human activities. To a very high level, physical planning forecast and projects activities relationships through a planning process which involve evaluation, thus such plan stands a good chance of promoting sustainable development.⁴⁸²

In summary the need for physical planning for sustainable development can be outlined as follows:-⁴⁸³ (a) As physical development occurs, it most often has severe impacts on land and water resources and on the atmosphere, thus the need to take advance action to prevent potential damages. (b) Pressure of population growth and urbanization most often have adverse implications on the supply of adequate shelter, infrastructure and services, therefore the need to plan for them. (c) The poor most often do not have access to suitable shelter, and most often lack security of land tenure, hence the need to protect their interest. To overcome these problems physical planning must provide compatible land uses, ensure orderly development, equitable land distribution, provide functional and visually pleasing environment and satisfactory services in a sustainable manner.

The big question that must now be addressed is, how can cities and towns be made sustainable, in social, economic and environmental terms, in the face of the challenges caused by rapid urbanization?

5.3 Urban Planning: What's new?

When the discussion on sustainable development was initiated, it barely touched upon the subject of planning. The Habitat Agenda, Agenda 21 and other international instruments focussed on issues of social, economic, and environmental sustainability, shelter and housing; the need for enablement and participation; the role of public and private sectors-but failed to

⁴⁸¹Ibid.

⁴⁸² Ibid.

⁴⁸³Adesanya, S. (1998). The physical development dimension of the sustainable development challenge in Nigeria in K. Adeniji and V.I. Ogu (eds). Sustainable physical development in Nigeria. Ibadan: NISER: pp 78- 92.

place emphasis on the role of urban planning and planners.⁴⁸⁴ Mechanisms to ensure sustainable development included improved municipal management practices, environmental planning and management approaches, the use of Environmental Impact Assessments (EIA) and Socio-Economic Impact Assessments (SEIA), the application of Geographical Information Systems (GIS) towards improved environmental and natural resource management. All aimed to ensure that local and national governments did their job effectively, without losing sight of social and environmental considerations. There was however hardly a mention of ‘planning practice’ as a means of ensuring sustainable development.⁴⁸⁵

The recent focus on improved governance in cities has also raised concerns about the future of urban planning. During a session on urban planning at the World Urban Forum in 2004, questions were raised as to whether good governance is a substitute for planning, and whether planning has any significant role at all in a market-led economic development.⁴⁸⁶ Ensuring that planning and governance work in harmony and not at cross-purposes (planning being traditionally technocratic and top down and governance in its latest emphasis participatory and stakeholder driven), are key issues that local authorities and professional bodies are grappling with.⁴⁸⁷ In order to be relevant in such a context, and to be able to meet the contemporary challenges of urbanization, poverty, and exclusion, the planning profession and thus planning practice needs to redefine itself.

The planning profession has in fact seen many ups and downs over the last four or five decades. Traditionally, urban planning was seen as the means by which governments could deliver development-housing, social and physical infrastructure to city dwellers.⁴⁸⁸ It aimed to provide a long-term perspective for a city’s development, based on comprehensive analysis of the given situation and careful projections of demand and supply of land, housing and services. It was driven by visions, goals and deliberate strategies for development, and translated them into land use, infrastructure and other plans. At its best, planning ensured good living environment, efficient service delivery, effective economic development and

⁴⁸⁴Supra note 392 at page 3.

⁴⁸⁵ Ibid

⁴⁸⁶Narang S. (2004), ‘Revisiting Urban Planning at the second World Forum in Barcelona.’ In *Habitat Debate* Vol. 10, No. 4: *A Future for Urban Planning?* P. 10.UN-HABITAT, Nairobi.

⁴⁸⁷ Ibid.

⁴⁸⁸Ibid.

social cohesion in cities. At its worst, it was unrealistic, with grandiose visions divorced from reality, technocratic and stifling.⁴⁸⁹ It was seen as a top-down decision making process, a set of strict and restrictive regulatory frameworks to determine and control the use of land and resources, and as an expensive and time-consuming process, which rarely led to implementation. The failures of master planning, the dominant planning approach, are regularly cited to prove the point.⁴⁹⁰

As planning fell from grace, throughout the 1980's and 1990's, *laissez-faire* approaches came to the fore.⁴⁹¹ Cities grew haphazardly, with private interests' increasingly overriding public interest. Two decades of *laissez-faire* and market-led development, however, have made cities less sustainable, habitable and equitable. It is evident that letting private interests control resources such as land and housing, infrastructure and transportation, without adequate guidance, has exacerbated inequity and exclusion. As a result, the poor are forced to operate outside the formal systems, because they cannot afford legitimate access to land, housing and services. Informality, illegality and exclusion have become the dominant feature of many of the world's cities.⁴⁹²

The time has come for the return of urban planning and new urbanism, albeit in a new guise, with a focus on strategic and participatory approaches. Strategic planning, as opposed to conventional planning approaches, is selective, rather than comprehensive, action oriented, and based not solely on an assessment of physical aspects of the city but also its social, economic and environmental strengths, weaknesses, opportunities and threats.⁴⁹³

5.4 Strategic urban planning and good urban governance

UN-HABITAT's recent experiences illustrate that planning is a key tool in ensuring good governance. Not the old fashioned, top-down, technocratic master planning, however, but strategic planning, which is selective, action-oriented and participatory.⁴⁹⁴ Strategic planning helps the city to respond to fast-moving events and takes into account implementation

⁴⁸⁹Taylor P. (2004) 'Planning for a better future.' In Habitat Debate Vol 10, No. 4: A Future for Urban Planning? Pp. 4-5. UN-HABITAT, Nairobi.

⁴⁹⁰ Supra note 402 at page 4.

⁴⁹¹ Ibid.

⁴⁹² Ibid.

⁴⁹³ Ibid.

⁴⁹⁴ Ibid.

capabilities and the resources required, being more interactive with a broad range of stakeholders. It is based on partnership with civil society and the private sector, rather than on legal sanction or power to enforce.

Strategic planning and good governance are based on similar normative framework and have a number of characteristics in common among them public participation, equity and accountability.⁴⁹⁵

5.5. Strategic urban planning and sustainable urban development in Kenya

Sustainability has been defined as comprising social, economic and environmental welfare. Social sustainability includes issues of safety, crime and poverty and inclusion, which can be addressed most effectively by improved planning and community empowerment while economic sustainability requires improved productivity, which in turn requires improvement to be made to infrastructure and services while ensuring transparent and user friendly rules and regulations, and thus accountability.⁴⁹⁶

Environmental sustainability involves improvement in the quality of the living environment, through upgrading slums, eradicating poverty, mitigating the impact of domestic and industrial wastes, ensuring judicious use of natural resources and controlling pollution. Sustainable urban development cannot be achieved without a new form of planning, one that is pro-poor, strategic and inclusive.⁴⁹⁷

The concept of sustainable development is not only an international topic but has also gained influence in Kenya. Kenya's initial approaches to sustainable development were largely non-legislative, but this has slightly changed over the years, especially in planning systems. The main question is whether sustainable development is just a rhetoric political theme or already a legal rule with the character of a general duty.

⁴⁹⁵Ibid.

⁴⁹⁶ Ibid.

⁴⁹⁷Hague, Cliff (2004) 'A commonwealth Perspective.' In Habitat Debate Vol. 10, No. 4: *A Future for Urban Planning?*P.6. UN-HABITAT, Nairobi.

Until the promulgation of the 2010 constitution, Kenya did not have a single and clearly defined national land policy.⁴⁹⁸ Article 42 in the Bill of Rights, creates an environmental right for all persons. This right includes having the environment protected for the benefit of present and future generations. Further, environmental protection for people of Kenya is enshrined as a constitutional concept that is actionable and enforceable as a basic right through a petition for enforcement of fundamental rights to the High Court (Article 70). The *Environment Management and Coordination Act (1999) (EMCA)* was hitherto the only legal source for this right and still provides alternative access to the High Court by ordinary suit (Section 3). It is therefore noteworthy that both *EMCA* (section 3) and the *Constitution* (Article 70) now embody a liberalized *locus standi* to enforce the environmental right in court without need to show personal loss or injury.

The constitutional environmental right includes having the environment protected for the benefit of present and future generations through legislative and other means, particularly those contemplated in Article 69. The aspect of having a right fulfilled through legislative and other means, coupled with the liberalized *locus standi* for access to justice, provides an opportunity for Kenya to realize some positive enhancement in environmental management and sustainable urban planning and development.

Chapter five of the *Constitution* contains provisions regarding environment and natural resources, sustainable land use and planning. While Article 42 captures the basic right to a healthy environment, Article 69(2) states that every person has a duty to cooperate with state organs, and other persons to protect and conserve the environment and ensure ecologically sustainable development.

Article 184 of the constitution provides that the national legislation shall provide for the governance and management of urban areas and in particular *inter alia* establish criteria for classifying areas as urban areas and cities, establish principles of governance and management of urban areas and cities. To give effect to Article 184 of the Constitution, parliament enacted the Urban Areas and Cities Act⁴⁹⁹ which provides for the, classification, governance and management of urban areas and cities; to provides for the criteria of

⁴⁹⁸Sessional paper no. 3 of 2009 on National Land Policy, Printed by the Land Development and Governance Institute, 2012

⁴⁹⁹Act No. 13 of 2011

establishing urban areas and also provides for the principle of governance and participation of residents and for connected purposes.

Section 3 of the Urban Areas and Cities Act lists the specific objectives of the Act as to establish a legislative framework for classification of areas as urban areas or cities; governance and management of urban areas and cities; participation by the residents in the governance of urban areas and cities; and other matters for the attainment of the objects provided for in paragraphs (a) to (c). For the first time in Kenya's history, governance and management of urban areas has been provided for expressly in the statute. Part 111 of the said Act provides for principles of governance and management of Cities and Urban areas.

On 11th August 2015 the Government of Kenya published The Physical Planning Bill, 2015 whose purposes is to make provision for planning, use, regulation and development of land and for connected purposes. The said bill is yet to be enacted into law. The objects of the bill once it becomes law are to *inter alia* provide a structure for the administration and management of physical planning in Kenya, to provide for principles, procedures and standards for the preparation and implementation of physical development plans in Kenya, and in regions, counties, urban areas and cities, to provide for the procedures and standards for the development control and regulation of land use, to provide a framework for the co-ordination of physical development planning by county governments, and to provide a mechanism for dispute resolution.

The said bill, once enacted and properly implemented will address some of the challenges that have befallen urban planning in Kenya but the greatest challenge will be to undo the mess that has already been done.

In conclusion the Constitution has made a credible legal effort by providing for the enactment of legislation to provide for management and governance of cities and urban areas. The constitution has also integrated sustainable utilization and sustainable management of natural resources as key legal concepts in environmental decision-making. However, the constitutional law position for ecologically sustainable development and sustainable environmental management in Kenya may only remain an aspiration unless laws such as EMCA the Physical Planning Act are either amended or totally reviewed to comply with the new Constitution.

5.6 Critique of the Concept of Sustainable Development

Over the past 25 years the concept of sustainable development has emerged gradually into a key policy objective for many governments. But it is still a somehow “unknown” concept.⁵⁰⁰ According to A. Ross “there seems to be very little understanding or coherent thought about what exactly sustainable development means.”⁵⁰¹ This leads to the conclusion that the concept of sustainable development needs further refinement.⁵⁰² Refinement takes time and needs to be done step-by-step. However, the concept of sustainable development itself has proven its resilience and its acceptability as a policy tool.⁵⁰³ Sustainable development involves a long-term process of change. This process needs a strategy that includes broad participation from representatives of governments, civil society and the private sector. It requires public awareness on the need to protect the environment. Only a broad participation can ensure that the concept of sustainable development is accepted and approached with maximum effort.

5.7 Urban Planning and Its Relationship to the Public’s Health.

The built environment influences the public’s health, particularly in relation to chronic diseases. There is good evidence to indicate that the burden of chronic disease in the population can be reduced through an active lifestyle, proper nutrition, and reduced exposure to toxic conditions.⁵⁰⁴ However, many urban and suburban environments are not well designed to facilitate healthy behaviors or create the conditions for health.⁵⁰⁵ Health officials

⁵⁰⁰Dr.VerenaBaerenbrinker, (June 2011) Sustainable development using urban governance instruments , Master theses submitted for the LL.M, University of Glasgow, School of Law, Berlin.

⁵⁰¹A. Ross, ‘It’s time to get serious – why legislation is needed to make sustainable development a reality in the UK’ (2010) 2 Sustainability 1109.

⁵⁰² R. Jain, ‘Sustainable Development: differing views and policy alternatives’ (2003) 4 Clean Technologies and Environmental Policy 197. Cited by Dr.VerenaBaerenbrinker, Supra.

⁵⁰³A. Ross, ‘It’s time to get serious – why legislation is needed to make sustainable development a reality in the UK’ (2010) 2 Sustainability 1111.

⁵⁰⁴Rosen G. *A History of Public Health*. Baltimore, Md: Johns Hopkins University Press; 1993:177–178, 212–213, 314–316.

⁵⁰⁵ Ibid

can provide information about healthy living, but if people live in poorly designed physical environments, their health will suffer.⁵⁰⁶

Laws regulate the emission of toxic substances or pollutants that degrade the environment. These measures are aimed at improving the built environment by reducing pollutants and ensuring the quality of air and water. Laws protecting the environment require developers to prepare an environmental impact statement before beginning development affecting the quality of the environment. Law influences the built environment in a variety of ways, ranging from environmental regulation, zoning, and building codes. Those responsible for governing urban areas must enforce laws designed to ensure healthy living conditions.

5.8 Conclusions

Rapid urbanization has brought in its wake increasing poverty, informality and exclusion in many parts of the world, especially in the developing and transition countries. As such, the sustainability of human settlements in social, economic and environmental terms is at risk like never before. The focus is increasingly on the role of law in urban planning, good urban governance and its impact on sustainable urban development. This research concludes that the hypothesis statements have been proved and attempts to make a case for a renewed emphasis on planning in order to achieve well-governed and sustainable cities. The research illustrates how improved governance and sustainable development can be achieved together through a strategic planning approach. The multiplicity and rigidity of laws and regulations compel citizens to pursue informal routes to conduct land and property transactions and property development.

Since no section of the country's urban environment is immune to environmental effects, there is urgent need to seek workable solutions by the application of planning, economic, legal, institutional and educational tools to achieve a sustainable urban environment. It is hoped that if these tools are properly adopted it will result in the enculturation of the right environmental management practices that would prevent the further deterioration of our physical urban environment; hence the possibility of achieving sustainable development in Kenya. Successful protection of the environment is dependant not only on public awareness and interest but also on a legal and political system that supports its activities and of course enforces the law. In order that sustainable development becomes a common practice, there

⁵⁰⁶ Ibid

needs to be changes in not just people's mind-set, design and development practices but also in existing government policies and mechanisms.

Good urban governance is the means to achieving sustainable development and there is an urgent need to change the way we govern our cities, conceptualise and plan our urban spaces to ensure greater integration, better resource management, creativity and flexibility and diversify the role that planners and other stakeholders play. There is also an urgent need to change and adapt modern development practices, policies and mechanisms deliberately geared to achieving sustainable development.

CHAPTER SIX

SUMMARY OF FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

6.0 Introduction

As the urban population increases, demand for every key service such as water, transportation, sewage treatment and low income housing will increase five- to sevenfold in cities of every size and type. If Kenya continues on its current path, urban infrastructure will fall woefully short of what is necessary to sustain prosperous cities. In the light of increasingly pressing urban challenges such as described in this document, the traditional approaches to planning, and the use of planning instruments have to be critically reviewed and revised with a view to making them more effective.

We have been able to examine the importance and relevance of the role of law in urban planning and governance and how it can be used to achieve sustainable urban development in Kenya. The essence of this is that our urban environment, which consists of the towns and cities, is what physical planning law is basically concerned with in relation to the changes within the physical environment and how it deals with future problems.

Despite the existing environmental laws, physical planning laws and regulations and laws governing building standards, the urban centres in Kenya still continue to suffer from poor environmental quality, irregular conversion of land use from the original land-use to different land-uses without recourse to these existing laws, poorly constructed buildings and unapproved structures. However, it is one thing to have laws guiding the operation of a society in place and another thing is to have a government that has the strong will and respect of rule of law to make the various existing laws operational. While it is recommended that Urban Planning Laws in Kenya be amended to conform with the letter and spirit of the Kenya Constitution 2010, it should be observed that it is not the existing laws that are deficient but lack of proper implementation, poor enforcement and lack compliance by all citizens.

The quality of any urban settlement largely depends on urban governance and the institutional framework under which it is managed. There is a need for more inclusive/participatory and transparent approaches to the management of urban affairs. This

coupled with the decentralization and devolution of management systems and functions to lower levels of government brought by the constitution of Kenya 2010 will if well managed contribute to the pursuit of efficient and sustainable human settlements and planning in Kenya's urban areas.

6.2 Conclusions

Good urban governance should deliberately ensure that law occupies a central role in urban planning and that policies are essentially selected options to be used as instruments for achieving intended goals and objectives. Consequently, it is essential to adopt urban planning legal and institutional framework to guide all urban development strategies, policy implementation methodologies and pertinent action plans.

It is thus a national legal framework for urban development, which shall serve as a guideline for implementation of appropriate urban development strategies at the national and county levels. It should be outlined based on a "holistic, urban approach" that will give explicit attention to urban development.

If managed properly, Kenyan cities and towns could provide the critical link between the development of rural areas and the larger national and global economy. There is a need to employ innovative approaches in urban planning that are more responsive to the challenges caused by urbanization bearing in mind that traditional approaches to urban planning have failed to effectively solve the numerous challenges caused by urbanization suggesting a strong need for a more meaningful and effective approach.

6.3 Recommendations

The existing urban development control instruments and practices have not been effective in guaranteeing orderly development of urban areas and sustainable urban planning despite having been in existence in Kenya from as early as 1947 in the name of Town and County Planning Act. This calls for a need to:-

- a) Review and harmonize all conflicting and contradictory laws and regulations and eliminate duplication of efforts and mandates. Planning and implementation must be brought to operate under one roof.

- b) Foster public private partnerships in urban development control as enunciated in Agenda 21.
- c) Technocrats in the name of professional bodies of the Architectural Association of Kenya (AAK), Kenya Institute of Planners (KIP), Schools of planning and their associates should take the lead in formulating the right endogenous planning paradigms, standards and models appropriate for the country in the 21st century.
- d) Adequate resource allocation should be mobilized to facilitate plan preparation and effectuation.
- e) Planners need to fill the gaps and weakness which used to exist in the past and devise better approaches of working with new institutions that will be created by the National and County governments; including the County Assembly, County Public Service Board, County executives, Town management Boards and the like.
- f) Review and amend the Physical Planning Act to conform to the new constitutional dispensation.
- g) Adopt innovative planning approaches involving use of modern technology such as the planning portal and paperless application process for approval of development plans in order to shorten time taken and eliminate inordinate delay in processing applications as well as reducing congestion in offices.
- h) Recognize informal settlements as legal parts of the city and support comprehensive development programmes and projects in slums.
- i) Ensure that the slum upgrading programmes and policies address immediate needs in relation to water, sanitation, health, energy, housing in addition to medium and long term goals.

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