THE SQUATTER PROBLEM AT THE KENYAN COAST:-

ADDRESSING THE PROBLEM WITHIN THE CURRENT LEGAL FRAMEWORK

PRESENTED BY:

MWAGONAH EMMANUEL MWAGAMBO

G62/68738/2013

A thesis submitted in partial fulfillment of the requirements for the degree of Master of Laws (LLM) School of Law, University of Nairobi.

Supervisor

Joy Asiema

Declaration

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

Student: **Mwagonah Emmanuel Mwagambo**

Admission Number: **G62/68738/2013**

Signature:

Date:

Supervisor:

Signature:

Date:

Acknowledgements

I wish to sincerely thank the following persons without whom this dissertation would not have been completed:

Joy Asiema, my supervisor, for her commitment, scholarly guidance and time spent in editing this thesis. I am heartily grateful to you.

Mercy Okiro for your encouragement and assistance in terms of research material and the final production of this work for providing me with insurmountable help during the compilation of this thesis and providing me with references to persons who proved to be of invaluable assistance. I am grateful.

Connie Nzau- Mwagambo for being a loving wife and friend and for helping in the proof reading of this work and making the much-needed changes.

Davidson Makau whose, detail, precision, additions and editing of this work produced this final copy.

Finally, to all my friends and colleagues who helped me in any way whatsoever in bringing this thesis to fruition. I thank you all.

Dedication

I dedicate this dissertation to my loving family:

To my parents, dad and mum, through your encouragement and guidance thus far I have come. Against all of life's turmoil, you stood by me and supported me; I love you and thank you.

To my wife Connie and my children Tuwa and Tunu, thank you for being there with me and bearing with me during the countless hours when I was immersed in this work and seemingly did not have time for you.

Thank you God for bringing us thus far.

Table of Contents

Declaration ii

Acknowledgements iii

Dedication iv

Table of Contents v

Abbreviations and Acronyms viii

List of Constitutions ix

List of Transnational Legal Instruments ix

List of Kenyan Statutes ix

CHAPTER ONE 1

1. INTRODUCTION 1

1.1. Background to the Problem 1

1.2 Problem Statement 6

1.3 Theoretical Framework 8

1.3.1 The Socio-Economic Theory of Law 9

1.3.2 The Natural Law Theory 9

1.4 Objectives of the Study 11

1.5 Research Questions of the Study 11

1.6 Hypotheses 12

1.7 Justification for the Study 13

1.8 Literature Review 13

1.9 Scope of the Study 18

1.10 Methodology 19

1.11 Chapter Breakdown 19

CHAPTER 2 21
2.0 HISTORY OF LAND LAWS IN THE COAST OF KENYA.....21
2.1 Introduction.....21
2.2 History of the Kenyan Laws on Land.....22
2.2.1 The Pre-colonial Period 22
2.2.2 The Colonial Period.....25
2.2.3 Post-Colonial period 34
2.3 Conclusion 42
CHAPTER THREE 44
3.0 REVIEW OF THE EXISTING LAWS ON LAND WITH SPECIFIC REFERENCE TO THE SQUATTER PROBLEM AT THE KENYAN COAST 44
3.1 Introduction.....44
3.2 Review of the rationale behind the current Laws on Land 45
3.3 Review of the Land Registration Act, No 3 Of 2012.....52
3.4 Review of the National Land Commission Act, No 5 of 2012 54
3.5 Review of the Land Act, No 6 of 2012 67
3.6 Shortcomings in the ability of the new Land Laws to address the squatter problem 76
3.6.1 Overlap of the functions of the National Land Commission and the Ministry of Lands, Housing, Urban Planning and Development.....76
3.6.2 The National Land Commission's reliance on funding from the National government 77
3.6.3 Lack of political good will.....78
3.6.4 Lack of autonomy and independence of the National Land Commission..78
3.6.5 Operation and Institutional Challenges.....79

3.7 Conclusion 80
CHAPTER 4 81
4.0 CONCLUSION AND RECOMMENDATIONS 81
4.1 Introduction.....81
4.2 Summary of Findings.....82
4.3 Conclusion 84
4.4 Specific Recommendations.....86
4.4.1 The Land Registration Act, No 3 of 2012.....86
4.4.2 The National Land Commission Act, No 5 of 2012 88
4.4.3 The Land Act, No 6 of 2012 90
4.5 General Recommendations 92
Bibliography 94

Abbreviations and Acronyms

IBEAC	Imperial British East Africa Company
KANU	Kenya African National Union
KLA	Kenya Lands Alliance
MRC	Mombasa Republican Council
NLC	National Lands Commission
NLP	National Land Policy

List of Constitutions

Constitution of Kenya, 2010.

Constitution of Kenya, 1969 (repealed).

List of Transnational Legal Instruments

Southern African Charter on Land, Labour and Food Security.

Framework and Guidelines on Land Policy in Africa.

List of Kenyan Statutes

Land Act, Number 6 of 2012.

Land Registration Act Number 3 Of 2012.

National Land Commission Act, Number 5 of 2012.

Land Consolidated Act, Cap 283.

Land Adjudication Act, Cap 284.

Land (Group Representatives) Act, Cap 287.

Trust Land Act, Cap 288.

Trusts of Land Act, Cap 290.

Equitable Mortgages Act, Cap 291.

Distress for Rent Act, Cap 293.

Trespass Act, Cap 294.

Land Acquisition Act, Cap 295.

Survey Act, Cap 299.

Land Control Act, Cap 302.

Land Adjudication Act, 1968.

CHAPTER ONE

1. INTRODUCTION

1.1. Background to the Problem

According to the Kenya Lands Alliance (KLA),[1] sixty eight percent (68%) of Kenyans are squatters.[2] The coastal counties[3] have a perennial problem of irregular land allocation to the detriment of the true owners of the land.[4] Inequality in land distribution is a national problem; however, the one at the coastal belt is unique. The problem of squatters, landlessness and the associated injustices can be traced to the pre-colonial period. Only the actors behind these injustices have changed over time.

The report of the *Commission of Inquiry into the Illegal and Irregular Allocation of Land (The Ndung'u Report*)[5] cited the coastal region as an area where prominent political families, who mostly live upcountry, own most of the prime land. The result is the growing population of squatters and landless indigenous coastal people, who are now being manipulated by politicians and groups like the Mombasa Republican

[1] Kenya Lands Alliance (KLA) is a not-for-profit and non-partisan umbrella network of Civil Society Organizations and Individuals committed to effective advocacy for the reform of policies and laws governing land in Kenya. For further information, please see Kenya Land Alliance website, at http://www.kenyalandalliance.or.ke/ (accessed 19/03/2016).

[2] The Land Act, Number 6 of 2012 at Section 2 defines a "squatter" as a person who occupies land that belongs to another person without that persons consent.

[3] There are 6 Counties in Coast Province namely Kilifi, Kwale, Lamu, Mombasa, Taita Taveta and Tana River. For further information on the counties at the Coast Province, see Constitution of Kenya, First Schedule; This classification of counties at the Coast Province of Kenya is premised on the Districts and Provinces Act, Cap 105 A, Third Schedule which provides for the provinces in Kenya and their respective districts.

[4] Commission on Revenue Allocation (2012) "Historical Injustices: A Complementary Indicator for distributing the Equalization Fund," CRA Working Paper No. 2012/02, Government Press, Nairobi, pg 24. See also, Karuti Kanyiga (1998) *Struggles of Access to Land: The Squatter Question in Coastal Kenya,* CDR Working Paper no. 98.7, Centre for Development Research, Copenhagen pg 5.

[5] The Commission of Inquiry into the Illegal/Irregular Allocation of Public Land, which came to be known as the "Ndung'u Commission" after the name of its Chair, Paul Ndiritu Ndung'u, was a Kenya Government Commission established in 2003. The Commission was formulated to inquire into the extra-legal allocation of public lands and lands reserved for public purpose to private individuals and corporate entities, and to provide recommendations to the Government for the restoration of those lands to their original purpose or other appropriate solutions.

Council (MRC)[6] for political mileage. This is one of the daunting tasks that the recently formed National Land Commission (NLC)[7] is mandated to address.

Inequality in access to and ownership of land in Kenya is a troubling question. Ownership and tenure of land is a very sensitive issue in Kenya, which can be traced back to the pre-independence era.[8] The National Land Commission (NLC) seeks to address these problems through its mandate outlined in Article 67 of Constitution of Kenya, 2010, the Land Act, the Land Registration Act and the National Land Commission Act.

The National Land Policy, 2007, outlined mechanisms for resolving the squatter problem at the coast of Kenya. The National Land Policy made various recommendations including the taking an inventory of all government land within the 10-mile coastal strip, covering 1,128 parcels measuring 80,000 hectares in Kwale, Kilifi, Mombasa, Malindi, Lamu and Tana River districts.[9] Its recommendations were, however, selectively and lethargically implemented till the promulgation of the

[6] Mombasa Republican Council (MRC) is separatist organization based at the Kenyan coast. The group claims that Mombasa and the coastal area are not part of Kenya and therefore should secede. The separatist organization has been blamed by the government for escalating insecurity at the Coast of Kenya. See Linah Benyawa (2015) "Government raises alarm over Mombasa Republican Council," in *Standard Digital*, on Monday, July 13, 2015, at http://www.standardmedia.co.ke/article/2000168983/government-raises-alarm-over-mombasa-republican-council?articleID=2000168983&story_title=government-raises-alarm-over-mombasa-republican-council&pageNo=1 (accessed 19/03/2016).

[7] Constitution of Kenya, 2010, Article 67, established the National Land Commission which body was operationalized by the enactment of the National Land Commission Act, Number 5 of 2012.

8 Benson Mulemi (2011) "Putting Land Grievances Behind us in Kenya," A report on the Historical Roots of Land-Related Grievances in Kenya, at http://www.academia.edu/1420126/Historical_Roots_of_Land-Related_Grievances_in_Kenya (accessed 9/11/2014) pg 4.

[9] The Kenya National Land Policy (NLP) is a policy document formulated to provide an overall framework and define the key measures required to address the critical issues of land administration, access to land, land use planning, restitution of historical injustices, environmental degradation, conflicts, unplanned proliferation of informal urban settlements, outdated legal framework, institutional framework and information management. See Ministry of Lands (2007) *National Land Policy*, Government Press, Nairobi, pg. iv on the Executive Summary.

current Constitution on August 27, 2010, thus rendering them obsolete. Unfortunately, the challenge of squatters still persists.

Currently, the squatter situation at the coast of Kenya can be linked to the following main causes:

1. The Arab alienation of coastal lands;
2. Alienation of coastal lands by white settler Lords to build a settler economy;
3. Imposition of English property laws;
4. The issue of land titling.[10]

Alienation of land at the Kenyan coast had been happening before the arrival of the British. The establishment of private claims over the land by the Sultan of Zanzibar and his subjects[11] institutionalized the taking away of land from the indigenous people. At the time, the indigenous people were thought to have relied on an indigenous land tenure system that was characterized as being "communal" without any sense of individual or common ownership. The fact, however, is that African indigenous tenure systems have been characterized by a complex array of rights ranging from "open" communal ones to individualized transmission via kinship arrangements and/or a combination of these.[12] African indigenous tenure systems allowed access to the land for persons who belonged to the community.[13] This ensured that, at that point in time, the challenge of squatters never arose.

10 Benson Mulemi (2011) "Putting Land Grievances Behind us in Kenya," A report on the Historical Roots of Land-Related Grievances in Kenya, page 9 at http://www.academia.edu/1420126/Historical_Roots_of_Land-Related_Grievances_in_Kenya (accessed 9/11/2014).
11 Karuti Kanyinga (2000) *Re-distribution From Above: The Politics of Land Rights and Squatting in Coastal Kenya*, Nordiska Afrikainstitute, Sweden, page 34 at http://www.diva-portal.org/smash/get/diva2:271584/FULLTEXT01.pdf (accessed 9/11/2014).
12 *ibid*, page 23.
13 Jomo Kenyatta (1938) *Facing Mount Kenya: The Traditional Life of the Gikuyu*, Heinemann Educational Books, Nairobi, Pg 26.

The dispossession of land from the indigenous people at the Coast of Kenya continued and became more deep-seated when the Imperial British East Africa Company (IBEAC) signed an agreement with the Sultan of Zanzibar in 1888 in which 'all rights to land in his territory except private lands' were ceded to IBEAC. This affected the 10-mile coastal strip running from Tanzania to the Somalia border. Massive land dispossession, however, came with the declaration of Kenya as a British East Africa protectorate in 1895, the construction of the Kenya-Uganda railway from Mombasa to Lake Victoria and the need to settle Europeans in colonial Kenya.[14]

The actions of the colonial government intensified the problem of landlessness at the coast as the indigenous people were never really considered as being able to acquire and possess land rights. This was attributable to their perceived inability to put land to uses that the British considered useful and effective. In addition, legislation at the time was geared towards providing land for the settlers who could facilitate the growth of the colonial economy through "productive" use of land.[15] These regulations were incorporated in the East Africa Order-In-Council of 1901, which empowered the Commissioner to dispose, sell or lease undeveloped and unoccupied land in the protectorate.[16] This disenfranchised the indigenous people further as they lost land due to a supposed failure to develop it.

14 Paul Maurice Syagga (2006) "Land Ownership and Uses in Kenya: Policy Prescription from an Inequality Perspective," in Regional workshop on Role of Geoinformation in National Development, on August 25-26, 2008, at Regional centre for Mapping of Resources for Development, Society, Society for International Development, Nairobi, page 294.

15 An example of such legislation is Land Regulations of 1897 which authorized the commissioner to issue certificates of short-term occupancy of 21 years renewable for a further 21 years if occupation had taken place and conditions attached to it had been fulfilled.

16 Karuti Kanyinga (2000), *Re-distribution From Above: The Politics of Land Rights and Squatting in Coastal Kenya,* Nordiska Afrikainstitute, Sweden, page 36 at http://www.diva-portal.org/smash/get/diva2:271584/FULLTEXT01.pdf (accessed 9/11/2014).

The colonial government, in a bid to uplift the colonial economy, implemented the recommendations of the *Swynnerton* plan of 1954.[17] The essence of the *Swynnerton* recommendations was the privatization of land through the displacement of indigenous property systems, relations, and modes of production and their replacement with a new legal order modeled after 1925 English land law.[18] The impact of the implementation of the recommendations of the *Swynnerton Plan* was the creation of squatters who previously were able to access land on the basis of their membership to the community. The failure in finding equivalent land rights under English land law to those already under African customary law during the privatization and registration of the land was a significant contributor to the challenge of landlessness in Kenya[19] and specifically at the coastal region.

Save for a few private individual landowners and a majority of the hotel owners along the beach, most of the individuals at the coast are yet to receive title documents to their property. The various legal and political strategies employed by successive government regimes resulted in the indigenous people of the coast being denied their, now inalienable,[20] right to own land. The legal framework operational prior to the promulgation of the 2010 Constitution and the enactment of the 2012 land laws was bereft of any feasible solutions to the squatter problem. They were a carry-over from the previous legal frameworks and offered little or no solution to the ever-increasing problem of squatters. They certainly needed an overhaul if the problem was to find a

[17] The Swynnerton Plan developed by Roger Swynnerton who was an official in the Department of Agriculture was a colonial agricultural policy aimed at intensifying the development of agricultural practice in the Kenya Colony. The plan was geared to expanding native Kenyan's cash-crop production through improved markets and infrastructure, the distribution of appropriate inputs, and the gradual consolidation and enclosure of land holdings.
18 Okoth-Ogendo (1987) "The Perils of Land "tenure" Reform," in J.W. Arntzenm *et al.* (eds) *Land Policy and Agriculture in Eastern and Southern Africa,* United Nations University, Tokyo, pg 1.
[19] Simon Coldham (1978) "The Effect of Registration of Title upon Indigenous Land Rights in Kenya," 22:2 *Journal of African Law,* Pg 97.
[20] Constitution of Kenya, 2010, Chapter 5.

lasting solution.

The lip service and temporary solutions offered by the post-colonial governments essentially amounted to brief reliefs to a deep-seated problem that arose in the pre-colonial period. This Study, however, acknowledges that an attempt has been made by the current Jubilee government to issue titles to the coastal residents.[21]

1.2 Problem Statement

Currently, there are two categories of squatters at the Coast of Kenya: Those who, despite occupying and using, through tilling for instance, the land which has been in their possession for decades still do not have the title to the land; and the descendants of those who were rendered landless as a result of being displaced from their ancestral homes due to the historical alienation of their lands by successive government regimes and have been forced to occupy people's land without their consent.

A lasting and effective solution to the squatter problem would be to give titles to those who have, for generations, openly and notoriously occupied the land on which they currently reside but are yet to get titles. Similarly it would be a viable solution to offer alternative settlement to the descendants of those who, due to successive historical injustices, were evicted from their ancestral homes.

The Constitution of Kenya, 2010 certainly provides a springboard towards the realization of the required solutions, to wit, the titling of land and the resettlement of

[21] Joseph Masha and Paul Gitau (2013) "President Uhuru Kenyatta issues 60, 000 title deeds to Coastal residents" in *The Standard* on August 30th 2013 at http://www.standardmedia.co.ke/?articleID=2000092322&story_title=uhuru-issues-60-000-title-deeds-to-coast-residents (accessed on 9/11/2013).

those disenfranchised by historical injustices. Article 40 of the 2010 Constitution, 2010, made the right to acquire and own property an inalienable right. It provides that persons have the right to own land, in their individual capacity or together with others, which property shall not be arbitrarily depraved without appropriate compensation.[22] Further, at Article 68, the Constitution provided a precursor to the establishment of a new legal regime on land. The operationalization of these constitutional rights to land applies to the indigenous people of at the Coast of Kenya, who are to enjoy their rights and freedoms to the full extent consistent with the Constitution. The Constitution mandates the government to acknowledge, respect and promote the rights to land and implement legislation to fulfill its mandate.[23]

The interpretation of this obligation is that the government must be actively involved in ensuring that every person has access to land and addresses the land rights of vulnerable groups who through historical injustices, were denied these rights. Thus, by dint of the provisions of Article 40 of the Constitution and other relevant constitutional provisions, the Government has a duty to ensure that the two categories of squatters at the coast are granted either ownership to the land they occupy or access to acquire alternative land. This can be through enacting legislation and policies to ensure the squatters at the coast access their rights to land.

Through the 2010 Constitution and the 2012 land laws, the conceptual framework for providing redress and solutions to the squatter problem has been put in place. What remains is to establish whether there exists, within these instruments, viable

[22] There are further constitutional requirements to be satisfied prior to the deprivation of private property. They include the requirements that the deprivation of private property be for a public function and should be

[23] Constitution of Kenya, 2010, Article 21.

mechanisms for the actual realization of the solutions.

The provisions in the constitution and numerous policies on land matters have eventually culminated in the enactment, in 2012, of new land laws viz. the Land Act, the Land Registration Act and the National Land Commission Act.

It is imperative to note that the 2010 Constitution and the 2012 land laws donate immense powers to the National Land Commission which include mechanisms for the redress of the squatter problem by either titling the lands of those who are already in occupation and resettling those who have been displaced.

Despite the promulgation of the Constitution more than five (5) years ago and the enactment of the 2012 land laws more than three (3) years ago, the problem of squatters has persisted. While acknowledging that a milestone has indeed been achieved in enacting the current legal regime on land, it is important at this juncture to question whether the National Land Commission (NLC), created under the Constitution and whose role is to *inter alia* address the squatter problem, has the machinery and required tools to actualize the titling of land and resettling of squatters.

1.3 **Theoretical Framework**

This paper seeks to find solutions to the squatter problem at the Kenyan coast. It analyses *inter alia* the historical underpinnings, legal framework and historical injustices that led to the problem. It then attempts to establish whether solutions to the problem exist within the existing legal, institutional and governance framework. This research will therefore be hinged on the following theories:

1.3.1 The Socio-Economic Theory of Law

In advancing this theory the paper will refer to the socio-economic theory of law that presupposes that factors of economics have overtaken and replaced justice as the basis for law reform and regulation of human behavior.[24] It will further seek to establish that the squatter problem arose as a result of successive Kenyan regimes having as their goal their capitalistic interests to the detriment of the social well being of the indigenous populations. The success of the solutions proposed in the new land laws is dependent on how well they address the overarching social (the underdevelopment and economic marginalization of the indigenous coastal communities) needs of the squatter population.

1.3.2 The Natural Law Theory

Natural Law theorists, for instance Thomas Hobbes detail that there exists Universal good or the good of self-preservation. In that, what human beings generally desire, due to similarities in physiological constitution, what is of central importance to them. A broad consensus can also be concluded from what human beings fear. Thus we should strive to build correct percepts of rationality around what human beings desire and fear[25] The theory advocated further by John Finnis propounds that there are certain basic forms of goods vital for human existence which are to be pursued while what causes discomfort, pain or anguish is to be avoided.[26] These basic goods have been regarded as being self-evident and irreducible. Examples of these basic goods

[24] Richard Posner (1973) brought economic analysis of law to the attention of the general legal academy; Posner made two claims: (I) Common law legal rules are, in fact, efficient; and (II) Legal rules ought to be efficient. In both claims, "efficient" means maximization of the social willingness-to-pay. In the course of the controversy, two other claims were articulated in Kornhauser (1984, 1985): (III) Legal processes select for efficient rules; and (IV) individuals respond to legal rules economically.

[25] Stanford Encyclopedia of Philosophy website, at http://plato.stanford.edu/entries/natural-law-ethics/ (accessed 13/7/2014).

[26] Alex E. Wallin (2012) "John Finnis's Natural Law Theory and a Critique of the Incommensurable Nature of Basic Goods," in 35:1 *Campbell Law Review* 58-81.

include life, religion, knowledge, self-sustenance, sociability, amongst others. John Finnis then details that these goods must have some methodological requirements to ensure practical reasonableness.

These methodological requirements are principles which facilitate the enjoyment of these basic goods. Among which include the favoring and fostering self-sustenance. Governments then should enact laws to ensure the enjoyment of these basic goods. Any laws that purport to limit the enjoyment of these basic goods is void. These basic goods though have been critiqued for being incommensurable. These goods lack an objective way of measuring them. For instance the principle of self-sustenance cannot be measured objectively.

With regards to this research, the right to own property and property itself is a universal good desired by human beings irrespective of their background.[27] This right is closely linked to the principle of self-sustenance. This study also acknowledges that the amount of property one is to own to ensure sufficient sustenance cannot be objectively measured but this does not take away from the significance of the basic good.

The focus of the Study is on property rights. As such, the failure to solve the squatter problem at the Coast of Kenya results in an infringement of the Mijikenda's human rights. This study corresponds with the natural law theorists in propounding that property is a universal good desired by human beings and thus should be shared equitably.

[27] Brian Bix (2012) *Jurisprudence: Theory and Context*, Carolina Academic Press, North Carolina, pg 65.

1.4 Objectives of the Study

The overall objective:

The overall objective of the study is to examine the problem of squatters at the Kenyan coast with a focus on how the matter is addressed in the Constitution of Kenya as well as the new legal regime on land.

The specific objectives of the study are to:

1. Examine the historical origin of the squatter problem at the Coast from the pre-colonial, colonial and post-independence era.
2. To examine the pre-2012 land regime and its contribution to the squatter problem.
3. To interrogate whether the current legal framework including the Constitution of Kenya and the new land laws, to wit, the Land Registration Act number 3 of 2012, the National Land Commission Act number 5 of 2012 and the Land Act, number 6 of 2012, are adequate to address the squatter issue at the coast.
4. To make appropriate recommendations for reform.

1.5 Research Questions of the Study

The overall research question that this Study addresses is what led to the challenge of squatters at the Kenyan coast with focus on how does the Constitution of Kenya and the new legal regime on land address this challenge?

This specific research questions are as follows:

1. Historically what led to the squatter problem at the Kenyan coast?
2. What regime of laws existed before the current legal framework and to what extent did they contribute to the squatter problem?
3. To what extent did the squatter problem inform the enactment of the new land

laws in Kenya?

4. Do the new land laws as well as the Constitution of Kenya provide an adequate mechanism for resolving the squatter problem at the Kenyan coast?
5. What amendments (if any) can be made to the new land laws to provide more adequately to the resolution of the squatter problem at the Kenyan Coast?

1.6 Hypotheses

This research presumes that:

1. The squatter phenomenon at the Kenyan coast can be linked historically to legal regimes adopted by the pre-colonial, colonial and post-colonial regimes which legal regimes were developed to actively contribute to the alienation of land originally belonging to the indigenous people.
2. The post -2010 legal framework *viz.* the Constitution of Kenya, 2010, and the new land laws, to wit, the Land Registration Act Number 3 of 2012, the National Land Commission Act Number 5 of 2012 and the Land Act, Number 6 of 2012, all of which came into force after the promulgation of the 2010 Constitution, have the potential to adequately resolve the squatter problem at the Kenyan coast and specifically whether:
3. There is need to amend the pre-2010 land laws to arm the National Land Commission (NLC) with a specific mandate and power to obtain a lasting solution to the squatter problem at the Kenyan coast,
4. There may be a need to have institutional reforms to resolve the squatter problem at the Kenyan coast.

1.7 Justification for the Study

The squatter problem is still rife at the Kenyan coast despite numerous efforts to cure it. There are various historical as well as socio-political reasons as to why the problem still exists. A step in the right direction was taken when the new land laws were enacted and which partly addressed the issue.

This Study makes an addition to the existing discourse on the subject with a focus on the dynamics post the promulgation of the 2010 Constitution and the 2012 land laws. Although the subject of squatters at the Kenyan coast has been extensively studied, most of the publications available concern themselves with the problem pre- the 2010 Constitution and the 2012 land laws.

This research, which is focused on the situation and development post the new legal regime, is therefore necessary and relevant.

1.8 Literature Review

This paper recognizes that many scholars have delved into the land question at the Kenyan coast including attempts at tackling the squatter problem, its origins and suggested solutions. This paper shall endeavour to build on these and enhance it through an analysis of the legal developments in the field.

In his analysis, *Fredrick Cooper*[28] researched on the transition from the abolition of slavery and the notion that the British, in an attempt to maintain agriculture labour but still abolish slave trade, imposed taxes and other measures to force Africans into the needed work force. In his analysis the indigenous people were allowed to grow crops

[28] Frederic Cooper (1997) *From Slaves to Squatters: Plantation labor & Agriculture in Zanzibar & Coastal Kenya, 1890-1925*, Heinemann Education Books, New Hampshire.

such as coconuts on land that did not belong to them so long as they acknowledged the rights of the landowner. He observed that the British occupation of the Kenyan coast destabilized the existing African land tenure system. The colonial state opted to establish a tenure system that was safe, reliable and "British." The rigidity of the British land tenure system, however, did not allow for ex slaves and the local *Mijikenda* to acquire property.

In his work *Fredrick Cooper* looks at the coast colonial economy and the effects of the policies imposed on the wellbeing of the *Mijikenda*. His detailed approach towards the situation of the squatters at the Kenyan coast provides us with a glimpse of the life of the squatter during the precarious era of colonialism. His analysis, however, is a historical perspective of the origin of the challenge. It fails to address the challenge, more so, from a constitutional and legal perspective. This Study analyses the historical perspective by building on the work by *Fredrick Cooper* and provides solutions to the challenge of squatters based on the current 2010 Constitution and the existing legal framework.

Closer home, *Dr. Benson Mulemi*[29]observed that whereas the land problems originated in the pre-colonial era the subsequent postcolonial regimes[30] exacerbated the landlessness and squatter problems through a culture of patronage, nepotism and cronyism in rewarding "their own". It is widely believed that the *Kikuyu* were able to benefit from settlement schemes, such as the *Mpeketoni* settlement scheme at the

[29] Benson Mulemi (2011) "Putting Land Grievances Behind us in Kenya," A report on the Historical Roots of Land-Related Grievances in Kenya, at http://www.academia.edu/1420126/Historical_Roots_of_Land-Related_Grievances_in_Kenya (accessed 9/11/2014).
[30] The governments of Jomo Kenyatta and Daniel Arap Moi the first and second presidents of Kenya who cumulatively ruled from 1978 to 2002.

coast. His analysis, however, is also premised entirely on the pre-2010 Constitution and excludes the impact of the subsequently enacted legislation. This lacuna in his Study will be sufficiently addressed in this Study.

Professor Kivutha Kibwana in his essay[31] attributes the squatter problem at the Kenyan coast to the Arabs and the Islamized Africans. He, however, fails to analyse the impact that the imposed foreign land tenure system had on the land rights of the indigenous people of the Coast of Kenya. This Study addresses the impact that these foreign land tenure systems had since they failed to find an equivalence of the African land rights in the rights protected under the foreign land tenure systems. Further, the imposition of the foreign land tenure systems was driven by individualistic, capitalistic interests that were peculiar and strange to the indigenous African accustomed to communal. The resulting impact of the imposition of the foreign land tenure systems is sufficiently pressed upon in this Study.

Karuti Kanyinga [32] comes closest in objectives to this paper. He analyses the complex land issues at the Kenyan coast with specific emphasis to the *Kilifi* district, which forms the focal point of this work. He analyses the issue of land ownership and the squatter problem and how leaders from the region have sought to address it. Similar to *Fredrick Cooper*, his focus is on the colonial and post-colonial era. The impact of the 2010 Constitution and the subsequent land laws are missing in his paper. Further, no solutions as to how best to combat the challenge of squatters at the Coast of Kenya is

[31] Kivutha Kibwana (2000) "Land Tenure, Spontaneous Settlement and Environmental Management in Kenya," in Smokin C. Wanjala (ed.) *Essays on Land Law: The Reform Debate in* Kenya, Faculty of Law, University of Nairobi, Nairobi, pp 105-134.
[32] Karuti Kanyinga (2000) *Re-distribution From Above: The Politics of Land Rights and Squatting in Coastal Kenya*, Nordiska Afrikainstitute, Sweden, at http://www.diva-portal.org/smash/get/diva2:271584/FULLTEXT01.pdf (accessed 9/11/2014).

highlighted in the Study. This Study builds on the work by *Karuti Kanyinga* on the squatter problem at the Coast and to an extent, how and to what degree the leaders in the region have addressed the challenge. This Study, however, adds to Karuti Kanyinga's Paper in analyzing the challenge of squatters at the Kenyan Coast paying attention to Kilifi County, thus covering a larger geographical area. Further, this Study provides such recommendations as to resolve the squatter challenge.

In his paper *Land Tenure Problems in The Ten-Mile Strip of the Coast Province of Kenya"*[33] *Professor Okoth Ogendo* provides a historical background to the issue and proposes tentative solutions. His solutions, however, are not in tandem to the Constitution, 2010, and the subsequently enacted land laws having been published in 1977. This Study borrows some of the recommendations and adapts them to best suit the current constitutional and legal framework.

Professor Patricia Kameri-Mbote and Kithure Kindiki, in a paper entitled *Trouble in Eden: How and Why Unresolved Land Issues Landed "Peaceful Kenya" In Trouble In 2008*[34] address the thorny issue of landlessness and the squatter problem at the Kenyan coast. The state that the problem of landlessness culminated to the 2007-2008 post-election violence since persons identified themselves along ethnic lines as a means to ensure their guaranteed access to land. Their recommendations are geared towards limiting speculative land holding to individuals and weaning Kenyans off their dire need for land. They fail to address how best to deal with the historical land

[33] Okoth-Ogendo (1977) "Land Tenure Problems in the Ten-Mile Strip of the Coast Province of Kenya," Memorandum Prepared for and at the Request of the Parliamentary Select Committee on the Issue of Land Ownership along the Ten-Mile Coastal Strip in Kenya.

[34] Patricia Kameri-Mbote & Kithure Kindiki (2008) "Trouble in Eden: How and Why Unresolved Land Issues Landed 'Peaceful Kenya' in 2008," in Vol 35:2 *Forum for Development Studies*, Norwegian Institute of International Affairs, Routledge, 167-193.

injustices having been perpetuated by the various political regimes that have been in power plaguing the communities in Kenya. The recommendations made in this Study are to the effect that they remedy the historical land injustices perpetuated upon the communities living in Kilifi County.

On this issue, *Paul Maurice Syagga*, in his article *Land Ownership and Use in Kenya: Policy Prescriptions from an Inequality Perspective* concerns himself with the evident differences and benefits that accrue to groups and individuals due to inequality. Specifically, he focuses on land ownership in Kenya, and makes recommendations to review the legal and administrative framework to allow for equitable access to land by the citizens of Kenya. His analysis focuses on how historical land injustices arose in Kenya. He postulates that the disposition of land during the colonial era disadvantaged some sections of the society rendering them landless. He states that the best mechanisms to address the historical land injustices in Kenya is through appropriate civic education, sufficiently funding the National Land Commission and the implementation of a proper legal framework. His recommendations, however, focuses on the Kenya, and are based on the assumption that the injustices faced by communities in Kenya are of a similar nature. This Study instead focuses on the communities living in Kilifi County, who are majorly the Mijikenda, and addresses the historical land injustices that have plagued the area and its inhabitants.

Mwandawiro Mghanga [35] has explored the history of the Kenyan coast, and examined in detail the extent to which the leaders in the past have dealt with the issue. He analyses the challenge of landlessness from a political point of view stating that the

[35] Mwandawiro Mghanga (2010) *Usipoziba Ufa Utajenga Ukuta*: *Land, Elections, and Conflicts in Kenya's Coast Province*, Heinrich Boll Stiftung, East and Horn of Africa.

conflicts during the 2007-2008 elections at the Coast province were sparked off by unresolved land issues. He states that since independence, land at the Coast of Kenya has been used for political patronage thereby facilitating cronies who have been unwilling to resolve the challenge of squatters. His general analysis covers the entire Coast province ranging from Taita Taveta, South Coast, Tana River and Tana Delta. This Study, on the other hand, focuses on Kilifi County and the origin of the squatter challenge therein. Further, the challenge of squatters is analysed from the legal perspective of repealed and current laws on land. The aim of this is to determine the degree to which the repealed legal framework contributed to this challenge and whether a solution lies in the current constitutional and legal framework.

1.9 Scope of the Study

The scope of this study is to examine the squatter problem at the Kenyan coast and how the problem is addressed and tackled in the constitution of Kenya together with the new regime of land laws.

This study also aims to review the land laws that existed prior to the current legal framework. It looks into how the issue of squatters was dealt with in the old regime of land laws, in order to establish whether these laws contributed to the persistence of the problem.

This study also seeks to recommend ways in which the current legal regime can be improved in order to efficaciously deal with the squatter problem. Inasmuch as the issue of squatters is a problem existing in other parts of the country, this study was limited to the Kenyan coast.

1.10 Methodology

The research relies on secondary sources of information, including but not limited to:

1. Desk review of existing literature and scholarly work in this area. This shall include an in-depth analysis of authoritative peer-reviewed journal articles, books, monographs and research papers.
2. Review of existing laws, government records and statistics available from the Internet, ministry of lands and the national bureau of statistics. This provides the situational analysis of the challenge on the ground.

1.11 Chapter Breakdown

Chapter one: chapter one will be an introductory chapter. It will provide a background and introduction to the problem as well as set out the objectives of the research. This chapter will also include the theories and hypotheses on which the research shall be grounded, an outline of the literature review and the research methodology.

Chapter two: chapter two will delve into the regime of land laws that existed prior to the enactments of 2012 land laws and the Constitution of Kenya, 2010. These laws were numerous and complex and were the origin and subsequently contributed to the problem of squatters at the Kenyan coast.

Chapter three: chapter three will provide an analysis of existing legislation touching on including but not limited to the Constitution of Kenya, The Land Act, Number 6 of 2012 and the Land Registration Act Number 3 of 2012 and the National Land Commission Act Number 5 of 2012. This analysis will be done in an attempt to establish whether these laws provide solutions to the challenges identified above and

whether they need to be reformed and/or other laws enacted.

Chapter four: chapter four will come up with conclusions and recommendations based on the findings made after an analysis of the existing legislation.

CHAPTER 2

2.0 HISTORY OF LAND LAWS IN THE COAST OF KENYA

2.1 Introduction

The land laws existent in Kenya prior to the promulgation of the Constitution greatly contributed to the squatter problem at the Coast. Only by identifying the root cause of the problem of squatters will we be able to sufficiently address it. This approach will provide a holistic realization of the causes of the squatter problem and thus a mechanism to remedy the quandary.

In this Chapter, the focus will be on the contribution to the squatter problem by the laws that existed prior to the institution of the new legal regime. This chapter will look at laws and regulations governing land in pre-colonial Kenya, colonial Kenya and post-colonial Kenya. The essence of this chapter would be to investigate to what extent the said laws exacerbated or pacified the squatter problem. The geographical focal point of this Chapter is the Kenyan Coast. The particular focus of this chapter will be on the land laws that had a direct impact on the squatter problem being experienced at the Coast of Kenya.

This chapter seeks to answer two interrelated research questions: first, historically what led to the squatter problem at the Kenyan coast? And second, what regime of laws existed before the current legal framework and to what extent did they contribute to the squatter problem

2.2 History of the Kenyan Laws on Land

The History of Land Laws in Kenya may be addressed under three subtopics:

- The Pre-colonial period;
- The Colonial period; and
- The Post-independence period.

2.2.1 The Pre-colonial Period

Communities in pre-colonial Kenya had unwritten laws regulating the ownership and use of Land within the community. The laws governing land were specific and varied from community to community but there were some distinct features that cut across most laws on land in pre-colonial Kenya.

Land in Kenya was primarily used as "commons" where it was held as a trans generational asset. The ancestors, the living and their descendants simultaneously owned the land. Land was managed at different levels of social organization with a social hierarchy in the form of an inverted pyramid. The family was at the tip and the community at the base, of the inverted pyramid.[36] The system in place essentially guaranteed access to land for all members of the Community because of lack of *de jure* individual ownership of land.[37] Laws governing land were in existence prior to the settlement of the British in Kenya. These pre-colonial laws on land sought to achieve a different objective *viz.* to ensure access to land to members of the community.

[36] H.W.O. Okoth Ogendo (2002) "The Tragic African Commons: A Century of Expropriation, Suppression and Subversion," in *Land Reforms and Agrarian Change in Southern Africa* (Programme for Land and Agrarian Studies, School of Government University of the Western Cape), p 2.
[37] Karuti Kanyinga (2000) *Re-distribution From Above: The Politics of Land Rights and Squatting in Coastal Kenya*, Nordiska Afrikainstitute, Sweden, at http://www.diva-portal.org/smash/get/diva2:271584/FULLTEXT01.pdf (accessed 9/11/2014) pg 31.

The persons living at the Coast, and in particular the *Mijikenda* had similar laws regarding ownership of Land. The mechanisms acting within the community targeted providing access to land through well-established internal social mechanisms of ownership and use. This removed the issue of landless persons since what really mattered was access to land, not ownership. Ownership vested in the community. This structure of land ownership existed in relative stability till the arrival of the Arab merchants.

The Arab merchants disrupted the land tenure system through establishment of slave trade and private claims over the coastal land by the Sultan of Zanzibar and the subjects living under the Sultan.[38] By the time of the building of the Fort Jesus by the Portuguese in 1593, the Coastal region was under the Omani Arabs.[39] By the 19th Century when the Europeans started penetrating the Coastal region, the Sultan of Zanzibar was already exercising jurisdiction over the Coastal region.

The settlement of Arabs at the Coast came with imposition of Islamic sharia law over the region under their jurisdiction. While Islamic Sharia Law promoted public interest it also established the right to private property.[40] This was to some extent similar to the African Tenure over land. The imposition of Islamic Sharia Law on non-Muslims

[38] John M. Mwaruvie (2011) "The Ten Miles Coastal Strip: An Examination of the Intricate Nature of Land Question at Kenyan Coast," in Vol 1 No 20 *International Journal of Humanities and Social Science*, Centre for Promoting Ideas (CPI), Los Angeles, at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&ved=0CDsQFjAD&url=http%3A%2F%2Fwww.ijhssnet.com%2Fjournals%2FVol_1_No_20_December_2011%2F17.pdf&ei=iLLzU-WaH-mY0QWZ5oHwCQ&usg=AFQjCNFnMLlM4mOLUMf-v9soK1FLs0mCVQ&sig2=U2sRqTeG8zLJ1rRA4iXZJg&bvm=bv.73231344,d.d2k (accessed 19/8/2014) pg 178. See also Charo J.B. (1977) "The Impact of Land Adjudication under the Titles Act Cap 282 in Kilifi District," LLB Dissertation, University of Nairobi.

[39] African Studies Centre Website, at http://www.africa.upenn.edu/NEH/khistory.htm (accessed 20/8/2014).

[40] Wael B. Hallaq (2009) *An Introduction to Islamic Law*, Cambridge University Press, Cambridge, pg 16.

(living within the jurisdiction of the Islamic Law) provided that non-Muslims were also to enjoy the same political and cultural rights as Muslims in the region.[41] Thus, the Sultan provided protection for land owned by Africans who were not Muslims and Muslims living under his domain.

As aforesaid, the imposition of Sharia Law allowed for title to land to be held by a single individual rather than the community as a whole as it once was. Sharia Law advocated more for private ownership of property whilst providing an overriding objective of prioritizing public interest. This was somewhat similar but intrinsically different to the African customs that provided for communal ownership of land for the interest of the community (public).

It is around this period that the problem of landlessness and subsequently squatters began. The private ownership claims established by Arabs and the subjects of the Sultan of Zanzibar over land at the Coast set the course for the growth of the squatter population at the Kenyan Coast.

The land laws in existence prior to the colonial period for the settlement of the Arabs was informal and of a social nature. It sought to ensure equitable redistribution of land by granting ownership to the community at large and allowing for individual access to land depending on the membership of the person.

Pre the Arab influx, squatters never existed because the community owned the land.

[41] The Constitution of Islamic State of Madina was the first written Constitution in Human history to govern the Muslims and non-Muslims living in Medina. It is used as an example of what kind of rights, duties and privileges non-Muslims living under Sharia Law enjoy, at http://www.constitutionofmadina.com/wp-content/uploads/2012/02/Constitution-of-Madina_Articles.pdf (accessed 27/8/2014).

The challenges that arise from the use of lands as a "commons," as advanced by Garret Hardin (1968) *The Tragedy of the Commons* never manifested in Kenya, rather the failure to recognize the African commons[42] is what led to some, if not most of the squatter problems experienced at the Kenyan Coast.

2.2.2 The Colonial Period

The 1884 Berlin Conference delineated specific spheres of influence for the various European Colonial powers. The major colonial holding for Britain was, amongst others, British East Africa. This included the Kenyan Coast.[43] The British Government then granted the administration of the region to the Imperial British East Africa Company (IBEAC). IBEAC had been granted a royal charter in 1888 that allowed it to enter into concessions on behalf of the British government so long as the concessions were beneficial to and relevant for the development of the British sphere of influence.[44] This allowed IBEAC to enter into a concession with the Sultan over the land at the Kenyan Coast.

The concession entered into by the Sultan of Zanzibar and the IBEAC perpetuated the alienation of land from the Coastal people. The agreement provided that all the rights to the land (that was not private land) in the Sultan's territory were ceded to the Imperial British East Africa Company.[45]

---

[42] H.W.O. Okoth Ogendo (2002) "The Tragic African Commons: A Century of Expropriation, Suppression and Subversion," in *Land Reforms and Agrarian Change in Southern Africa* (Programme for Land and Agrarian Studies, School of Government University of the Western Cape) pg 5.
[43] About Geography website, at http://geography.about.com/cs/politicalgeog/a/berlinconferenc.htm (accessed 20/8/2014).
[44] Encyclopedia Britannica Website, at http://www.britannica.com/EBchecked/topic/315078/Kenya/259594/The-British-East-Africa-Company (accessed 27/8/2014).
[45] H.W.O Okoth-Ogendo (1991) *Tenants of the Crown: Evolution of Agrarian Law and Institutions in Kenya*, African Centre for Technology Studies, Nairobi, pg 16.

The concession agreement provided a means by which alienation of land belonging to the indigenous people at the Coast would begin to take place. The gist of this concession agreement between the Sultan of Zanzibar and IBEAC was that all land not formally recognized by the Sultan as being under private ownership was granted to the Imperial British East Africa Company.

It is important to note that due to the imperial doctrine of jurisdiction, which relates to sovereignty over foreign territory, the concession agreement only granted IBEAC rights to the land under the dominion of the Sultan, i.e. within the 10 mile Coastal Strip.[46] It was at this point in time however that the protection for the land held under communal ownership declined substantially.

The signing of the concession agreement led to the exercise of jurisdiction by the British over the region and subsequently the creation of laws governing the land within the ten-mile Coastal strip. As such the signing of the concession agreement had a profound impact on the dispossession of the land belonging to the indigenous people at the Coast.

Dispossession of land continued with the enactment in 1894 of the Indian Land Acquisition Act that applied to Zanzibar and the Kenyan coast. IBEAC had been declared insolvent in 1895 and subsequently surrendered the concession it had entered into to the British government. The enactment of the Act was after the declaration of Kenya as a British Protectorate. The Act sought to dispossess inhabitants of the region including Indians and Europeans of land for the purpose of construction of the

[46] *ibid.*

railway.[47] The land from the 10-mile coastal strip to the interior of Kenya was treated as ownerless. The reason behind this was that it was regarded that Africans had no private proprietary (ownership) rights over land and were merely interested in occupation of the land.[48]

The imposition of the Indian Land Acquisition Act in 1894, set the stage for importation of more Britain- based land laws to Kenya. The importation of these laws led to the evolving of a system of laws that were tailored towards developing the economic potential of Kenya for the benefit of the British. Land as a factor of production was of great importance to the British in developing the economy of Kenya. Prior to the enactment of the Indian Land Acquisition Act, the British were only able to acquire land at the Coast of Kenya through agreement with the Sultan. The agreement that had been entered into by the Sultan and IBEAC subsequently applied to dealings between the Sultan and British government.

In order to enable the acquisition of land by the British, the Land Regulations of 1897 were enacted. These regulations on land facilitated the transfer of land at the Kenyan Coast to the British settlers by granting the Commissioner in Kenya the power to appropriate land by the issuance of twenty-one (21) year lease certificates over land. These leases were renewable if effective occupation was proved. The matter of effective occupation was solely tailored to favour the British since it was deemed at the time that the indigenous people's customs on the use of land were not regarded as effective occupation.

[47] Karuti Kanyinga (2000) *Re-distribution From Above: The Politics of Land Rights and Squatting in Coastal Kenya*, Nordiska Afrikainstitute, Sweden, at http://www.diva-portal.org/smash/get/diva2:271584/FULLTEXT01.pdf (accessed 9/11/2014) pg 36.
[48] H.W.O Okoth-Ogendo (1991) *op. cit.*.

A land law that was subsequently applied in Kenya was the Foreign Jurisdiction Act of 1890. This Act gave to the Crown the power of control and expropriation over "waste and unoccupied land in protectorates where there was no settled form of government and where the land had not been appropriated either to the local sovereign or to individuals." This provision on land was incorporated in the 1901 East African (Lands) Order-in-Council[49] and so were the provisions of the Land Regulations of 1897.

The incorporation of the Foreign Jurisdiction Act of 1890 into Kenya is a further example of how the squatter problem at the Kenyan Coast was created through the importation of foreign laws into Kenya.

The application of imported laws into the local land tenure system disrupted the existing tenure in land. A direct result of the expropriation of land that the British government considered to be waste and unoccupied was the increase in the population of squatters.

The indigenous people of Kenya had various uses for land such as pastoralism, among the Maasai or bee keeping among the Kamba. At the Kenyan Coast, some of the use of land included *inter alia* religious as is common in the forested the *Kayas*[50] were situated. The reason and purpose for Africans having the large bare tracts of land at the time was as a result of a "nomadic" rotation on the land due to sparse populations and as an effective natural method of resource conservation and management.[51]

[49] *ibid.*
[50] Kaya is a Miji Kenda term for a sacred place of worship, sacrifice and libation
[51] Wellington Nguya Wamicha and Justus Inonda Mwanje (2000) "Environmental Management in Kenya," in *Environmental Forum Publications Series, No 2*, at

However, the British did not regard this use of land by Africans as effective occupation. For this reason the British then appropriated the land and granted it to British settlers.

It is however imperative to note that whereas the imposition of the Crown Lands Ordinance in 1902 at the Kenyan Coast targeted lands belonging to the indigenous populations, it had little or no effect over land occupied by the subjects of the Sultan or other persons at the Coast who practiced Islam and were therefore deemed subject to Muslim law. An example of this discriminatory alienation of land is the alienation of 95 % of the land at Malindi and Kilifi, which are predominantly occupied by the Mijikenda, which land was subsequently appropriated to Arabs and Swahilis.[52]

The Crown Land Ordinance of 1902 forced persons to forfeit land that was not developed or occupied.[53] It also gave to the Crown in England title to land in Kenya. The Crown could lease or grant freehold title over land considered to be "unoccupied or under-developed," regardless of any claims of ownership.[54]

The Arabs and those that practiced Islamic Law at the Coast were not affected since it was assumed that private ownership rights had been established by the application of

---

http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB8QFjAA&url=http%3A%2F%2Fwww.ossrea.net%2Fpublications%2Fimages%2Fstories%2Fossrea%2Fenv-kenya-part-2.pdf&ei=ytX5U-G0HoTTaOmLgMgH&usg=AFQjCNHtJlNHLB_9QRQTp8plaHKscLp2JQ&sig2=Ot3FSHoKURu6SGRdpTIHbA&bvm=bv.73612305,d.d2s&cad=rja (accessed 24/8/2014) pg 20.

[52] Karuti Kanyinga (2000), *Re-distribution From Above, The Politics of Land Rights and Squatting in Coastal Kenya*, Nordiska Afrikainstitute, Sweden, at http://www.diva-portal.org/smash/get/diva2:271584/FULLTEXT01.pdf (accessed 9/11/2014) pg 59.

[53] Benson Mulemi (2011) "Putting Land Grievances Behind us in Kenya," A report on the Historical Roots of Land-Related Grievances in Kenya, at http://www.academia.edu/1420126/Historical_Roots_of_Land-Related_Grievances_in_Kenya (accessed 9/11/2014) pg 5.

[54] *ibid*.

Islamic Law and presumably that most Arabs had put in investment into the land they were in possession of.

The brunt of the imposition of these laws fell on the indigenous people at the Coast (mainly Mijikenda) who lived outside the ten-mile coastal strip, which was under the jurisdiction of the Sultan. They were dispossessed of their land without compensation for the reason that the British government failed to consider any legitimate right to land founded on community ownership arrangements.[55]

In order to further facilitate the transfer of land from the Arabs to the British at the Coast, the British enacted the Land Titles Ordinance of 1908.[56] The imposition of the Land Titles Ordinance was a further disruption of the land tenure system at the Coast and in effect went ahead to perpetuate the problem of squatters. The Ordinance granted free hold titles to Europeans whilst reserving the less fertile and more arid lands for the Mijikenda.

The creation of the reserves commenced in areas that were further away from the shoreline. This point also marked a shift from the erstwhile arrangement of granting the Europeans 21-year leasehold titles. These were now converted to absolute or almost absolute tenures in the form of leaseholds of 999 years and the grant to settlers of estates in fee simple. The initial plan for using leasehold certificates ensured land flowed to the party with the greatest need to develop it hence establishing a basis for the redistribution of land. Upon imposition of free hold titles, the earlier intention and objective of redistribution of the land to the indigenous populations was extinguished.

[55] *ibid.*
[56] Frederick Cooper (1997) *From Slaves to Squatters: Plantation Labor and Agriculture in Zanzibar and Coastal Kenya 1890-1925*, Heinemann Educational Publishers, New Hampshire, at 193.

In response to complaints raised by the British settlers with regard to the Crown Lands Ordinance of 1902, the British administration in Kenya enacted the Crown Lands Ordinance of 1915. The 1915 ordinance espoused the position that land occupied by the indigenous people or reserved for their use by the Governor, was considered to be Crown Lands and hence the governor could alienate the land. The Ordinance also extended the Lease period created by the Crown Lands Ordinance of 1902. The Lease periods were extended to nine hundred and ninety-nine years.[57] The effect of the two Crown Land Ordinances was to make African indigenous people, "Tenants at the will of the Crown.[58] The Crown had the prerogative to willy- nilly appropriate, grant, dispossess or lease land to anyone.

At this time, the indigenous populations had been moved to established native reserves that were insufficient to handle the growing African populations living there and, even worse, eroded the initial African tenure on land, which allowed access to use of land.[59]

All in all, the enactment and imposition of these British laws on Kenya led to immense alienation of land and dispossession of the indigenous people of their land. It marked the beginning of the problem of squatters at the Kenyan Coast. It essentially turned the indigenous *Mijikenda* into "tenants" on their own land. Most indigenous groups at the Kenyan coast did not own any land immediately upon enactment of the

[57] Karuti Kanyinga (2000), *Re-distribution From Above: The Politics of Land Rights and Squatting in Coastal Kenya*, Nordiska Afrikainstitute, Sweden, at http://www.diva-portal.org/smash/get/diva2:271584/FULLTEXT01.pdf (accessed 9/11/2014) pg 37.
[58] H.W.O Okoth-Ogendo (1991) *Tenants of the Crown: Evolution of Agrarian Law and Institutions in Kenya*, African Centre for Technology Studies, Nairobi, pg 16.
[59] Karuti Kanyiga (2000) *ibid*.

Crown Land Ordinance of 1915.[60]

The British administration in Kenya subsequently noted the problems that arose from overcrowding in the native reserves. They then commissioned the Kenya Land Commission in 1934 to make recommendations on the way forward with regard to African reserves. This is when the debate on individualization of tenure began.

In 1954, this debate culminated in the commissioning and implementation of the recommendations of the "*Plan to Intensify the Development of African Agriculture in Kenya*," commonly referred to as the "*Swynnerton Plan"* after R.J.M. Swynnerton, who was its brainchild. The plan advocated for individualization of tenure as a means of developing agriculture, in Kenya. The plan sought to do away with the traditional communal tenure of land. It was argued that the traditional communal system of land tenure would not ensure security of tenure. The individualization of tenure, it was argued would enable the African farmer, who was previously denied capital for investment, to acquire capital for development purposes.[61]

In order to give effect to the recommendations of the Swynnerton plan, the colonial government enacted the Land Consolidation Act of 1959. The aim of which was to consolidate the fragmented pieces of land into economically viable parcels of land. The enactment of this statute led to further displacement of persons and loss of land for others. This in itself increased the squatter problem.

The intentions of the Swynnerton plan were noble but ended up accumulating land for

[60] *Isaka Wainaina Gathomo & Another* v. *Morito Indagara & the A.G of Kenya* eKLR.
[61] Deepak Lal & Paul Collier (1986) *Labour and Poverty in Kenya: 1900-1980*, Clarendon Press, Gloucestershire, pg 27 and pg 45.

chiefs and loyalists instead of the persons who were real owners of the land. It has been argued by *Oginga Odinga* in *Not Yet Uhuru*[62] that the Swynnerton Plan ended up creating bourgeoisie to protect the interests of the British Colonialists the effect of which was the birth of a division between the persons owning land and the landless.[63]

Most land alienation from the native Africans at the Kenyan Coast happened during the colonial period. British administration in Kenya perpetuated the acquisition of the land through enactment of ordinances, which disenfranchised the Africans.

It is evident that the recommendations from the commissions and the plans on land further pushed the British government agenda in total disregard of the interests of the indigenous populations - the real owners of the land. During the pre-colonial and postcolonial era, extensive (land) disenfranchisement was perpetuated against the indigenous people at the Kenyan coast leading to the burgeoning of the squatter problem.

As such, the squatter problem is a direct consequence of the colonial land policies and laws.[64]

It is imperative to note that the historical injustices, including, but not limited to the forced alienation of the coastal lands thereby disenfranchising the indigenous populations, have been acknowledged by the British.[65]

---

[62] Oginga Odinga (1974) *Not Yet Uhuru: An Autobiography*, Heinemann Publishers, New Hampshire, pp 107.

[63] Mwandawiro Mghanga (2010) *Usipoziba Ufa Utajenga Ukuta*: *Land, Elections, and Conflicts in Kenya's Coast Province*, Heinrich Boll Stiftung, East and Horn of Africa, pg 20.

[64] *ibid*

[65] Kenya Land Alliance (2004) "The National Land Policy in Kenya: Addressing Historical Injustices," Issue Paper No 2/2004, at http://www.caledonia.org.uk/land/documents/kla_issues_paper.pdf (accessed on 12/11/2014), pg 5.

2.2.3 Post-Colonial period

Upon the attainment of independence in 1963, the government of Kenya inherited many of the laws that had been passed by the British during the colonial period. Examples of these Laws include the Crown Lands Ordinance (which later became the Government Lands Act). This blind inheritance of laws that had been tailor-made for the forceful alienation of African lands by the British essentially provided continuity to the alienation by the new government.

Notably, there were some basic principles that were agreed upon by the British colonizers and the Kenyan leaders. Examples of such principles are the protection of private property and a resettlement programmed financed by the government of Britain by way of a grant to Kenya. The resettlement program was aimed at curing the malady of squatters in Kenya.[66] This gave birth to the creation of schemes for settlement. Several schemes were created at the coast in places such as *Tezo Roka*, *Mtondia*, *Mtwapa* and *Ngerenya*. Despite the establishment of these settlement schemes the squatter problem at the coast was not cured. This was partly due to government lethargy in ensuring that records of the beneficiaries (genuine squatters) were proper and accurate and partly due to the fact that oft time those who benefitted were not always genuine squatters but land hungry seekers from upcountry.[67]

After the passing of the Constitution in 1963, the laws governing land under the colonial regime were incorporated into the Kenyan legal system. Here, lip service

[66] Paul N. Ndungu (2006) *Tackling Land related Corruption in Kenya*, at http://siteresources.worldbank.org/RPDLPROGRAM/Resources/459596-1161903702549/S2_Ndungu.pdf (accessed 2/9/2014), pg 3.
[67] Karuti Kanyinga (2000), *Re-distribution From Above: The Politics of Land Rights and Squatting in Coastal Kenya*, Nordiska Afrikainstitute, Sweden, at http://www.diva-portal.org/smash/get/diva2:271584/FULLTEXT01.pdf (accessed 9/11/2014), pg 70.

change was effected on the adopted laws. The Government merely changed the titles rather than the substance of the adopted laws. For example, the word “ordinance” was changed to “Act” and “Crown” was changed to “President” or “Government.”

Amongst the laws that were adopted was the Crown Lands Ordinance of 1915. The Government in 1963 adopted the ordinance and renamed it the Government Lands Act, Cap 280 (“the GLA”). The Act was primarily enacted to make further and better provisions for the regulation, leasing and the other disposal of government lands. In the same way the Crown Lands Ordinance of 1915 gave the Crown of England powers over the land in Kenya, the Government Lands Act simply transferred these powers to the acting president. The President thus had the power to dispossess, lease, grant and appropriate government land to any person. The powers of the president were outlined in section 3 of the Act. Under this section, the president could also exercise some powers over private property.

The powers exercisable by the president included the power to vary any covenants, agreements or conditions attached to land, make grants or dispositions over government land and accept the surrender of any freehold land. Under Section 20 of the GLA the president could order for the selling of leases over farms. This notwithstanding that the president was a mere custodian of the land holding the same for the benefit of the populace. The president was essentially in the position of a trustee for the people of Kenya, the beneficiaries. The president was to be guided by principles of English law and the doctrines of equity in exercise of his powers.[68]

[68] Cf Government Lands Act, section 77 exercise of the powers of the court on forfeiture of land for a breach of covenant or condition.

The reality, however, was that there was a blatant disregard and ambivalence of this trust. The president in abuse of the powers conferred to him by the Governments Land Act, allocated land to himself, his family, his friends and cronies. The court recently declared some of the land decrees made by the Late President Jomo Kenyatta illegal. The Late president had made declarations on the basis of powers allocated to him by the Governments Land Act, Cap 280. The decrees which had dictated to whom land was to be allocated and to whom a transfer of prime property could be made, was declared illegal and unconstitutional.[69]

Mzee Jomo Kenyatta relied on the allocation of land that had initially been held by settlers to his cronies in order to solidify his patronage and perpetrate sycophancy. At independence the land held by the settlers was meant to revert back to the indigenous people who had been disenfranchised during the pre-colonial and colonial period. Jomo Kenyatta abused the powers he wielded under the Government Lands Act and instead used his presidential prerogative as a tool to serve selfish interests and for self-aggrandizement to the prejudice of the indigenous populations.

Land at the Kenyan Coast was appropriated to the elite and the most vocal of sycophants. The locals, the Mijikenda, continued to be disenfranchised since their political representatives were bribed using land.[70] An example of such loyalist rewarding and cronyism is the grant of large tracts of land given to the *Late Ronald Ngala* who, even after benefitting from the provisions of the Swynnerton plan, was still awarded land by former president Jomo Kenyatta in order to suppress the genuine

[69] Eunice Machuhi (2014) "Kenya court declares Jomo Kenyatta land decree illegal," in *African Review*, on March 13, 2014, at http://www.africareview.com/News/Kenya-court-declares-Kenyatta-land-decree-illegal/-/979180/2242636/-/i54gnqz/-/index.html (accessed 6/9/2014).
[70] *ibid*.

land claims of the Mijikenda.[71]

Subsequent presidents, including president Daniel Arap Moi who continued the trend started by his predecessor, perpetuated this trend of buying political patronage. Moi also relied on the issuance of land titles to serve his personal interests rather than pillage public funds since the international community less scrutinized land.[72] The reliance on land for political patronage was also in response to the reduction in foreign aid resources.[73] An example is the list of people (to be settled and allocated land) sent to the chairman of the allocation committee of the Magarini settlement scheme in 1984. The list of persons had its origins from the office of the President.[74]

Through progressive and unjust mechanisms of allocation of land the first two presidents of Kenya ended up using the powers conferred upon them to amass wealth and power instead of solving the land problem at the Kenyan coast. Had the law been clear as to procedure for the allocation of land, gains would definitely have been made in attempting to settle the squatters at the Kenyan coast. Misappropriation of land would have been limited and the squatter problem could have been, partially if not completely, eradicated given that at the time populations were still relatively sparse.

Another example of a post-colonial land law that saw the worsening of the land problem at the Coast and Kenya in general was the enactment of the Registered Land Act, Chapter 300 of the Laws of Kenya in 1963. Under section 28 of this Act, the first

[71] *ibid*.
[72] Jacqueline M. Klopp (2000) "Pilfering the Public: The Problem of Land Grabbing in Contemporary Kenya, Africa," in 47:1 *Africa Today*, Indiana University Press, Baltimore.
[73] Paul N. Ndungu (2006) *Tackling Land related Corruption in Kenya*, at http://siteresources.worldbank.org/RPDLPROGRAM/Resources/459596-1161903702549/S2_Ndungu.pdf (accessed 2/9/2014) pg 3.
[74] Weekly Review, May 4, 1984.

person to register land held an indefeasible title over the land. Any previous claims over the land were extinguished upon first registration.

The aim of this provision in the Registered Land Act was to defeat competing interests over land that had accumulated over time during the pre-colonial and colonial period. The Act was meant to transform the status of multiple customary claims to individual ownership. The Act also sought to iron out the conflicts that might arise due to multiple laws on land. This provision is found in section 4 of the Act, which states that any law or practice, which is inconsistent to the provisions of the Registered Land Act, shall cease to apply with regard to land. The effect of this was massive misappropriation of land by individuals who had the means to procure titles over land. To those left landless by such acquisition, there were no means to challenge the legality of the title in court.

The law at this point in time perpetuated an illegality to the detriment of Kenyans. The Registered Land Act led to insecurity of tenure and loss of land where the persons relied on customary land tenure and entrusted the registration of the property onto one person to hold in trust for the rest of the members of the family or community.[75] The erosion of customary land tenure systems and enforcement of the individual title may have had the positive aspect of unlocking capital for the development of the land but conversely locked out access to land by all the rest of the persons who did not have the legal title to the land. This has led to speculative holding of land where owners deny anyone access to land that they own whilst they fail to put it to any use and subsequently sell it for extremely high profits when the prices of land increase.

[75] Albert Mumma (2003) "The Procedures for Issuing Titles to Land in Kenya," in Vol 2 *Land Reform in Kenya*, Law Society of Kenya Journal, Nairobi, pg 27.

The speculative holding of land is one of the factors that led to the exacerbation of the squatter problem at the Kenyan Coast. The Registered Land Act hence, to some extent, allowed for the "legalization" of the past actions of late Jomo Kenyatta and former President Moi. This is due to the fact that the persons who registered the land first were regarded as being the owners of the land possessing absolute title to the land, subject only to encumbrances. The law on first registration should have been tailored to ensure the true owners of the land are identified whilst providing for a mechanism to deal with multiple ownership of land provided for under customary tenure in land.

The squatter problem at the coast of Kenya was worsened by the enactment of the Land Adjudication Act, Cap 284, in 1968. The Act was to provide for the ascertainment and recording of rights and interests in Trust Land. Section 6 of the Act established a local adjudication committee. The committee was to determine claims to land while relying on local customs and practices in its determination of the claims.

The determination of claims to land, however, was cumbered by the means of ascertaining who the original owners of the land were. It was uncertain who really owned the land considering that there lay multiple claims on the land. The Mijikenda claimed that the land belonged to them but so did the Arabs which resulted in overlapping claims over the land. Although adjudication may have solved some of the claims to land, it accelerated the progression towards the individualization of proprietorship in land and exacerbated the problem of landlessness and, by extension, the squatter problem.

In 1999, the government took note of the land problem in Kenya and specifically at the Coast of Kenya and appointed a Commission of Inquiry to look into the issue of land laws that were at the time in place in Kenya. The Commission, officially known as the Commission of Inquiry into the Land Law System in Kenya ("the commission"), was to review the land issues in Kenya, analyze the legal and institutional framework governing land tenure and make recommendations as to changes in laws and policies in order to address some of the land question(s).[76] Gazette Notice No. 6593 and 6574 of 1999 operationalized the Commission of Inquiry.[77]

The Commission identified increased population, rural-urban migration, increase in demand for arable land and the ingrained Kenyan culture that encouraged individual ownership of land, as the main factors that have led to the land question(s). Most importantly however, it identified the lack of a comprehensive national land policy to regulate the relationship between the State, the people and land as the main cause of land problems, which included amongst others, the squatter problem currently being experienced.

The Commission further reported that the land problem(s) is attributed to the abuse of the land laws that existed at the time. Specifically, the Government Land Act, Cap 280 and the Trust Land Act, Cap 288. These two laws were exploited to grant land to cronies as a means to secure patronage and loyalty. The report prepared by the Commission of Inquiry recommended the creation and implementation of a national

[76]Humphrey K. Njuguna & Martin M. Baya (___) *Land Reforms in Kenya: An Institution of Surveyors of Kenya (1SK) Initiative*, at https://www.fig.net/pub/proceedings/korea/full-papers/pdf/session7/njuguna-baya.pdf (accessed 1/9/2014), pg 2.
[77] *ibid*.

land policy.

The Commission of Inquiry into the Illegal/Irregular Allocation of Public Land commonly referred to as the "Ndungu Land Commission" was also tasked with the duty of investigating the illegally allotted public land in Kenya. The commission identified the titles to public land that were irregularly allocated or "grabbed." The Commission also highlighted the problems in our land laws that allowed for the irregular allocations of land. Most importantly, the Commission made recommendations on the way forward with regard to land laws in Kenya. For example, the Commission recommended that all land allocations in settlement schemes made to undeserving people be revoked. Another example is the recommendation to revoke all titles of land allocations of Trust lands made to individuals (whether natural persons or companies) that were contrary to the provisions of the Trust Land Act, the Land Adjudication Act and the Constitution. Some of the recommendations made by the Commission of Inquiry were the precursors to provisions in the land laws in existence currently.[78]

One such provision that was borrowed from the recommendations of the Commission of Inquiry is the creation of a land commission with the power to supervise and manage public land in Kenya thereby curtailing the powers that the president unilaterally enjoyed over land. This is the seed that gave birth to the National Land Commission Act establishing the National Land Commission. Most other recommendations of the "Ndungu Commission," however, are yet to be

[78] Paul N. Ndungu (2006) *Tackling Land related Corruption in Kenya*, at http://siteresources.worldbank.org/RPDLPROGRAM/Resources/459596-1161903702549/S2_Ndungu.pdf (accessed 2/9/2014), pg 5.

implemented.[79]

The lethargy by the government in implementing the recommendations of the Commission have resulted in the persistence of grave injustices being perpetuated against people who have legitimate claims to land but who are, however, still squatters.

2.3 Conclusion

The squatter problem has existed at the Kenyan coast since the coming into the country firstly of the Arabs and subsequently foreign populations. The gradual exacerbation of the problem is attributed to the foreign land laws imposed on the region, which advocated for individualization of tenure to the detriment of the existing African land rights.

The subsequent regimes that inherited these laws abused them and used the same for political gain to the detriment of the persons who are the legitimate proprietors of the land. Leaders have, in many instances, abused their discretionary powers to seek patronage and reinforce their support instead of genuinely finding a lasting solution to the squatter problem at the coast.

Other than the *Ndung'u Commission* there have been subsequent commissions established to inquire into the land problem in Kenya. Some of the recommendations have been implemented and largely formed the substratum of the new land laws. The raft recommendations made by these commissions have yet to be fully implemented

[79]Africa Centre for Open Governance website, at http://www.africog.org/reports/mission-impossible-implementing-ndung%E2%80%99u-report (accessed 7/9/2014).

by parliament through change in law and policy. The continuous failure to implement these recommendations will certainly lead to the persistence of the squatter problem in the Kenyan Coast.

The Constitution has now vested on every person an inalienable right to own and access land. It is against this backdrop that this Study argues that the supreme law of the land has now provided a nascent opportunity to cure the squatter problem once and for all.

CHAPTER THREE

3.0 REVIEW OF THE EXISTING LAWS ON LAND WITH SPECIFIC REFERENCE TO THE SQUATTER PROBLEM AT THE KENYAN COAST

3.1 Introduction

This chapter shall focus on the legal regime of land laws that came into effect after the promulgation of the Constitution on August 27, 2010. The main objective of this chapter shall be to decipher whether or not the current legislation on land is capable of addressing the squatter problem at the coast of Kenya. This chapter argues that whereas the existing legislation provides a suitable blue print to address the complex land issues at the Kenyan coast, they lack a strict enforcement mechanism and requires the strengthening of the institutions tasked with the mandate of reform in the land sector. This Study argues that with proper implementation of the laws currently regulating land in Kenya, the squatter problem at the Kenyan coast shall be adequately addressed.

The squatter problem at the Coast of Kenya persists due to lack of independent enforcement machinery following the enactment of the laws governing land after the promulgation of the Constitution on August 2010. In order to fully actualize the provisions found in the land laws, there is need for separate and distinct mechanisms of enforcement that ensure the proper implementation of the land laws. This chapter analyses these laws governing land holding in Kenya. Specifically looking at the existing lacunas in the laws and how the enactments address the problem of squatters at the coast of Kenya.

The typology that is adopted analyzes the provisions of each piece of legislation with a view of establishing its suitability or otherwise in compliance to the principles set out earlier whilst answering the research questions set out in Chapter one. The new constitutional dispensation seeks to take away administration and management of land from the Government and the Ministry of Lands, Housing and Urban Development.

This was adopted from *Sessional Paper No 9 of 2009 on the draft National Land Policy* and the recommendations from the "Ndung'u Land Commission" which suggested the establishment of a National Land Commission.[80] The new land regime provides for the different categories of land as Private, Public and Community.[81] This, as discussed in the ensuing paragraphs, helps ease administration and curtails underhand dealing with either Community or Public land without following the set out procedures.

The Chapter will address the following research questions: First, to what extent did the squatter problem inform the enactment of the new land laws in Kenya? And second, whether the new land laws as well as the Constitution of Kenya provide an adequate mechanism for resolving the squatter problem at the Kenyan coast?

3.2 Review of the rationale behind the current Laws on Land

The rationale for the pursuit of new land laws for governing the land sector may found in the push that revamped the Kenya's National Land Policy.[82] Kenya does not

[80] This has been achieved by enactment of the National Land Commission Act pursuant to Article 67(3) of the Constitution of Kenya, 2010.
[81] Part II –VIII of the Land Act which are a reflection of Articles 62, 63 and 64 of the Constitution. With the distinctions, there are particular procedures and persons tasked with overseeing the transfer of title and manner.
[82] Government of Kenya (2009) *Sessional Paper No 3 of 2009 on National Land Policy*, Government

have a comprehensive land policy setting out the relationship between the different categories of land and the rights arising therefrom.[83]

The draft land policy explains that the maladies in the land sector, including but not limited to the squatter problem at the Kenyan Coast were caused by the raft of pieces of legislation that existed and which in turn made land administration unnecessarily complex.[84] This led to problems which manifested themselves in various ways including a breakdown in the land administration system, disparities in land ownership, poverty and most specifically, for purposes of this thesis, the issue of squatters on land.

The demand for new laws on land started in the post-independence period. *Sessional Paper No 3 of 2009 on National Land Policy* explains that the raft of inconsistent pieces of legislation, which made land administration complex, caused the maladies of the land sector.[85] This led to problems that manifested themselves in different ways such as a breakdown in the land administration system, disparities in land ownership, poverty and most importantly squatters on land.

The expectation that Kenyans had, that land previously alienated by the colonialists during the colonial period would revert back to the people at independence, turned out

---

Press, Nairobi, at Executive Summary.

[83] The previous *National Land Policy* of 2007 is outdated and unable to sufficiently address the current challenges plaguing land in Kenya in light of the constitutional and legal dispensation after 2010.

[84] *Ibid*, the guiding theme has been "To guide the Country towards a sustainable, efficient and equitable use of land for prosperity and posterity." This was informed by the Commission of Inquiry into the Land Law System in Kenya (Commission of Kenya Review) and The Commission of Inquiry into Irregular/Illegal Allocation of Public Land (Ndungu Report,2004).

[85] *ibid*, the guiding theme has been "To guide the Country towards a sustainable, efficient and equitable use of land for prosperity and posterity." This was informed by the Commission of Inquiry into the Land Law System in Kenya (Commission of Kenya Review) and The Commission of Inquiry into Irregular/Illegal Allocation of Public Land (Ndungu Report, 2004).

to be elusive. Instead, the "fruits" of independence were a continuum of expropriation and disenfranchisement. This called for a revamp of the existing laws.

The situation at the Coast albeit with some peculiarity, stems from the matters discussed in Chapter 2. The origin of the squatter problem at the coast of Kenya has been sufficiently addressed in the preceding chapter where I identified that the squatter problem at the Kenyan coast stems from non-recognition of the ownership by the indigenous people and dispossession of the locals by successive regimes. These problems can only be properly addressed and redressed progressively through legal instruments.

It goes without saying that the legal framework will need political commitment and goodwill to ensure its proper implementation to combat this problem. The laws that are relevant to this chapter are the Land Registration Act, No 3 of 2012, the National Land Commission Act, No 05 of 2012 and the Land Act, No 06 of 2012.

The Constitution of Kenya, 2010, lays the backbone framework from whence these laws operate. Section 40 of the constitution is specific that the right to land is an inalienable right. The constitution also hints at the canopy of issues that ought to be dealt with in the current laws by the setting out principles it envisions for Kenya's draft land policy.[86]

The provisions of the Constitution need to be operationalized through the enactment of proper policies and accompanying legislation. So far, the government has made a

[86] Article 60(a) (b) and (d), Constitution of Kenya, 2010.

noble attempt to operationalize the relevant Articles.[87] Yet arguably, more is yet to be done in implementing the provisions of the law.

The right of the squatters at the Coast of Kenya to own land is premised in the Constitution. Specifically, Article 40 enshrines each person's right to own property anywhere in Kenya. When read with Article 21, the State is mandated to observe, respect, protect, promote and fulfill the fundamental rights guaranteed by the Constitution, 2010. This places a burden on the State to ensure the right to own property by the squatters at the Coast is protected. The State has attempted to achieve this through the enactment of the existing land laws. The protection of this right to own property may further be promoted and protected by providing enforcement mechanisms independent of the State and its operatives.

The State has an additional duty outlined under Article 21 (3) to implement affirmative action in order to address the needs of vulnerable groups. The Constitution has given the categories of vulnerable groups, among which are ethnic and cultural communities. This provision can be interpreted to mean that the State is mandated to implement affirmative action to correct any historical injustices perpetuated against the Mijikenda.

Further to this, the Constitution sets out Chapter 5 where specific provisions dealing with land and the environment are found. Here, principles to guide the sustainable use of land are laid out.

[87] Articles 60(2), 62(4), 63(5),64(4), 67(3)and 68, Constitution of Kenya, 2010.

The issues that have been discussed in the previous chapters find the keys to their probable solution in the principles set out in the Constitution, 2010. As discussed by Mazrui, these issues are paradoxical in nature and therefore deserve special attention. The issues which are now decades old present a peculiar challenge as viewed against the land issues arising in the Rift Valley.[88] This is explained by the fact that land issues at the coast go beyond annexation by the Crown to include the sovereignty exercised by the Sultan of Zanzibar over the area prior to colonization of Kenya.[89]

The principles referred to by the Constitution of Kenya relevant to this study are as follows:

1. Equitable access to land;
2. Security of land rights;
3. Sustainable and productive use of land resources; and
4. The transparent and cost effective administration of land.

These principles if adequately expressed in statute and policy would solve the quandary of squatter issues at the Kenyan Coast.[90] This study looks at how these principles have been expressed in the current legal framework. This analysis also reveals the fidelity of the current legal framework governing land to the Constitution of Kenya, 2010. The greatest factor that has prompted this research is persistent lack

[88] Martina Caterina & Johanna Klos (2014) *Unfinished Business: Kenya's efforts to address displacement and land issues in Coast Region*, Internal Displacement Monitoring Centre, Geneva.
[89] Jan Hoorweg (2000) "The Experience with Land Settlement," in Jan Hooreg *et al. Kenya Coast Handbook: Culture, Resources and Development in the East African Littoral*, Lit Verlag, Hamburg, at https://openaccess.leidenuniv.nl/bitstream/handle/1887/9673/ASC_1253933_104.pdf?sequence=1 (accessed 8/9/2014), pg 312.
[90] It is not covert that the laws in seeking to operationalize these principles will directly be helping solve the land problems that have been the mainstay of the troubles that face the development agenda of Coast Province. It is additionally the contention of this research that the government needs to take an active role in helping realize the aspirations of those agitating for a lasting panacea to the problems brought to the forefront by this research.

of use and access or ownership of land.

Additionally, the Constitution looks at granting the ownership of the land in Kenya collectively as a nation, as communities and as individuals under Article 61. The Constitution looks at reestablishing the African system of land tenure that existed prior to the arrival of the Arabs where land was owned jointly by the community, in this instance, the citizens of Kenya in their respective communities identified by ethnicity, culture or similar community of interest.[91]

The Constitution, however, balances both communal and individual rights by respecting the individual ownership of land that is currently in place.[92] The Constitution enshrines the ownership of the land in Kenya to the people of Kenya; hence any foreign entity or noncitizen cannot hold land on freehold tenure to the detriment of Kenyans. When read together with Article 64, this ensures that Kenyans for the benefit of Kenyans own land in Kenya.

The Constitution, in protecting the right to own land by Kenyan citizens, creates several categories of land. These categories include community land, private land and public land. The Constitution has specific provisions to guard against the improper expropriation of public and community land as was previously witnessed during the colonial and post-independence periods in Kenya.

By listing what amounts to public land, the Constitution identifies and therefore aids in protecting the stated land. Under Article 62 (1) (a), the Constitution of Kenya,

[91] See Constitution of Kenya, 2010, Article 63 (1).
[92] The Constitution indicates that land may be held by individuals in their capacity as private persons. This has been discussed sufficiently in preceding sections of the Chapter.

2010, lists land which at the effective date was unalienated government land to form part of public land. The Constitution then indicates that such public land shall be held by a county government in trust for the people resident in the county. The provision looks to cure the emergent problem of "professional squatters" who settle on land illegally for commercial purposes.[93] Community land is also identified under Article 63 as a means to ensure its protection. Unfortunately there is no definition of what amounts to community land.[94] The holding of community land is not dissimilar to public land in that title to the land is held by the respective county government on behalf of the community. Most importantly though is the categorization of land regarded as community land. Article 63 (2) extensively details what amounts to community land in Kenya, thus providing for the much needed protection to this sensitive category of land ensuring access to land to persons who belong to the community to whom ownership of the land is vested.

In order to have a land management body with the oversight responsibility over land use planning, the Constitution, 2010, establishes the National Land Commission under Article 67. The establishment of this oversight body provides for an oversight mechanism on the use of land in Kenya. Further powers of the National Land Commission are provided for under Article 67 (2). The National Land Commission has been in contention with the Ministry of Land, Housing and Urban Development thereby hampering the execution of its mandate effectively.[95] The dispute is premised

[93] Patrick Beja (2012) "Coast land problem a disaster in waiting," in *Standard Digital*, on October 3, 2012, at http://www.standardmedia.co.ke/?articleID=2000067502&story_title=coast-land-problem-a-disaster-in-waiting&pageNo=1 (accessed 6/10/2014).

[94] There is no definition of community land. What is in existence is a description of community land in Kenya.

[95] Paul Ogembo (2015) "Ngilu disowns technical team report over Lands ministry, National Land Commission row," in *Daily Nation*, on Tuesday, February 3, 2015, at http://www.nation.co.ke/news/Ngilu-disowns-technical-team-to-resolve-Lands-row/-/1056/2611408/-/vmqbtwz/-/index.html (accessed 1/10/2015).

entirely over the separation of powers and duties.[96]

The Constitution, under Article 68, mandates parliament to enact legislation on land governing various aspects of land. These legislations are to give flesh to the skeleton of the provisions of the Constitution.

3.3 Review of the Land Registration Act, No 3 Of 2012

This Act seeks to consolidate and revise the existing law on registration of land. As elucidated above, the historical methods of granting title to land is at the root of the squatter issue at the Kenyan coast. The registration (recognition) of some interests while overlooking other valid interests is what led to the squatter issues. This section seeks to find whether the Land Registration Act provides any viable solutions to the squatter.

The Land Registration Act seeks to solve the issue of dual ownership and fraudulent titles by seeking to have well prepared cadastral maps.[97] These maps are to clearly demarcate parcels of land in accordance to registration. This shall have the effect of preventing double registration. Land ownership shall be evident on digitized searches which shall also reveal the historical records of any parcel of land.

The titles which were issued under the Government Lands Act and The Land Titles Act shall not be considered as valid titles anymore.[98] They shall be scrutinized to

[96] *ibid*. Further analysis on the different roles of the Ministry of Land, Housing and Urban *Development vis-à-vis* the National Land Commission is under section 3.2.1. on the review of the National Land Commission, No 5 of 2012.
[97] Section 15, Land Registration Act.
[98] Mona Doshi (2012) *The Land Laws of Kenya: A summary of the Changes*, Anjarwalla and Khanna, Nairobi, at http://estates.uonbi.ac.ke/sites/default/files/centraladmin/estates/Summary-of-the-Land-

ensure that they were alienated or allotted in the prescribed manner. In contrast however, the titles under the Registration of Titles Act and the Registered Land Act shall continue to be valid.

This is definitely a step in the right direction as it is presupposed that such scrutiny shall lend itself to investigating how titles under the GLA were historically alienated. As earlier mentioned, most titles in the squatter ridden parts of the coastal belt fall under the GLA and LTA regime of registration. With a genuine and concerted effort at unraveling the historical passage of title to its current proprietors, it shall be possible to revoke titles that passed through fraudulent means and hopefully revert these to their rightful beneficiaries.

The Act applies to all the different forms of tenure as established by the Constitution.[99] The Land Registries expected to be in each registration unit established by the commission in consultation with the county governments are to have a register of Community land.[100] This helps to avert possible grabbing of land or the trustees of landing converting the same to their own benefit and use thereby exacerbating the squatter problem. It also helps the situation at the coast since trust lands to be held on behalf of the community by the County Government of the different counties are expected to be registered. This represents a paradigmatic shift aimed at preserving customary land tenure systems that once existed in the Kenya.[101]

Laws-Anjarwalla-Khanna-October-2012.pdf.pdf (accessed 11/9/2014), pg 7.

[99] Section 3 Land Registration Act. The Act actually refers to Articles 62 and 64 and at subsection (c) refers to Community interests

[100] *ibid* Section 8. This was not in the previous legislation regime and made it easy for community land to disappear without a trace.

[101] Collins Odote (2010) "Retracing our Ecological Footsteps: Customary Foundations for Sustainable Development and Implications for Higher Education in Kenya," a conference paper presented at the 7th Strathmore between October 28-28, 2010; Collins Odote (2015) "Retracing our Ecological Footsteps: Customary Foundations for Sustainable Development and Implications for Higher Education in

Land that is to be repossessed from persons who had irregularly acquired it will be held as trust land. Part of it will be divided among the genuine coastal squatters whose lineage can be traced back to those originally disposed.

3.4 Review of the National Land Commission Act, No 5 of 2012

The most salient introduction under the new regime is the National Land Commission under section 3(a).[102] This body is mandated with the administration of public land on behalf of the National and county Governments.[103] The National Land Commission was proposed by the draft National Land policy prepared in 2009 and was eventually established by the National Land Commission Act No 5 of 2012. The National Land Commission is established with the view of having an institution independent of the government taking charge of public land and having general supervisory powers over use of land in Kenya.[104]

The issues that the squatter problem at the Kenyan coast brings to the forefront are a culmination of historical maladministration of land matters in Kenya. The overlap in land administration regimes established by the Land Titles Act and the Registered Land Act, Cap 300, Laws of Kenya, was among the key causative agents of chaos in land matters at the Coast of Kenya thereby contributing to the squatter issue. The fact that the Coast was placed at the administration of the Imperial British East African Company yet still under the sovereignty of the Sultan also contributed to the current

Kenya," *UNLJ* 55-72, pg 59.

[102] The section provides for the objectives of the Act. The Commission is to be guided by the provisions of Article 60 of the Constitution.

[103] Article 67(2)(a) of the 2010 Constitution.

[104] Section 5 (1), National Land Commission Act, No 05 of 2012.

problem being experienced.[105]

It is true that land issues at the coast have oft had political nuances which are best handled by an independent commission. This ensures that grant of political leases for political patronage ceases to happen. The commission in discharging its mandate also acts as a custodian to public and selective community land as provided for under Article 67 (2) on the functions of the National Land Commission (NLC).

Of concern to the squatters at the coast of Kenya is the legal challenge of the recognition of the Arab Swahili titles over land occupied by the Mijikenda brought about by the 1908 Coast Land Settlement Act further aggravated the situation by disenfranchising the indigenous populations and recognizing Arab Swahili titles over land already occupied by the Mijikenda. Mghanga, in *Usipoziba Ufa Utajenga Ukuta: Land, elections and conflicts in Kenya's Coast Province,*[106] reflects on a warped policy that focused more on political considerations and expediency rather than a development agenda. It is therefore crucial to have a Commission that will oversee the utilization of land with development as the driving agenda. The Land Act as read with the National Land Commission Act tasks the Commission with oversight over land use planning throughout Kenya.[107]

The National Land Commission Act in keeping with the new Constitution has the object of making further provisions as to the functions of the Commission and

[105] Frederick Cooper (1997) *From Slaves to Squatters: Plantation Labor and Agriculture in Zanzibar and Coastal Kenya 1890-1925*, Heinemann Educational Publishers, New Hampshire, pg 193.
[106] Mwandawiro Mghanga (2010) *Usipoziba Ufa Utajenga Ukuta*: *Land, Elections, and Conflicts in Kenya's Coast Province*, Heinrich Boll Stiftung, East and Horn of Africa, pg 21.
[107] Article 67(2) (h) of the Constitution 2010 and Section 5(1)(h) of The National Land Commission Act. This gives the Commission power to monitor development control and compulsory acquisition as exercised by the government.

additionally giving effect to the objects of devolved government.[108] However, the question arises as to its suitability and ability to deliver on its mandate.

In the discharge of its mandate, the Commission has experienced institutional and operational challenges which included lack of adequate human and financial resources, non-compliance by state corporations and agencies with their statutory obligations to declare public land inventories.[109]

The Commission is given an investigative function to investigate historical injustices and provide recommendations on possible ways of redress.[110] The Commission is given the function of investigation of historical injustices and recommendation of possible ways of redress.[111] The challenge of squatters at the Coast of Kenya is attributable to the overlapping legal land regimes that focused on maintaining the status quo at the Coast. For instance, section 28 when read together with section 143 of Registered Land Act, cap 300, Laws of Kenya. The mandate of the National Land Commission to investigate and recommend redress for historical injustices shall go a long way in attempting to resolve the problem of squatters at the coast. NLC is handed the role of investigation of the historical injustices[112] that occurred in the region and looking into the validity of titles issued by earlier regimes. The Land Titles Act (Cap 282)[113] overlooked indigenous claims to the land at independence. The persons who are referred to as absentee landlords appeared wielding titles. This is inextricably linked to the phenomena of irregular allocation of public Land.

[108] Preamble of the National Land Commission Act.
[109] The National Land Commission progress Report (March 2013 to January 2014).
[110] Article 67(2) (e) as read together with Section 5(1)(e) of the Act.
[111] Article 67(2) (e) as read together with Section 5(1)(e) of the Act.
[112] Article 67(2)(e) as read with Section 5(1)(e) of The National Land Commission Act.
[113] Repealed by the Land Registration Act of 2012.

It is noteworthy that the power to investigate historical injustices, illegal titles and to make appropriate recommendations directly addresses the subject matter of this research, but questions arise. The issues presented require more than investigation and recommendation. This is because the enforcement of the recommendations will require the goodwill and support of the executive arm of the government.

It is not to be lost on us that the government will invariably encounter competing interests where such potentially emotive matters are involved. This results in a situation where the recommendations made by the NLC are unfulfilled.[114] This results in the trumping of the seemingly lesser rights of communal ownership which are viewed as amorphous and having no particular individuals to enforce.[115] This is particularly evident when we consider the fact that the indigenous communities had communal land tenure during the Arab settlement at the coast of Kenya.

The NLC Act seeks to address this by bestowing the management and administration of community land on the Commission.[116] This is different from ownership of the land since the title to the land is vested on the county government of the locality where the land is found. It is common place that the county Governments are better placed to understand the issues that are specific to the respective counties that they administer. This has the benefit of informing the manner of vestment of title.

[114] Many are the times the government will intend to execute development projects whereas the lands on which the projects are dependent upon have no clear owners. There are instances where the land is owned by the community drawing from the definition drawn from Article 63 (d) i-iii.
[115] Ben Ole Koissaba (2014) "Campaign Update: Kenya-Maasai Protest Against New Land Concessions for Geothermal Extradition in Kenya," in *Cultural Survival*, on July 7, 2014, at https://www.culturalsurvival.org/news/campaign-update-kenya-maasai-protest-against-new-land-concessions-geothermal-extraction-kenya (accessed 9/8/2014).
[116] Section 5(2)(a), National Land Commission Act.

When considering that squatters at the coast comprise majorly the Mijikenda, the vesting of the title to the community land on the County Government of Kilifi allows for the county and the National Land Commission (NLC) to tackle the problem of squatters. The County Government is knowledgeable on the prevailing ethnic and cultural circumstances facing the squatters on the ground. Hence, the mandate of the National Land Commission to manage community land where the title is held by the County Government addresses the problem of squatters at Kilifi to a greater extent provided that the spirit and letter of the Constitution is adhered to.

In a sense, the county governments provide a mechanism to ensure the land is owned by the community and used for the benefit of the community to whom it belongs. This provides an opportunity for the coastal county governments to carry out a first hand inventory of land ownership within the county and thereafter make informed decisions based on the data collected. Vast tracts of fallow land that have been "grabbed" by wayward persons who misappropriated the land and which land is not utilized can escheat to the government to be held in trust for the community.

By having the mandate of administration of land, the National Land Commission (NLC) has the power to monitor dealings in land. The challenge of uncontrolled and unpredictable land market contributes to land related problems including the problem of squatters and landlessness. The mandate to monitor land dealing in Kenya ensures that the county governments or other unscrupulous persons do not improperly allocate unregistered land, including unregistered community land, to the detriment of the community.

To a limited extent, the land market can be controlled hence protecting persons who own land but are ignorant as to the adjudication processes involved in land registration. Closely linked to the mandate of monitoring dealing in land, the NLC is to monitor registration of interests in land.[117] This monitors the movements in transfer of land and may help clean up the messy land market. The NLC would know whenever public or community land is to converted to private land. This precludes any avarice that is the tendency of the political class which has greatly contributed to the squatter problem.[118]

The irregular allocation of land is made less probable by having the Independent Commission being in charge of land administration.[119] This helps to protect land from parochial political interests such as the use of land as leverage for political support and goodwill.[120]

There exist valid claims that the indigenous coastal people have been left out by successive regimes when titles to land were issued. It is commonplace that the titling of land in Kenya and more so at the coast is often used for purposes of gaining political mileage. It is the mandate of NLC to advice the government on a national

[117] Section 5(2)(c) National Land Commission Act

[118] Davis M. Malombe (2011) *Position Paper on Engendered and rights based Land Reforms in Kenya*, Kenya Human Rights Commission, Nairobi, pg6, at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&ved=0CD0QFjAD&url=http%3A%2F%2Fwww.khrc.or.ke%2Fresources%2Fpublications%2Fdoc_download%2F38-a-position-paper-on-engendered-and-rights-based-land-reform-in-kenya.html&ei=hHIJVM-aLsTH7AbozIGYAw&usg=AFQjCNH-Zz3yLYlhtF6coAZloGbIUIk6qg&sig2=A44A4Dux3LGz8cgI1CfKzQ&bvm=bv.74649129,d.ZGU (accessed 5/9/2014). This paper, though focusing on engendered rights does not fail to bring out the manner in which land has been grabbed by political leaders.

[119] Section 5(1) (a) and (e) of the National Land Commission; The Commission additionally deals with assessment of taxes and premiums on land and immovable property in an area designated by law. This is a clear indication of the desire to have the Commission take charge of the crucial issues pertaining to land which were formerly exercised by the governments through the Local governments. The corruption that riddled the sector then if stemmed out will help solve the glaring land issues at the coast.

[120] The Commission of inquiry into illegal/Irregular Allocation of Public Land (Ndungu Report).

land policy to administer land in Kenya. When read together with the NLC's mandate to have oversight responsibilities over land use in Kenya, this would ensure that no further politically actuated land dealings occur in the coast province. The challenge of political misappropriation of land for political purposes will be done away with in totality aiding in resolving the squatter problem.

Shifting the focus to the issue of validity of title, the Commission is handed the role of investigation of the historical injustices[121] that occurred in the coastal region. The Land Titles Act (Cap 282)[122] overlooked indigenous claims to the land at independence. The persons who are referred to as absentee landlords appeared wielding titles. This is inextricably linked to the phenomena of irregular allocation of public Land. It is a step in the right direction that the Land Act, which shall be discussed below in greater detail, provides for the revocation of irregularly obtained titles.

The Commission additionally is expected to monitor registration of interests in land.[123] This is in a bid to monitor the movements in transfer of land and clean up the messy land market. This will ensure that the Commission will be able to know whenever public or community is converted to private land. This precludes any avarice that is the tendency of the political class[124] as has often been used at the

[121] Article 67(2)(e) as read with Section 5(1)(e) of The National Land Commission Act.
[122] Repealed by the Land Registration Act of 2012.
[123] Section 5(2)(c) National Land Commission Act
[124] Davis M. Malombe (2011) *Position Paper on Engendered and rights based Land Reforms in Kenya*, Kenya Human Rights Commission, Nairobi, pg6, at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&ved=0CD0QFjAD&url=http%3A%2F%2Fwww.khrc.or.ke%2Fresources%2Fpublications%2Fdoc_download%2F38-a-position-paper-on-engendered-and-rights-based-land-reform-in-kenya.html&ei=hHIJVM-aLsTH7AbozIGYAw&usg=AFQjCNH-Zz3yLYlhtF6coAZloGbIUIk6qg&sig2=A44A4Dux3LGz8cgI1CfKzQ&bvm=bv.74649129,d.ZGU (accessed 5/9/2014).

Kenyan Coast.

The NLC is also mandated under Section 5(1) (h) with the function of monitoring land use planning all over the Kenya.[125] This oversight role will have a bearing on how the Government or any other person uses land. This will have to be in accordance with the principles of the Constitution of Kenya, 2010.[126]The provisions of the Constitution on the use of land include, amongst others, the equitable access to land, encouragement of communities to settle land disputes through recognized local community initiatives consistent with this Constitution, 2010.[127] This serves to protect the people from autocracy and will help focus on sustainable and productive management encompassing sound conservation and protection of ecologically sensitive areas. The principles of the Constitution on land which have been operationalized by section 5 (1) (h) of the National Land Commission Act seek to solve the problem of squatters through ensuring access to land for the benefit of the community whilst securing land rights of the community and individual persons. This provides an opportunity to resettle squatters on land that formerly belonged to their forefathers.

The government has traditionally had the power to compulsorily acquire land for public benefit and use. This power is often misused and has to a large extent contributed to the problem of squatters. The National Land Commission has a mandate to ensure that this acquisition is not exercised arbitrarily and without just cause. If the NLC does not effectively exercise its administrative functions properly,

[125] Section 5(1) (h) of the National Land Commission Act as read with Article 67(1)(h) of the Constitution of Kenya.
[126] Article 60 of the Constitution of Kenya.
[127] *ibid.*

there is a possibility of their arising a loophole which may easily be exploited with the result being further dispossession of the land for people at the Coast. A case in point is the push by the government to construct the first three berths of the Lamu Port hence the need to compulsorily acquire the surrounding land. The project will certainly result in the dispossession of the people at the Coast thus adding to the current problem. Proper implementation of the constitutional and legal provisions regulating land would ensure that compulsory acquisition is only done where it is in the interest of the public to acquire the land. Compensatory payment in full should be prompt. This ensures that compulsory acquisition is not exploited for parochial interests.[128]

The Commission is also expected to administer all unregistered community land on behalf of the Counties.[129] This is different from the administration of public land. However the objects are the same. Most importantly though is the fact that the NLC would guarantee access to land for communities owning unregistered community land.

There have often been arguments that the NLC lacks the proper facilities, mandate and equipment to carry out its mandate and is effectively a toothless bulldog.[130] This argument would extend from the earlier postulation that the mandate to investigate and report should have been complemented by an additional role of enforcement. This is because the reports are expected to be enforced by the government, specifically the

[128] Ben Ole Koissaba (2014) "Campaign Update: Kenya-Maasai Protest Against New Land Concessions for Geothermal Extradition in Kenya," in *Cultural Survival*, on July 7, 2014, at https://www.culturalsurvival.org/news/campaign-update-kenya-maasai-protest-against-new-land-concessions-geothermal-extraction-kenya (accessed 9/8/2014).

[129] Section 5(2)(e) of the National Land Commission Act.

[130] Hakii Jamii website, at http://www.hakijamii.com/index.php/2-uncategorised/127-media-story-land-reforms-under-threat-as-nlc-denied-cash (accessed 9/9/2014). See also Harold Ayodo (2014) "Land reforms under threat as NLC denied cash," in *Standard Digital*, on January 30, 2014, at http://www.standardmedia.co.ke/lifestyle/article/2000103509/land-reforms-under-threat-as-nlc-denied-cash?pageNo=2 (last accessed 2/9/2014).

Ministry of Land, Housing and Urban Development.

There have been wrangles between the Ministry of Land, Housing and Urban Development and the National Land Commission.[131] The Ministry of Lands, Housing and Urban Development is mandated to implement the land policy recommended by the National Land Commission (NLC); however, the Ministry has been unwilling to facilitate the working of the NLC leading to constant interruptions in dealing with land. The result is the perpetuation of landlessness in Kenya.

The contrast in the preceding paragraph is arguable in light of the vesting of powers on the NLC and the funding of the NLC.[132] It is noteworthy that the Act gives the commission any power that is incidental to the execution of its mandate.[133] It is imperative that legislation be enacted to give the Commission specific powers of enforcement. This serves to ensure that the Ministry of Land, Housing and Urban Development, can raise no objection of lack of powers against it as it seeks to perform its functions which include:

1. Power to gather any relevant information to its mandate from any person or state organ and can additionally compel production where necessary;
2. Hold inquiries for the purposes of performance of its functions;
3. Take any measures it deems necessary for the compliance with the principles of the National Land Policy and the provisions of Aerticle60 of the 2010

[131] Cyrus Ombati (2015) "CS Fred Matiang'i orders staff to ignore National Land Commission's circular," *op.cit.*

[132] This goes against the contention that the commission is a toothless bulldog. The commission is granted all powers incidental to the performance of its functions. Additionally, PART IV Sections 26-29 provide for the fund of the Commission which shall be run by the Commission itself. This is inclusive of payment of salaries and funding of all the activities.

[133] National Land Commission Act, Section 6.

Constitution. (The same are replicated under Section (4)(2) of the Land Act, discussed below).

From the foregoing, it is clear that the Commission has the required power to tackle the menace of squatter settlement at the coast which stems majorly from disenfranchisement, through land grabbing and the legal regimes that regulated land at the coast of Kenya.[134]

The sad reality, however, is that with the lack of a specific enforcement mandate, these powers shall just remain "paper powers." The remaining challenge is what Mghanga[135] recommends as the masterstroke that holds the key to the challenges arising from the efforts aimed at reform. This is the strengthening of the institutions – in this case the National Land Commission which ought to be adequately armed with all powers necessary for the administration of Land and enforcement of findings.

Additionally, the members of the Commission are not appointed directly by the president.[136] This helps to ensure the independence of the commission from political influence and a reduction in the abuse of the discretionary powers of the president as was previously witnessed. The panel set forth in the First schedule to the Act is to be appointed by different stakeholders in the land sector. The panel comprises two members of The Non-Governmental Organizations, a person nominated by the Kenya Private Sector Alliance a representative of the Cabinet Secretary, a nominee of the

[134] Martina Caterina & Johanna Klos (2014) *Unfinished Business: Kenya's efforts to address displacement and land issues in Coast Region*, Internal Displacement Monitoring Centre, Geneva, pg 10.
[135] Mwandawiro Mghanga (2010) *Usipoziba Ufa Utajenga Ukuta*: *Land, Elections, and Conflicts in Kenya's Coast Province*, Heinrich Boll Stiftung, East and Horn of Africa, pg 87-89.
[136] Section 7 of the Act provides for the procedure for the appointment to the Commission.

office of the President and one from the defunct Office of the Prime Minister.

The obvious advantage of this is that it ensures that the Commission in the execution of its mandate is devoid of any governmental interference and improves the Commission's capability to deliver on its crucial mandate. Given the fact that the squatter problem at the Kenyan Coast has numerous political undertones, the independence of the NLC is a welcome move. This coming from a backdrop and knowledge that the land question at the Kenyan Coast is often politicized in order for it to play into the hands of a political elite.[137]

Whereas on paper, the NLC Act is for all intents and purposes equipped to tackle the squatter problem, the reality on the ground is that the NLC has far been ineffectual due to lack of enforcement mechanisms. The squatter problem, as per Mghanga, is a looming disaster waiting to happen despite the relative calm experienced during the 2007 elections. The problem needs a swift remedy because as things stand, the peace and stability of the coast region could be in jeopardy.

It is a requirement that the Commission makes a report to the President and Parliament at the end of each financial year[138]. This report apart from entailing the fiscal use of budgetary money is expected to include:

---

[137] Axel Harneil-Sievers (2010) "Misleading Quiet: An Introduction to Coast Province During and Beyond Kenya's Post-Election Crisis," in Mwandawiro Mghanga (2010) *Usipoziba Ufa Utajenga Ukuta*: *Land, Elections, and Conflicts in Kenya's Coast Province*, Heinrich Boll Stiftung, East and Horn of Africa, at V.
He explains that the land question has become a hot potato. He further postulates that secessionist groups like the Mombasa Republican Council have been able to take advantage of this to satisfy their own ends.

[138] Part VI (MISCELLANEOUS PROVISIONS); Section 33if the National Land Commission Act as read together with Article 254 of the Constitution of Kenya, 2010. Having the Commission on its toes is one of the ways the law will be implemented. With the implementation of the law, the Squatters at the Coast will find solutions to the ghost of squatting that has haunted them since independence in the allocation of the land they live in to strangers

1. Any difficulties encountered in the execution of mandate
2. Information on the progress made in registration of title in land
3. Recommendations made to the County and National Governments or any other state agency and the action taken thereafter.

This helps to synchronize the mandate of the Commission with the tasks of the National Government. As such, this together with the requirement for publishing[139] of such reports ensures that the public is aware and may result in positive involvement of the executive in terms of enforcement.[140] In the end it helps improve the chances of the Commission to actually deliver on the role it is expected to play.

Some of the provisions of the National Land Commission Act are genuinely aimed at eliminating the squatter problem at the Coast but to date, the NLC has been plagued with various problems that hinder its full functionality. The Ministry of Lands, Housing and Urban Development has in many instances usurped the powers reserved for the National Land Commission.[141] This has impeded the complete independence of the National Land Commission. The execution of the roles of the NLC is hindered by the squabbles with the Ministry of Lands, Housing and Urban Development resulting in functional friction between the two entities. A clear distinction needs to be drawn on what are the specific powers of the two entities.

---

[139] Article 254(3) of the Constitution of Kenya, 2010.

[140] Mwandawiro Mghanga (2010) *Usipoziba Ufa Utajenga Ukuta*: *Land, Elections, and Conflicts in Kenya's Coast Province*, Heinrich Boll Stiftung, East and Horn of Africa, at pg 17 argues that the government is well aware of the problem of land in Coast province but instead of working to alleviate it, it aggravates the problem manifold times. He gives the example of the government allocating 100,000 acres of arable land to Quatar in Tana even before the land question at the coast is solved. This points to the cynical or somewhat resigned attitude the government is taking in addressing the land problems at the coast.

[141] Kelvin Karani (2014) "National Land Commission accuses ministry of taking over its role," in *Standard Digital*, on June 3, 2014, at http://www.standardmedia.co.ke/article/2000123415/national-land-commission-accuses-ministry-of-taking-over-its-role (accessed 6/10/2014).

Further to this, the funding of the National Land Commission, as outlined by section 26 of the National Land Commission Act is from funds allocated by parliament, funds accruing to the Commission in its functioning and funds donated to the Commission. The Commission is mandated under section 28 to prepare annual estimates for approval by the National Assembly. This kind of approval tends to create financial dependence on the National Assembly. The National Assembly is then able to arm-twist the Commission into complying with its wishes where need arises. Total functionality of the Commission may be observed by ensuring total financial independence from the National Assembly.

It is however genuinely feared that government lethargy and interference will contribute significantly to inaction in fully arming and granting the NLC full autonomy.

3.5 Review of the Land Act, No 6 of 2012

Whereas the National Land Commission Act focuses on addressing land administration the, the Land Act addresses itself to the determination of the rights appurtenant to the holders of the land. The objective of the enactment of the Land Act, No 6 of 2012 is to give effect to Article 68 of the Constitution whilst revising, consolidating and rationalizing the land laws in existence. The Land Act deals with aboriginal title[142] and communal claims to land and that annexation led to alienation and expropriation of land belonging to the Mijikenda. This is the same experience in

[142] The issue of aboriginal rights has been canvassed in *Kemtai & 9 Others v. Attorney General & 3 Others*, High Court of Kenya Civil Case No 238 of 1999 at Nairobi (Coram Oguk & Kuloba JJ). Also available on e KLR. Although the court found the application lacking merit on the fact that they had changed lifestyle and had acknowledged the government's allotment letters, the court stated that the aboriginal title ought to be respected where possible. The holding is in keeping with Okoth-Ogendo's refusal of terming African Land as *tera nullus* and *tabula rasa* at the time of colonial annexation.

all areas where land was needed to serve imperial interests.[143] The carry-on effect of this phenomenon after the imperialists left has led to the presence of large tracts of land whose ownership is with persons not ordinarily resident at the coast or "absentee landlords"[144] thereby leading to the proliferation of the squatter problem while large tracts of fallow land are underutilized.

The enumeration and demarcation of the different tenures will go a long way in helping address the squatter issue at the coast. With the institutionalizing of a stringent land system that protects property rights, unscrupulous dealings are somewhat minimized.

It is the task of this section of my thesis to appraise the manner in which the Land Act seeks to achieve this. This will help outline its ability to address and possibly provide the solutions that this paper seeks.

As earlier stated, Section 40 of the Constitution vests in every person the right to acquire and own property. This is in essence a tacit push towards equitable and affordable distribution of wealth to help dissipate the simmering tensions at the coast brought about by the squatter problem. This need is canvassed by Syagga who proposes that distributive justice[145] should be used to tackle poverty and inequality.[146]

---

[143] H.W.O. Okoth Ogendo (2002) "The Tragic African Commons: A Century of Expropriation, Suppression and Subversion," in *Land Reforms and Agrarian Change in Southern Africa* (Programme for Land and Agrarian Studies, School of Government University of the Western Cape). Prof Ogendo argues that the suppression of the customary Land rights justified the expropriation of Native land.

[144] Mghanga uses the Swahili word "wabara" to connote the persons who have title to land in Coast province while not being indigenous people of the Kenya Coast. The term outsiders encapsulates the persons who have been either evicted(Pg 318 of Horweg) or have been on the receiving end of clashes in 1997(Mghanga)

[145] Distributive Justice as per John Rawls entails sharing of the benefits of resources and income among the people in the state. This is to ensure that the disparity between the poor and the rich is checked. It is unconscionable to have a State where a handful of persons own thousands of hectares of land whereas

The problem at the Kenyan Coast has been somewhat peculiar due to the fact that even then, a different piece of legislation, the **1908 Coastal Land Titles Ordinance** was used in the 10-mile coastal strip whereas different legislations applied to the hinterland.[147]It is this that informs the need for the formation and protection of the different tenures and additionally governs their conversion from into a standard form[148]. The Land Act provides for this. The ensuing paragraphs shall inquire into the manner in which the Land act has sought to give effect to the same.

The Land Act is mainly guided by the principles set forth in the Constitution, 2010.[149] The salient feature of this Act is that it places the reservoir of powers previously wielded by the Minister for Lands (now the Cabinet Secretary for Lands, Housing and Urban Development) on the National Land Commission.

This shift is calculated to lessen the historical vagaries of use of land for political capital and mileage. The Act embodies the realization and need to vest the administration, management and control of land on an independent body. Although it may be argued that ministerial appointments are now free from political influence, it is foolhardy to imagine that political nuances and arm-twisting cannot arise.

---

hundreds of thousands have limited or no access to land which is a crucial factor of production.

[146] Paul Maurice Syagga (2006) "Land Ownership and Uses in Kenya: Policy Prescription from an Inequality Perspective," in Regional workshop on Role of Geoinformation in National Development, on August 25-26, 2008, at Regional Centre for Mapping of Resources for Development, Society, Society for International Development, Nairobi, pg 295. The author states that we cannot expect the Coast of Kenya to be peaceful whereas there are deep seated injustices perpetrated against the locals. He as a matter of fact predicts that Coast Province could easily erupt into the worst forms of violence as compared to what we witnessed in the Rift Valley

[147] *ibid*. The 1908 Coastal Land Titles Ordinance operated to govern the coastal strip whereas the 1902 Crown Lands ordinance was the reference law defining and demarcating Crown lands.

[148] Section 5 of the Land Act, No 6 of 2012.

[149] Section 4(2) of the Land Act, No 6 of 2012.

The Act recognizes the different forms of tenure. It states that it shall seek to protect the rights arising from all the forms of tenure. Additionally it seeks to eliminate all forms of discrimination in ownership of and access to all the forms of tenure.[150] This will help in ensuring that land rights are traceable to the communities that previously held them despite these rights having previously been regarded as atavistic and unenforceable. Herein lies a magnificent opportunity to address the historical injustices that led to the disenfranchisement of the indigenous coastal tribes and to right the century old wrongs.

Often time, land belonging to communities has been allocated to individuals; the argument being that land as property cannot be owned communally. Whereas it is often envisaged that such individual holding of title in trust for the benefit of the community is indeed for the benefit of the community. It is commonplace that such trust is often abused and the beneficiaries left squatting on land which is supposed to be theirs.

The letter of the law anticipates that the various state actors will not have a free hand to deal with land without considering the claims of the local communities. These are likened to what the Constitution terms as Customary Land rights.[151] This is further protected by the National Land Commission's oversight role over land use planning throughout Kenya.[152]

The Act ropes in the Cabinet Secretary in the implementation of reforms aimed at the sector.[153] The roles given include:

[150] *ibid*, Section 5(2).
[151] Land Act, Section 5(1)(d).
[152] Article 67(2) (h) of the Constitution of Kenya, 2010.
[153] *ibid*, Section 6 of the Land Act.

1. Implementation of policies on land on the recommendation of the National Land Commission;
2. Facilitation of the implementation of policy and reforms; and
3. Formulation of the standards of service in the Sector.

The fact that the Commission has to liaise with an appointee of the executive in order to fulfill its mandate has brought about the debate that the National Land Commission is a toothless bulldog.

It is not in contention that the mandate of enforcement and execution of the national land policy rests with the Cabinet Secretary. The Commission is to advice on policy matters, conduct research and recommend suitable policies which are then to be implemented by the Cabinet Secretary.[154] This of course has the potential of bringing conflict in the land arena more so where the NLC agenda and executive's agenda are at cross roads.

The Act reiterates the position that is contained in the National Land Commission Act. It vests the management of public land in the National Land Commission.[155] It is imperative to note that the Commission, can dictate that subject to certain conditions, land be used in a particular manner. This is a robust and far reaching power donated to the Commission in that it may bar the allocation of public land. This in itself provides the NLC with suitable checks and balances against arbitrary and subjective land allocation by the executive. The Act further provides for the possibility of conversion

[154] Sections 5(1) (b) and (d) of the Land Act.
[155] *ibid*, Section 8.

of land tenure from one form of to another.[156]

For instance public or private land can be converted to community land subject to or in the interest of land use planning, public health, safety, public order and public morality. Private Land can be converted to public land through compulsory acquisition, reversion, surrender or transfer. Whereas the law that will govern dealings with Community land is yet to be passed, Section 9 of the Act provides the executive, through the National Land Commission, an excellent opportunity to utilize its powers to acquire fallow and unutilized land to resettle the mushrooming coastal squatters.

The Act states that Public land can be converted to private land by alienation.[157] This is subject to the strict tendering guidelines provided for under the Act.[158] This serves to ensure that public land is not irregularly allocated. The auction is to be public and a public notice ought to be given to the public to attract all potential buyers.

The upshot of this is that the irregular land allocation that has over time engendered poverty in the coast province will be checked. The coast province has a poverty index of 62% second only to Nyanza province.[159] This notwithstanding, the wide array of natural resources that the Coast boasts ranging from tourism to agriculture. However, the indigenous people often cannot realize the benefits of these resources due to the historical allocation of the land to outsiders.[160]

---

[156] *ibid*, Section 9.

[157] Section 9(2)(a) of the Land Act, No 6 of 2012. This entails the voluntary and absolute transfer of title in land. This serves to ensure that transfer of title to land on political grounds is estopped.

[158] *ibid* at Section 12. This section sets forth the procedure which seeks to open up the process to the public and additionally curtail underhand dealings with Public Land. Additionally, section 14 states the requirements as to particulars of the procedure of notice to the public.

[159] Mwandawiro Mghanga (2010) *Usipoziba Ufa Utajenga Ukuta*: *Land, Elections, and Conflicts in Kenya's Coast Province*, Heinrich Boll Stiftung, East and Horn of Africa, pg viii.

[160] *ibid* at note 26. The introduction additionally brings to the forefront the headache of lack of access to resources which are found on the land due lack of title. The 1960 settlements provided other persons with titles which the indigenous people did not have hence cordoning them off from any meaningful

Large tracts of land at the Kenyan Coast are owned by "properly placed" individuals who were given the land either due to their political affiliations, patronage, nepotism and cronyism. Recently the government revoked titles to 500,000 acres of land owned by only 22 individuals.[161] Whereas this land was previously Government Land, its passage from the Government to the individuals was found to have been dubious.

It is unconscionable that the Government can sanction the owning of such huge parcels of land by a small number of individuals and proceed to issue titles thereto whereas the majority of Coastal populations are squatters on their own land.

There arises the challenge of distinguishing between genuine and professional squatters.[162] Professional squatters come about when land owners, upon acquiring title to their land parcel, proceed to sell the land and thereafter continue to squat on the same land or move to squat on neighbouring lands and the vicious cycle is then replicated.

The Act seeks to redress the occurrence of such injustices by providing that any allocations of land that are substantial must first seek and obtain the approval of the National Assembly or the county assembly as the case may be.[163]

---

activity on the land that was suddenly owned by other people.

[161] James Mwambai (2014) "Government Revokes Deeds of 500, 000 Acres of Land in Lamu," *All Africa*, on August 1, 2014, at http://allafrica.com/stories/201408010190.html (accessed 22/3/2016).

[162] Joseph Masha (2013) "Squatters protest delayed title deeds issuance," in Standard Digital, on July 16, 2013, at http://www.standardmedia.co.ke/?articleID=2000088550%29 (accessed 11/9/2014).

[163] Land Act, 2012, Section 9 (3). This serves as a protective remedy against the possibility of the occurrence of grave injustices which may take years to redress

With proper legislation and institutions, coastal lands that were previously gifted willy-nilly and irregularly can eventually escheat back to government and hopefully be re allocated to the proper beneficiaries who are the descendants of the original proprietors.

The Act provides that compulsory acquisition can only be done at the request of either levels of government.[164] This request must first be made to the National Land Commission.[165] This is in keeping with land administration that is free from the manipulation by the political elite. This helps alleviate the squatter problem in that together with the recognition of communal land rights, in future the land belonging to, say, the coastal people will not be arbitrarily seized without the involvement of the NLC. Many times land acquired compulsorily under the pretext of compulsory acquisitions whereas the real motives are to serve parochial and selfish interests.

Section 134 of the Act, if implemented shall provide a genuinely lasting solution to the problem under discussion. This provision is directly related to access to land. It proposes the establishment of settlement programs that are aimed at providing a livelihood and shelter to persons who have completely no access to land.[166] It provides that the NLC shall be in charge of such arrangements.

Subsection 2 of Section 134 specifically mentions squatters and displaced persons as the intended recipients of such schemes. This shall to a great extent help resolve the plethora of problems presented arising from the issue of squatters at the Coast.

[164] Either of the two levels of Government i.e. the National Assembly or the Senate.
[165] Land Act, Section107. Additionally, prompt compensation is required by Section 111 as read with Article 40(3) of the Constitution of Kenya, 2010.
[166] Section 134(1) of the Land Act.

A condition precedent for this to happen would be the dispossession of persons who irregularly acquired title to land. This of course requires government goodwill. The commission cannot effectively bring effect to this unless the government is fully committed to the course. It therefore begs the question as to whether the Commission is sufficiently armed to deal with such scenarios.

In keeping with Article 68(c) (i) of the Constitution, the Land Act gives guidelines as to the possibility of having maximum and minimum acreage for different economic zones. This will help the squatter problem by rendering ownership of immense chunks of land unlawful since land is by its nature finite while populations continue to grow. As it stands however this still remains a proposition which still lacks the tools, mechanisms and legislation to give it full effect. Section 159[167] of the Act despite being seemingly draconian and a restraint to property ownership is in my view a step in the right direction. This has the potential of freeing up land that is fraudulently hence illegally held. On tabling and adoption, the registrar is to reject any application for the registration of interests in land which breaches the prescribed maximum and minimum acreage.[168]

The Act also gives the commission powers to transfer unutilized land belonging to absentee landlords to squatters.[169] This goes a long way in ensuring that the current squatters on their own land acquire title.

[167] Section 159 proposes that there be a maximum acreage of land to be held by an individual within certain zones. This of course is challengeable in that it seems to contravene the right to ownership of property.
[168] Section 159(4) this implies that the enormous lands that are owned by individuals will be unlawful and this ultimately makes available land for the resettlement of the squatters.
[169] *ibid*, Section 160(2)(e).

Realistically though, resettlement of persons without issuing them title to the parcels where they are relocated to is merely addressing one part of the problem. Possession of land without being granted ownership is essentially postponing the problem. The underlying issue of squatting on land shall still remain.

3.6 Shortcomings in the ability of the new Land Laws to address the squatter problem

It is evident from this thesis that the body armed with the role of curing the effects of the historical injustices visited upon the coastal people is the NLC. However in the discharge of this mandate, the NLC has had some teething problems in the form of both organizational and institutional challenges which must be overcome in order for its role to be effective some of these challenges are enumerated below:

3.6.1 Overlap of the functions of the National Land Commission and the Ministry of Lands, Housing, Urban Planning and Development

As earlier mentioned, whereas the constitution and the new land laws clearly give the mandate of management and administration of land matters to the NLC, there appears to be an overlap between this mandate and that of the Cabinet Secretary to the Ministry of Lands, Housing, Urban Planning and Development. This has often caused uncertainties with regard to the functions of each body. Often, the ministry has usurped roles and powers which under the constitution and the new laws should properly fall within the ambit of the NLC. These grey areas have brought teething problems to the carrying out of the functions of the NLC. The squabbles have often been played out in the public gallery thereby watering down the effectiveness with which the NLC can carry out its mandate.

As the law stands, the final decision maker appears to be the cabinet secretary; this then brings into question the independence of the NLC. The different roles and functions of the two bodies do not elicit clearly the boundaries within which each body is to operate.

There is still pending before the Supreme Court of Kenya[170] an advisory opinion as to the respective functions of each part.

This shall go a long way in clearing the haze and settling once and for all the uncertainties as to definitive roles and functions that currently surround the two bodies.

3.6.2 The National Land Commission's reliance on funding from the National government

As earlier mentioned in this Study, the National Land Commission gets a bulk of its funding from the national government. You cannot bite the hand that feeds you. This then brings into fore the question of whether the NLC while relying on funding from the Government really can be independent of the caprices of government in the carrying out of its mandate. The NLCs absolute independence is thus put into doubt.

Due to this reliance on funding from the national treasury, there is a nascent risk of the NLC falling victim to intimidation and threats both from parliament and the executive when it does not agree to the sometimes onerous requests of government. The NLC further risks being deprived of the much needed funding when it doesn't adhere to these requests.

[170] There is pending before the Supreme Court an advisory opinion that was sought by the NLC to delineate clearly the various roles and functions of the ministry and the NLC.

3.6.3 Lack of political good will

As set out earlier in this Study, the Constitution and the new land laws have provided a good legal framework that, if properly utilized, can make significant steps in curing once and for all the squatter problem at the Kenyan coast. This legal framework, however, cannot act in a vacuum and requires the concerted efforts of both the NLC and other players including the county assemblies.

As aforesaid, the county government is essentially the custodian of public land in the respective counties and holds public land in trust for the benefit of the people. The NLCs role is the management and administration of the said land. It therefore requires that both parties act in tandem to realize the objectives set out in the constitution and the new land laws.

Achieving this is often easier said than done given the fact that involving the governing body of the county in planning and decision making will invariably introduce politics into the land arena thereby muddling the real issues.

3.6.4 Lack of autonomy and independence of the National Land Commission

A strict reading of the land laws clearly shows that the NLC cannot unilaterally carry out its mandate without variously involving the cabinet secretary, parliament or the county land management boards.

Whereas the NLC is charged with having and oversight role over land matters, it has become more apparent that this role cannot be carried out autonomously and independently and must often rely on the involvement and decisions of third party

bodies. This erodes the mandate donated to the NLC by the constitution and the other land laws.

Whereas this is not in itself necessarily untoward, some of the ills that were envisaged to be cured by the establishment of the NLC including but not limited to the squatter problem cannot properly be tackled due to the obvious bureaucracy and bottlenecks that can be placed on the discharge of these duties of the NLC by these third party institutions.

3.6.5 Operation and Institutional Challenges

In the preamble to the National Land Commission's annual progress report for the period of March 2013 and January 2014, the Chairman of the NLC, Mohammed Swazuri cites as some of the challenges faced by the NLC in the discharge of its mandate, institutional and operational challenges which include lack of adequate human and financial resources, non-compliance by state corporations and agencies with their statutory obligations to declare public land inventories. He also states that there is a general lack of public awareness on the mandate of the NLC.[171]

For the NLCs mandate to be effective, all players required to bring the intended change must work in tandem. The NLC cannot work in a vacuum and only through active involvement of the various agencies and bodies concerned can the role of the NLC be effective.

[171] National Land Commission website, at www.nlc.or.ke/?wpdmact=process&did=MTAuaG90bGluaw== (Accessed 8/8/2015)

3.7 Conclusion

In conclusion it is evident from this section that the laws are indeed able to tackle the problem of squatters at the Kenyan Coast. The qualification however is that for these laws to be able to properly suited to cure the historical injustices and resolve the issue of squatters and landlessness at the Kenyan coast, the institution charge with this role must be sufficiently empowered.

The irony is that the commission which is mandated to investigate historical injustices has to report its findings to the executive. It has been the norm of the executive to shelve the recommendations of Commissions, take them for granted and generally fail to act on them. Tragically, the recommendations are often “paper recommendations” without any meaningful implementation and steps being taken to remedy the situation.

If the recommendations that have been espoused in this chapter are legislated upon, institutionalized and effected the squatter issue at the coast of Kenya would be dealt with comprehensively.

Public awareness and involvement is key to bring effect to any intended change to the existing *status quo.* For the NLC to be effective, the coastal people must be firstly be aware of its role and what recourse it offers to their grievances.

CHAPTER 4

4.0 CONCLUSION AND RECOMMENDATIONS

4.1 Introduction

This Chapter seeks to capture the essence of the research by summarizing the findings, conclusions and recommendations on the squatter problem at the Kenyan Coast.

This study has made a case for revising the mechanisms for the implementation of the laws regulating land. The study has argued that the whereas the current laws regulating land are conceptually adequate in addressing the squatter problem at the Coast of Kenya, specific policies, legislation and institutions need to be put in place in order to practically resolve the problem.

The main hypothesis that the squatter phenomenon at the Kenyan coast can be linked historically to legal regimes adopted by the pre-colonial, colonial and post colonial regimes which legal regimes were developed to actively contribute to the alienation and ownership of land originally belonging to the indigenous people has been proven.

The legal regimes that have governed the coastal region have neglected the right of the natives at the Kenyan coast to own property. This has been demonstrated by the impact of the successive laws enacted to regulate land holding at the coast of Kenya. The laws tended to favour foreigners rights to holding land in the region over the indigenous inhabitants. This right to own property by the natives at the coast of Kenya needs to be respected and upheld.

The secondary hypotheses, to wit, whether the post -2010 legal framework *viz.* the Constitution of Kenya, and the new land laws, to wit, the Land Registration Act number 3 of 2012, the National Land Commission Act number 5 of 2012 and the Land Act, number 6 of 2012, all of which came into force after the promulgation of the new constitution, have the potential to adequately resolve the squatter problem at the Kenyan coast and specifically whether:

1. There is need to amend the post-2010 land laws to arm the NLC with a specific mandate and power to obtain a lasting solution to the squatter problem at the Kenyan coast,
2. There may be a need to have institutional reforms to resolve the squatter problem at the Kenyan coast, have also been proven.

With adequate reforms in the legal regime ensuring the proper functioning of the National Land Commission, the challenge of squatters at the coast will be resolved.

4.2 Summary of Findings

The study has established that the squatter problem at the Coast of Kenya can be attributed to the enactment of foreign laws governing land. These foreign laws led to expropriation of land at the Coast and the rest of Kenya. This had been happening since the arrival of the Arabs and establishment of their dominion over the Coast of Kenya. These foreign laws disrupted the existing African land tenure system resulting in the current quagmire. The system of tenure that was in place initially ensured equitable access to land whilst providing for ownership on a communal and trans generational basis.

This study has also established that regime of laws governing land that existed during the colonial period and the post-colonial period and generally the regime prior to the enactment of the Constitution of Kenya, 2010, were exploited by the existing crop of political leaders to guarantee political patronage. Hence, the problem of squatters became more complicated with further claims on the land arising over a period of time.

The voids in the laws governing land at the time were repeatedly detected in the various commissions of inquiry formed to look into the problem of land in Kenya. In order to respond appropriately to the land question(s), the relevant commissions made several recommendations that informed the laws on land enacted after the promulgation of the Constitution of Kenya, 2010. It is noteworthy that the laws on land sought to operationalize the provisions of the Constitution, hence were specifically tailored to meet the objects set out under Chapter 5 (on land and the environment) of the Constitution.

The Constitution of Kenya and the relevant enacted laws on land provide for formulae through which the squatter problem at the Kenyan Coast may be dealt with. The Constitution ingrains and makes inalienable the right to own and acquire land. Further to this, the enacted laws on land attempt to mitigate the effects of the historical injustices perpetuated upon the people at the Coast of Kenya.

From the preceding chapters, it is agreeable that the State needs to approach the menace of squatters at the Coast with more aggression. Relying on political goodwill alone has proven to be futile. This difficulty is exacerbated by some existing

enforcement mechanisms in the Law governing land in Kenya generally and specifically at the Coast of Kenya.

The people at the Coast of Kenya are also partly responsible in contributing towards the continuity of the problem of squatters. This was witnessed in times when they sold land immediately upon receiving title to it, whilst they had been squatting on the land for ages.[172] After selling the land, they revert back to their squatter status in hope for a solution from the government. This is not the category of squatter that this thesis sought to help- the genuine squatter is the subject of this Study.

The Land laws in existence currently offer an avenue for solving the squatter problem at the Coast. Yet there were some omissions noted in the laws that need to be addressed in order to ensure a holistic approach towards the tackling of the squatter problem at the Kenyan Coast.

4.3 Conclusion

Land is intricately linked to the livelihood of the people of the Coast. This is premised on the economic and social activities. Thus, it is vital to protect their source of livelihood through promoting and protecting the right to hold land. Their challenges commenced prior to independence and have persisted to date. This study analyzed the constitutional and legal framework regulating land in Kenya.

The main objective of examining the issue of squatters at the Kenyan coast with a

[172] Erick Ngobilo *et al.* (2013) "Unscrupulous dealers accused of misleading villagers to sell their land parcels after getting title deeds," in *Daily Nation*, on September 9, 2013, at http://www.nation.co.ke/counties/COAST-villagers-to-sell-their-land-parcels-title-deeds/-/1107872/1995396/-/view/printVersion/-/b6v0rd/-/index.html (accessed 11/9/2014).

focus on how the matter is addressed in the Constitution of Kenya, as well as the new land law regime has been addressed by the Study. The Study has adequately examined the historical underpinnings of the squatter problem at the Coast of Kenya, the pre-2012 legal land regime and the current legal regime. In doing so, the objectives of the Study and the accompanying research questions have been adequately addressed.

The hypotheses postulated in Chapter one have been proven and this study has in chapter three made recommendations to address the problem of squatters at the Kenyan coast to ensure the protection of the right to own property.

This study concludes by stating that for the squatter problem at the coast of Kenya to be adequately resolved, it is imperative to firstly respect and uphold every persons right to acquire and own property. This right is inalienable.

This enhanced fight against the squatter problem at the Coast of Kenya will play a key role in making amends for historical injustices, respecting provisions of the Constitution, providing for ownership of property and diminishing the chances of post-election violence erupting once again.

The effective solution to the problem requires an enhanced effort by the government and various other stakeholders in implementing the provisions of the Constitution and the various other laws governing land.

Adopting the recommendations stated in this study will boost the current initiatives already in place in the fight against the squatter problem at the Kenyan Coast. Further,

it will enhance policy formulation and enable various institutions such as the State to observe, respect, protect, promote and fulfill the rights and fundamental freedoms found in the bill of rights.

4.4 Specific Recommendations

In light of the research made in this study, the following recommendations with regard to the specific acts are made:

4.4.1 The Land Registration Act, No 3 of 2012

The Land Registration Act is intended to rationalize the registration of titles to land and to give effect to the principles and objects of devolved governments in land registration.

The registration of title to land is a means to ascertain ownership of land. Technically, registration of title is supposed to confer security of tenure allowing the owner of the land to enjoy the use of the land in quiet possession. This study recommends the following:

As mentioned in Chapter 3, the Land Registration Act seeks to solve the issue of dual ownership and fraudulent titles by seeking to have well prepared cadastral maps. Land ownership shall be evident on digitized searches which shall also reveal the historical records of any parcel of land. The Act also seeks to invalidate all titles issued under the Government Lands Act and The Land Titles Act

The focal point of this study being the Kenyan coast whose lands primarily fall under the regime of Government Lands Act and The Land Titles Act, an invalidation of the

title is a welcome step. This shall allow for a historical scrutiny of the passage of title from the British to its current holders. This Study recommends that specific legislation outlining the manner in which this exercise shall be done be, introduced to provide guidelines on the process with strong recommendation that if any alienation of land is found to have been fraudulent the same be nullified and title revoked.

As aforesaid a genuine and concerted effort at unraveling historical, passage of title to its current proprietors will provide a basis to revoke titles that passed through fraudulent means and hopefully revert these to their rightful beneficiaries.

The Act applies to all the different forms of tenure as established by the Constitution. The Act provides for county governments to have a register of Community land. Again here, The Study recommends that specific policies and mechanisms be put in place to ensure the creation of these registries. It is still commonplace in the coast of Kenya to have land communally held and registered in the name of the head of the clan. This has its intrinsic dangers more so when such a custodian dies. There is the danger of the beneficiaries to the land being rendered squatters on their own land marking the beginning of a vicious cycle. This helps the situation at the coast since trust lands to be held on behalf of the community by the County Government of the different counties are expected to be registered. This shall preserve still existing customary land rights and holding.

Further to this, this study recommends a mechanism for enforcement of the powers of the Registrars as conferred by section 14 of the Act. In order to ensure complete compliance with the exercise of powers of the Registrars, a system of enforcement

needs to be in place. Failure to implement such a mechanism will render the provisions of the Land Registration Act ineffectual. It may be imperative to have the Supreme Court issue an advisory opinion on how best to implement the recommendations of the constitutional created institutions governing land in Kenya.

This enhanced fight against the squatter problem at the Coast of Kenya will play a key role in resolving historical injustices, respecting provisions of the Constitution providing for ownership of property and diminishing the chances of post-election violence erupting once again. It requires an enhanced effort by the government and various other stakeholders in implementing the provisions of the Constitution and the various other laws governing land. Adopting the recommendations stated above will achieve a more enhanced fight against the squatter problem that will enable the State to observe, respect, protect, promote and fulfill the rights and fundamental freedoms found in the bill of rights.

4.4.2 The National Land Commission Act, No 5 of 2012

The National Land Commission Act was enacted to provide for functioning of the National Land Commission. The Act operationalizes Article 67 of the Constitution of Kenya.

This study recommends the total overhaul of the National Land Commission Act which seemed to have been rushed through parliament to reach constitutional deadlines, thus resulting in the overlapping of the roles of the NLC and the Ministry of Land, Housing and Urban development.

The National Land Commission is the body charged with management of public land amongst other functions. As such, it is instrumental that the Act creating the NLC is comprehensive in outlining the powers of the NLC.

This study recommends that enforcement mechanisms be donated to the National Land Commission Act and entrenched in its mother statute to ensure the proper implementation of the recommendations developed by the NLC. This can be achieved through the proper change in law to give precedence to the implementation of recommendations of the NLC through the Ministry of Land, Housing and Urban Development. Where the Ministry of Land, Housing and Development fails to implement the recommendations, the NLC may proceed to seek judicial review remedies against the inaction of the Ministry of Lands, Housing and Development at the expense of the Ministry. The overhaul of the Act should clearly specify what the roles of the two entities are.

This study recommends the streamlining of the functions of the NLC and the county land management boards. This would ensure the running costs of the government are reduced significantly. The National Land Commission Act establishes the County Land Management for the purposes of managing public land in the Counties. This creates a redundancy in execution of duties considering that the management of public land is a role to be played by the NLC. Hence, this study recommends that the county land management board development agenda should be presented annually to the NLC for its approval. The study also recommends that the county land management boards should undergo further training to ensure they are qualified to address the current social and economic challenges facing land within their

jurisdiction.

The funds relied upon by the NLC in execution of its mandate make it financially dependent on parliament. To ensure substantial financial independence of the NLC in carrying out of its mandate, there funds should be charged directly from the Consolidated Fund upon approval of the estimates by the National Assembly.

Lastly, the public should be informed on the role of the National Land Commission in light of land in Kenya. The civic education will generate sufficient political goodwill for the implementation of the recommendations made by the National Land Commission.

4.4.3 The Land Act, No 6 of 2012

The purpose of enacting the Land Act was to provide for the sustainable administration and management of land and land based resources. As such, the Land Act, 2012, is key in solving the squatter problem at the Coast of Kenya. There are certain lacunas that exist in the Land Act which are to be addressed. They include:

The National Land Commission is given the power to allocate public land on behalf of the National and County governments under section 12 of the Act. The Commission is empowered to set aside land for investment purposes having in mind the benefit to be accrued to the local communities. I recommend a change of the provision to ensure that the power of the Commission to set aside land for investment purposes is aligned with the National and County governments planning priorities. A conflict in exercise of power will create a means for exploitation by the governments

in power. The result of which may be the wrongful exercise of the power of compulsory acquisition. With the indication on how best to exercise this power.

The National Land Commission, whilst exercising its power of appropriation of public land, needs to be preparing a report on an annual basis on the use of allocated public land. This report will allow for better public scrutiny of the land resource.

With the involvement of the Cabinet Secretary for Lands, Housing and Urban Development under section 6 of the Land Act, the functioning of the National Land Commission (NLC) is impeded. The mandate of the Cabinet Secretary overlaps with the mandate of the NLC in some cases. For instance, the Cabinet Secretary is given the oversight mandate to monitor and evaluate land sector performance whilst the NLC is mandated, under section 5 of the National Land Commission Act to monitor and have oversight responsibilities over land use planning throughout the country. This conflict results in under implementation of the provisions of the Land Act thus perpetuating the land problem (s) generally in Kenya and specifically at the Coast of Kenya. This study recommends that the oversight role be the mandate of the NLC. This can be done through streamlining of the Land Act to highlight the different roles of the institutions. Mandating the NLC with the oversight role reduces political interference involved in the regulation and oversight of land use and planning thus improving the implementation of the provisions of the Land Act. Providing clearly for the roles that NLC vis-à-vis the Ministry of Land, Housing and urban Development will go a long way in ensuring that the constitutional entities are sufficiently facilitated to resolve this problem of squatters at the coast of Kenya.

Section 134 of the Land Act provides for the establishment of settlement schemes to provide access to land for shelter and livelihood. The section applies directly to the squatter problem at the Coast. The provision under section 134 (8) stating that land acquired under a settlement scheme is not transferrable except through a process of succession needs to be applied to persons who are receiving title deeds for land on which they have been squatters.

This study recommends that policies, rules and regulations be put in place to give effect to section 134. This will cure the problem of people at the Coast contributing towards the worsening of the problem by selling any land they receive title to. The provisions also need to ensure that land acquired through settlement schemes is not subdivided except through the process of succession. This will ensure that subdivision of land does not happen to the point of rendering the subdivided parcels of land unviable economically. The Land Act may state that, “Land titles issued to squatters shall only be transferable or subdivided through a process of succession.”

4.5 General Recommendations

The proposal by the national land policy to take an inventory of all government land within the 10-mile coastal strip, covering 1,128 parcels needs to be actualized. This will form a starting point for establishing the current ownership of these parcels of land and whether or not the alienation was legal.

There is a need for a clear definition of the respective roles of the National Land Commission and the Cabinet Secretary. For the NLC to be able to effectively discharge its mandate, it is imperative that there be a clear-cut distinction between the

roles of the NLC and those of the Cabinet Secretary.

For the NLC to be fully independent and autonomous in the discharge of its duties, its source of funding ought to be decentralized from the national treasury. An independent fund needs to be created to fund the NLCs activities with the source of these funds coming from third party sources including donor agencies, NGOs, international bodies and private entities.

County government land management boards ought to be properly empowered to assume their fundamental role in carrying out their important role of acting as custodians of public and community land. The aim of involving the county management boards in land management is to decentralize the function of land management and localize the same. This shall result in a more centred and focused approach to finding viable solutions at the grass-root level. The county land management boards partnership with the NLC in the management of land is essential to bring about effective reforms. The board needs to be sufficiently trained and equipped to carry out their role as set out in the land laws.

The NLC needs to forge partnerships with the various players in the land arena in order to develop plans and workable strategies aimed at finding practical solutions to the squatter problem.

Bibliography

Books and Journal Articles

1) Bix, Brian (2012) *Jurisprudence: Theory and Context,* Sweet & Maxwell, London.
2) Caterina, Martina & Johanna Klos (2014) *Unfinished Business: Kenya's efforts to address displacement and land issues in Coast Region,* Internal Displacement Monitoring Centre, Geneva.
3) Collier, Deepak (1986) *Labour and Poverty in Kenya: 1900-1980*, Clarendon Press, Gloucestershire.
4) Cooper, Frederic (1997) *From Slaves to Squatters: Plantation labor & Agriculture in Zanzibar & Coastal Kenya, 1890-1925*, Heinemann Education Books, New Hampshire.
5) Dudziak, Mary L. (2008) "Thurgood Marshall's Bill of Rights for Kenya," in 8:13 *Legal studies Research Paper Series,* University of Southern California Law School, California, at http://weblaw.usc.edu/centers/class/class-workshops/usc-legal-studies-working-papers/documents/08_13_paper.pdf (accessed 9/11/2013).
6) Hallaq, Wael B. (2009) *An Introduction to Islamic Law*, Cambridge University Press, Cambridge.
7) Hoorweg, Jan (2000) "The Experience with Land Settlement," in Jan Hooreg *et al. Kenya Coast Handbook: Culture, Resources and Development in the East African Littoral,* Lit Verlag, Hamburg, at https://openaccess.leidenuniv.nl/bitstream/handle/1887/9673/ASC_1253933_104.pdf?sequence=1 (accessed 8/9/2014).
8) Kameri-Mbote P*, Ours by Right, Law, Politics and Realities of Community Property in Kenya,* Strathmore University Press, Nairobi.

9) Kameri-Mbote, Patricia & Kithure Kindiki (2008) “Trouble in Eden: How and Why Unresolved Land Issues Landed ‘Peaceful Kenya” in 2008,” in Vol 35:2 *Forum for Development Studies*, Norwegian Institute of International Affairs, Routledge.

10) Kanyinga, Karuti (2000), *Re-distribution From Above: The Politics of Land Rights and Squatting in Coastal Kenya,* Nordiska Afrikainstitute, Sweden, page 34 at http://www.diva-portal.org/smash/get/diva2:271584/FULLTEXT01.pdf (accessed 9/11/2014).

11) Leo, C. (1978) “The Failure of the ‘Progressive Farmer’, in Kenya’s Million Acre Settlement Scheme, in *Journal of Modern African Studies*

12) Mghanga, Mwandawiro (2010) *Usipoziba Ufa Utajenga Ukuta*: *Land, Elections, and Conflicts in Kenya's Coast Province*, Heinrich Boll Stiftung, East and Horn of Africa.

13) Mitullah, Winnie V (2003) *The Politics of Transition in Kenya: From KANU to NARC*, Heinrich Boll Foundation, Nairobi.

14) Mitullah, Winnie V (2003) *The Politics of Transition in Kenya: From KANU to NARC*, Heinrich Boll Foundation, Nairobi.

15) Mumma, Albert (2003) “The Procedures for Issuing Titles to Land in Kenya,” in Vol 2 *Land Reform in Kenya*, Law Society of Kenya Journal, Nairobi.

16) Musembi, C.N. (2006) “Breathing Life into Dead Theories about Property Rights: De Soto and Land Relations in Rural Africa,” Vol 28 (8) *Third World Quarterly,* Institute of Development Studies, University of Sussex, Brighton.

17) Mwaruvie, J.M. (2011) “The Ten Miles Coastal Strip: Na Examination of the Intricate Nature of the Land Question at the Coast,” in Vol 1 No 20 *International Journal of Humanities and Social Science,* Centre for Promoting Ideas, Los

Angeles.

18) Mwaruvie, John M. (2011) "The Ten Miles Coastal Strip: An Examination of the Intricate Nature of Land Question at Kenyan Coast," in Vol 1 No 20 *International Journal of Humanities and Social Science*, Centre for Promoting Ideas (CPI), Los Angeles, at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&ved=0CDsQFjAD&url=http%3A%2F%2Fwww.ijhssnet.com%2Fjournals%2FVol_1_No_20_December_2011%2F17.pdf&ei=iLLzU-WaH-mY0QWZ5oHwCQ&usg=AFQjCNFnMLlM4mOLUMf-v9soK1FLs0mCVQ&sig2=U2sRqTeG8zLJ1rRA4iXZJg&bvm=bv.73231344,d.d2k (accessed 19/8/2014).

19) News, Partner (2004) "Land Ownership, Access and Use," in *The Development Journal of MS Kenya*, No. 3.

20) Odinga, Oginga (1974) *Not Yet Uhuru: An Autobiography*, Heinemann Publishers, New Hampshire.

21) Ojienda, T. O. (2003) "Customary Land Rights, Land Adjudication and Regime of Beach Plots," in Law Society of Kenya, Vol 2*Land Law Reform in Kenya*, Law Society of Kenya, Nairobi.

22) Okoth Ogendo, H.W.O. (2002) "The Tragic African Commons: A Century of Expropriation, Suppression and Subversion," in *Land Reforms and Agrarian Change in Southern Africa* (Programme for Land and Agrarian Studies, School of Government University of the Western Cape)

23) Okoth-Ogendo, H.W.O (1987) "The Perils of Land "tenure" Reform," in J.W. Arntzenm *et al.* (eds) *Land Policy and Agriculture in Eastern and Southern Africa*, United Nations University, Tokyo.

24) Okoth-Ogendo, H.W.O (1991) *Tenants of the Crown: Evolution of Agrarian Law and Institutions in Kenya*, African Centre for Technology Studies, Nairobi.

25) Okoth-Ogendo, H.W.O. (1979) "African Land Tenure Reforms," in J. Heyer (ed.) *Agricultural Development in Kenya*, Oxford University Press, Nairobi.

26) Wamicha, Wellington Nguya and Justus Inonda Mwanje (2000) "Environmental Management in Kenya," in *Environmental Forum Publications Series, No 2*, at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB8QFjAA&url=http%3A%2F%2Fwww.ossrea.net%2Fpublications%2Fimages%2Fstories%2Fossrea%2Fenv-kenya-part-2.pdf&ei=ytX5U-G0HoTTaOmLgMgH&usg=AFQjCNHtJlNHLB_9QRQTp8plaHKscLp2JQ&sig2=Ot3FSHoKURu6SGRdpTIHbA&bvm=bv.73612305,d.d2s&cad=rja (accessed 24/8/2014).

Monographs, occasional and working papers

1. Doshi, Mona (2012) *The Land Laws of Kenya: A summary of the Changes*, Anjarwalla and Khanna, Nairobi, at http://estates.uonbi.ac.ke/sites/default/files/centraladmin/estates/Summary-of-the-Land-Laws-Anjarwalla-Khanna-October-2012.pdf.pdf (accessed 11/9/2014).
2. Kanyiga, Karuti (1998) *Struggles of Access to Land: The Squatter Question in Coastal Kenya*, CDR Working Paper no. 98.7, Centre for Development Research, Copenhagen.
3. Malombe, Davis M. (2011) Position *Paper on Engendered and rights based Land Reforms in Kenya*, Kenya Human Rights Commission, Nairobi, pg6, at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&ved

=0CD0QFjAD&url=http%3A%2F%2Fwww.khrc.or.ke%2Fresources%2Fpublications%2Fdoc_download%2F38-a-position-paper-on-engendered-and-rights-based-land-reform-in-kenya.html&ei=hHIJVM-aLsTH7AbozIGYAw&usg=AFQjCNH-Zz3yLYlhtF6coAZloGbIUIk6qg&sig2=A44A4Dux3LGz8cgI1CfKzQ&bvm=bv.74649129,d.ZGU (accessed 5/9/2014).

4. Mitullah, Winnie V, "Struggles Of Access to Land: The Squatter Question In Coastal Kenya, Cdr Working Paper No. 98.7, Centre For Development Research, Copenhagen.
5. Ndungu, Paul N. (2006) *Tackling Land related Corruption in Kenya*, at http://siteresources.worldbank.org/RPDLPROGRAM/Resources/459596-1161903702549/S2_Ndungu.pdf (accessed 2/9/2014).
6. Njuguna, Humphrey K. & Martin M. Baya Land *Reforms in Kenya: An Institution of Surveyors of Kenya (1SK) Initiative,* at https://www.fig.net/pub/proceedings/korea/full-papers/pdf/session7/njuguna-baya.pdf (accessed 1/9/2014).
7. Odote, Collins (2010) “Retracing our Ecological Footsteps: Customary Foundations for Sustainable Development and Implications for Higher Education in Kenya,” a conference paper presented at the 7th Strathmore between October 28-28, 2010.
8. Syagga, Paul Maurice (2006) “Land Ownership and Uses in Kenya: Policy Prescription from an Inequality Perspective,” in Regional workshop on Role of Geoinformation in National Development, on August 25-26, 2008, at Regional centre for Mapping of Resources for Development, Society, Society for International Development, Nairobi, page 294.

Book Chapters

1. Juma C. (1996) “In Land we Trust,” in C. Juma and J.B Ojwang (eds.) *In Land we Trust: Environment, Private Property and Constitutional Change,* ACTS Press, Nairobi.
2. Kibwana, Kivutha (2000), Spontaneous Settlement and Environmental Management, in Smokin Wanjala (ed) *Essays on Land Law: The Reform Debate in Kenya,* Faculty of Law, University of Nairobi, Nairobi.
3. Migot-Adholla, S. E., F. Place and W. Oluoch-Kosura (1994) “Security of tenure and land productivity in Kenya,” in Bruce J. W. *et al.* (eds.) *Searching for land tenure security in Africa,* World Bank, Washington DC.
4. Ogolla, B. D & Mugabe, J. (1996) “Land Tenure Systems and Natural Resources Management,” in Juma C. & Ojwang J.B. (eds.) *In Land we Trust: Environment, Private Property and Constitutional Change,* ACTS Press, Nairobi.
5. Okoth-Ogendo, H.W.O. (1979) “Imposition of Property Law in Kenya,” in B. Harrell-Bond and S. Burman (eds.) *The Imposition of Law*, Academic Press, New York.
6. Okoth-Ogendo, H.W.O. (1981) “Land Ownership and Land Distribution in Kenya’s Large-Farm Areas,” in T. Killick (ed.) *Payers on Kenya Economy: Performance, Problems and Policies*, Heinemann Education Books, Nairobi.
7. Okoth-Ogendo, H.W.O. (1986), “The Perils of Land Tenure Reform: The Case of Kenya,” in J. Amtzen, L. Ngengco and S. Turner (eds.) *Land Policy and Agriculture in Eastern and Southern Africa,* Tokyo.
8. Okoth-Ogendo, H.W.O. (1993) “Agrarian Reform in Sub-Saharan Africa: An Assessment of State Responses to the African Agrarian Crisis and their

Implications for Agricultural Development," in J. Basset and D. E. Crummey *Land in African Agrarian Systems*, University of Wisconsin Press, Madison.

9. Wanjala, S.C. (2011) "Problems of Land Registration and Titling in Kenya: Administrative and Political Pitfalls and their Possible Solutions," in S. Wanjala (ed.) *Essays on Land Law: The Reform Debate in Kenya*, Faculty of Law, University of Nairobi, Nairobi.

Newspaper Articles

1. Ayodo, Harold (2014) "Land reforms under threat as NLC denied cash," in *Standard Digital*, on January 30, 2014, at http://www.standardmedia.co.ke/lifestyle/article/2000103509/land-reforms-under-threat-as-nlc-denied-cash?pageNo=2 (last accessed 2/9/2014).
2. Koissaba, Ben Ole (2014) "Campaign Update: Kenya-Maasai Protest Against New Land Concessions for Geothermal Extradition in Kenya," in *Cultural Survival*, on July 7, 2014, at https://www.culturalsurvival.org/news/campaign-update-kenya-maasai-protest-against-new-land-concessions-geothermal-extraction-kenya (accessed 9/8/2014).
3. Machuhi, Eunice (2014) "Kenya court declares Jomo Kenyatta land decree illegal," in *African Review*, on March 13, 2014, at http://www.africareview.com/News/Kenya-court-declares-Kenyatta-land-decree-illegal/-/979180/2242636/-/i54gnqz/-/index.html (accessed 6/9/2014).
4. Masha, Joseph (2013) "Squatters protest delayed title deeds issuance," in *Standard Digital*, on July 16, 2013, at http://www.standardmedia.co.ke/?articleID=2000088550%29 (accessed 11/9/2014).
5. Masha, Joseph and Paul Gitau (2013) "President Uhuru Kenyatta issues 60,

000 title deeds to Coastal residents" in *The Standard* on August 30th 2013 at http://www.standardmedia.co.ke/?articleID=2000092322&story_title=uhuru-issues-60-000-title-deeds-to-coast-residents (accessed on 9/11/2013).

6. Ngobilo, Erick *et al.* (2013) "Unscrupulous dealers accused of misleading villagers to sell their land parcels after getting title deeds," in *Daily Nation*, on September 9, 2013, at http://www.nation.co.ke/counties/COAST-villagers-to-sell-their-land-parcels-title-deeds/-/1107872/1995396/-/view/printVersion/-/b6v0rd/-/index.html (accessed 11/9/2014).

Reports

1. Government of Kenya *Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Land*, Government Printers, Nairobi.
2. Government of Kenya (1978) *Report of the Select Committee on the Issue of Land Ownership Along the Ten Mile Coastal Strip of Kenya*, Government Printers, Nairobi.
3. Government of Kenya (2009) *Sessional Paper No 3 of 2009 on National Land Policy*, Government Press, Nairobi.
4. Government of Kenya (2013) *Report Of The Truth, Justice And Reconciliation Commission*, 2013, Truth Justice And Reconciliation Commission (TJRC), Kenya.
5. Ministry of Lands (2007) *National Land Use Policy*, Government Press, Nairobi.
6. Ministry of Lands and Housing (2005) National Land Policy, *Issues and Recommendations Report*, Government Press, Nairobi.
7. Ministry of Lands, *Current Status of Land in the Coast*, Government Press,

Nairobi.

8. Mulemi, Benson (2011) “Putting Land Grievances Behind us in Kenya,” A report on the Historical Roots of Land-Related Grievances in Kenya, page 10 at http://www.academia.edu/1420126/Historical_Roots_of_Land-Related_Grievances_in_Kenya (accessed 9/11/2014).
9. Okoth-Ogendo, H.W.O. (1977) “Land Tenure Problems in the Ten-Mile Strip of the Coast Province of Kenya,” Memorandum Prepared for and at the Request of the Parliamentary Select Committee on the Issue of Land Ownership along the Ten-Mile Coastal Strip in Kenya.
10. Republic of Kenya (2009) *Sessional Paper no 3 of 2009 on National Land Policy*, Government Printers, Nairobi.

Online sources

1. About Geography website, at http://geography.about.com/cs/politicalgeog/a/berlinconferenc.htm (accessed 20/8/2014).
2. Africa Centre for Open Governance website, at http://www.africog.org/reports/mission-impossible-implementing-ndung%E2%80%99u-report (accessed 7/9/2014).
3. African Studies Centre Website, at http://www.africa.upenn.edu/NEH/khistory.htm (accessed 20/8/2014).
4. Encyclopedia Britannica Website, at http://www.britannica.com/EBchecked/topic/315078/Kenya/259594/The-British-East-Africa-Company (accessed 27/8/2014).
5. Hakii Jamii website, at http://www.hakijamii.com/index.php/2-

uncategorised/127-media-story-land-reforms-under-threat-as-nlc-denied-cash (accessed 9/9/2014).

6. http://www.constitutionofmadina.com/wp-content/uploads/2012/02/Constitution-of-Madina_Articles.pdf (accessed 27/8/2014).
7. Kenya Land Alliance website, at Http://www.kenyalandalliance.or.ke (accessed 9/9/2014).
8. Kenya Law website, at http://kenyalaw.org (accessed 9/9/2014).

Dissertations and Research Projects

1. Charo J.B. (1977) "The Impact of Land Adjudication under the Titles Act Cap 282 in Kilifi District," LLB Dissertation, University of Nairobi.
2. Kibugi, R (2011) *Governing Land Use in Kenya: From Sectoral Fragmentation to Sustainable Integration of Law and Policy.* Thesis submitted to the Faculty of Graduate and Postdoctoral Studies in partial fulfillment for the Doctors of Laws (LL.D) degree, University of Ottawa

List of Repealed Statutes

1. Government Lands Act, Cap 280 (Repealed)
2. Indian Land Acquisition Act, 1896 (Repealed)
3. Indian Transfer of Property Act, 1882 (Repealed)
4. Land Acquisition Act, Cap 295, (Repealed)
5. Land Planning Act, Cap 303, (Repealed)
6. Land Titles Act, Cap 282 (Repealed)
7. Registered Land Act, Cap 300 (Repealed)

8. Registration of Titles Act, Cap 281 (Repealed)
9. Transfer of Proper Act of India, 1882 (Repealed)
10. Way leaves Act, Cap 292 (Repealed)

List of Cases

1. *Attorney General* v. *Lohay Akonaay,* Court of Appeal of Tanzania, Civil Appeal No 31 of 1994 (Coram: Nyalali, C.J., Makame, J.K., and Kisanga, J.A.).
2. *Joseph Arap Ngo'k* v. *Justice Moijo Ole Keiwua,* Court of Appeal, Civil Application No 60 of 1997 at Nairobi.
3. *Kemtai & 9 Others v. Attorney General & 3 Others*, High Court of Kenya Civil Case No 238 of 1999 at Nairobi (Coram Oguk & Kuloba JJ).
4. *Kuria Greens Limited* v. *The Registrar of Titles & Commissioner of Lands*, High Court of Kenya, Petition No 107 of 2010 at Nairobi (Coram: D. Musinga, J).
5. *Mwangi Muguthu* v. *Maina Muguthu,* High Court of Kenya, Criminal Application No 377 of 1986 (Unreported).
6. *Republic of Kenya* v. *Kisumu District Lands Officer and The Kisumu District Lands Registrar*, High Court of Kenya, Miscellaneous Application No 80 of 2010 at Kisumu (Ali-Aroni, J.).
7. *Samuel Murimi Karanja & 2 others* v. *The Republic of Kenya*, High Court of Kenya, Criminal Application No 412 of 2003.