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MASTER OF LAWS**

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**TOPIC: ADDRESSING PAST AND HISTORICAL LAND INJUSTICE IN
KENYA: ARTICLE 67(2)(e) OF THE CONSTITUTION AND SECTION
5(1)(e) OF THE NATIONAL LAND COMMISSION ACT**

SUBMITTED ON 11TH NOVEMBER 2016

DECLARATION

This thesis is my original work and has not been presented for a degree at the University of Nairobi or any other University or examination body

Signature_____

Date_____

Benjamin Mwikya Musyoki

DECLARATION BY THE SUPERVISOR

This thesis has been submitted for examination with my approval as University Supervisor

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Date_____

Rodney Okoth Ogendo (Supervisor)

DEDICATION.

This paper is dedicated to my wife Monicah Kisuu Mwikya for her unwavering support and encouragement during my research, compilation and writing. Without your prayers and support I would have given up. To my sons Nathan, Bruce and Edwin may this be an impetus to your love for education which gave me the energy to go on when things were tough for me hustling between the project and my job. I also dedicate the work to my father and mother Musyoki and Kavunge respectively.

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LIST OF LEGAL INSTRUMENTS USED

Constitution of Kenya

Constitution of Kenya Review (Amendment) Act number 9 of 2004.

Crown Ordinance 1902 (Repealed).

Environment and Land Court Act, number 19 of 2011.

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Njoya & 6 Others –versus- The Attorney General & 2 Others (2004) 1KLR 161.

ABBREVIATIONS USED

ELC	ENVIRONMENT AND LAND COURT.
IBEA	IMPERIAL BRITISH EAST AFRICA COMPANY.
FAO	FOOD AND AGRICULTURAL ORGANISATION.
ICCPR	INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS.
ICESCR	INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS.
ILO	INTERNATIONAL LABOUR ORGANISATION.
KADU	KENYA AFRICAN DEMOCRATIC UNION.
KANU	KENYA AFRICAN NATIONAL UNION.
LEGCO	LEGISLATIVE COUNCIL.
NLC	NATIONAL LAND COMMISSION.
NLP	NATIONAL LAND POLICY.
UDHR	UNIVERSAL DECLARATION OF HUMAN RIGHTS.

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ABSTRACT

Land is in no doubt the most important asset in the lives of Kenyans. It is a factor of production which is core to the economic activities of this country. The advent of settlers and colonialism in East Africa placed land in a high level of importance than before. It is not a unique situation for Kenya. Wars have been fought world over with ownership of land and other resources associated with it being at the center of controversy.

When colonialism set in, many people were displaced from their original homes. After the Second World War indigenous Kenyans discovered that their land had been systematically taken away from them. This saw the beginning of vicious war between the indigenous Kenyans and the colonial government. After independence it was felt that the atrocities committed against indigenous Kenyans as far as land was concerned would be remedied. It never came to pass as the original owners of the land which had been taken away were not the beneficiaries of the independence.

Since independence there have been calls by Kenyans, politicians, leaders and other stakeholders for new land law regimes. Land law reforms have been piecemeal and of no positive results for ordinary Kenyans. Instead of restitution or remedy, more land injustices have been committed against Kenyans after independence. In late 1988 and the early 1990s fight for law reforms was rejuvenated and for more than a decade solutions seemed to be elusive.

In 2010 Kenyans passed a new Constitution which saw reforms and overhaul of the land laws system achieved. Among hopes in the new Constitution was introduction of Article 67 of the Constitution which set up a National Land Commission and defined its functions. In 2011 the Parliament passed National Land Commission to give effect to Article 67 of the Constitution.

One of the functions of the NLC as set out in the legal instruments was to investigate and make recommendations in respect present and past historical land injustices. It was hoped that these provisions of law were adequate to give the NLC enough powers and instruments in addressing past and historical land injustices in the country. Since its establishment in 2011 the NLC has not done much in this field.

This paper is set to look at what the NLC would be expected to do in order to discharge its mandate under Article 67(2)(e) of the Constitution and section 5(1)(e) of the National Land Commission Act. Chapters 1 and 2 deal with definition and discussion on land injustices in this country while chapter 3 and 4 discusses the laws NLC should use in addressing the issues and recommendations.

CHAPTER ONE

INTRODUCTION

1.1 Introduction

Land is an important factor of production and it's the core to Kenya's economy. Due to its importance every aspect of human survival or existence to some extent depends on availability of land. Owing to its importance land has posed the greatest challenge to our country and it's the main cause of conflicts which have been experienced for over a century now. Sometimes these conflicts have mutated to political, ethnic and social upheavals which have at some point contributed to near complete breakdown of law and order in the entire country. The conflict have overtime resulted to injustices and unfair treatment of quite number of Kenyans. There have been attempts by successive regimes to make good these injustices and unfair treatment. However there have been suspicions that the successive governments have been players in perpetration of injustices. It is against this background that the NLC was formed. It is hoped that NLC will among others things address the historical injustices which have been visited upon large number of citizens. Sound legal and institutional framework are needed to achieve this objective. This chapter lays the foundation for establishing whether the existing institutional and legal frameworks are adequate to enable the NLC address the historical land injustices in Kenya.

1.2 Background to the problem

Towards the close of 19th Century, there arose the need in Europe for land and raw materials. The European countries discovered that there was plenty of land and raw materials in Africa. In 1885 in Berlin Conference, Britain secured colonial dominance on Kenya.

British Government encouraged its citizens to come to East Africa where there was plenty of cheap land, abundant labour and large potential profit.¹ Many settlers responded positively. Before the advent of Europeans in Kenya, land was held by communities, clans or tribes. There was no individual land tenure. This was the beginning of land ownership problems not only in Kenya but also across Africa and Asia where large populations were dispossessed of their land.²

With time Britain government passed several laws which were meant to ensure dominance and government in Kenya whose effect was to confine the indigenous Kenyans to the less productive areas. The white settlers were settled in lands which were fertile and productive. The settlers influenced colonial government decisions making using their political ties in London and economic promises.³ They pushed for and won extension of the leases for land they had acquired in the highlands from a term of 99 years to that of 999 years.⁴ The settlers were insisting of being granted perpetual leases but the secretary of state was for 99 years leases. Negotiations between

¹ Elkins C, Britain's Gulag; The Brutal End of Empire in Kenya (Jonathan Cape London 2005) p 3.

² Ibid p 4.

³ Ibid p 11.

⁴ Ibid.

the settlers and the state agreed on 999 years.⁵ In all these arrangements and legislation the African Kenyans who were the indigenous people were not involved. Their role if any was peripheral and of no effect.

In addition to the settlers, Kenya became home to immobilised British soldiers after the First World War.⁶ The soldiers were re-settled in Kenya by 1920. This was as a result of recommendations of a commission which was set up in 1917 by Governor Belfield. The commission's terms of reference was to consider;

*'the practicability without financial assistance from the government of settlement on land in the protectorate of soldiers of European extraction who have served His Majesty's forces in the present East Africa and elsewhere'*⁷

The commission had made recommendations that land already surveyed for alienation should be turned over to the soldiers in 999 years leases free of any purchase price and subject only to annual rent of 10 cents of a rupee per acre.⁸ This state of affairs did not go down well with indigenous persons as they saw it as a means of taking away their land in disguise of rewarding soldiers. There was no justification why the soldiers who were compensated with land were only those of European extraction yet they had no connection to the indigenous people. Their African colleagues were not compensated. In fact to the contrary they lost their lands. The corresponding schemes for African soldiers was to train them as carpenters, mechanics, artisans, builders and blacksmiths.⁹

Things would change for worse after the Second World War. Much of the land for the scheme for settlement of the so called immobilized soldiers was found in Nandi although the original plan was to hive it from Kikuyu reserves between Nairobi and Limuru. The best grazing land in Nandi was therefore appropriated and Natives ordered off and paid five rupees only for each two huts in their compound. This was a drastic clearance.¹⁰ This shows how the protectorate administration looked down upon the African's interest and ownership of land. It seemed that according to the authorities, the natives owned the huts and not the land. This act was similar to other colonial settlements and treatment of Africans and it was considered to be entirely within the framework of settlers' property law. Interestingly after Second World War a similar scheme but targeting unused settler's land was carried out but the settlers were compensated for the land unlike the 1920s Africans case where they were paid for the huts only.

Introduction of the British land tenure system in Kenya changed the status obtaining before. The prevailing system then was customary. The laws introduced by the colonialism extinguished

⁵ O. Ogendo, *Tenants of The Crown; Evolution of Agrarian Law and Institutions in Kenya* (Acts Press 1991) 41.

⁶ Ibid.

⁷ Ibid p 46.

⁸ Ibid.

⁹ Sessional Paper No. 8 of 1945 page 3.

¹⁰ Ogendo (n 11)

customary rights to ownership of land. Continued oppression and occupation of land ultimately led to resistance from the indigenous Kenyans.

Kenyan's movements and agitation for restoration of their land resonated with other East African countries like Tanzania where the Meru lands movements were almost similar.¹¹ Faced with resistance, the colonial government passed successive laws sometimes softening its stand. In Kenya, the government in 1957 came up with a system of registration through the Land Registration Ordinance.¹² Its effect was to extinguish all existing rights and interest under customary law.¹³ Of interest to this research is section 89(1) which provided that a first registration was unchallengeable.¹⁴ What this meant was that any individual who manipulated registration system became the owner in exclusion of all the others.¹⁵ This led to dispossession of the members of a family by whoever had muscle to register. This provision was retained in the successor of the Ordinance.¹⁶ The Land Act 2012 has however changed this position. It does not give blanket protection to first registration.

During negotiations for independence for Kenya in 1960, resettlement of the indigenous persons was a central issue. In fact the issue was too hotly in debate that even some sections of the black Africans led by a political party known as KADU called for postponement of independence until the rights of minority communities were guaranteed. One major issue at that time was land distribution and ownership of land with KADU pushing for regionalism. After independence some regional assemblies openly called for eviction and denial of some groups access to land in Rift Valley while KANU another political party, insisted on settlement of people anywhere in the country. KANU pushed for settlement of people in white highlands in Rift Valley in order to satisfy what freedom fighters wanted.¹⁷ As it is written elsewhere in this paper although the idea of settling freedom fighters was a good one, it was never actualised as envisaged and instead the lands went to undeserving people. The problem persists today with masses in Kericho suing the British and Kenya government for these historical injustices.

The most valuable land which was originally tribal land was in the hands of white settlers who believed that it belonged to them.¹⁸ The Kenya African nationalist believed that land reforms would redress a historical injustice of displacement of African people from their lands under colonialism while the British held the stand that, any resettlement scheme must not interfere with

¹¹ J Kiroo, *The Meru Land Case* (East African publishing House 1967) p 20.

¹² C.S. Wanjala *Essays on Land Law; The Reform Debate in Kenya* (University of Nairobi 2000) p 19.

¹³ *Ibid* p 19.

¹⁴ *Ibid*.

¹⁵ *Ibid*.

¹⁶ *The registered Land Act, Chapter 300 Laws of Kenya, Government printer (Now Repealed)*.

¹⁷ S Wanjala & Others, *Yearning for Democracy; Kenya at the Dawn of a New Century* 41.

¹⁸ M L Dudziak, 'Working Towards Democracy: Thurgood Marshall and The Constitution of Kenya' (2006) Vol 3 *Duke Law Journal*, p 759.

settler property rights and must therefore be based on compensation.¹⁹ Somehow the settlers had their way.

The post-colonial government did not do much to redress the injustice suffered. This situation has made historical land issues to remain unresolved in Kenya up to date. The problem of displacement continued beyond independence in 1963. Although Kenyans fought for independence from Britain on background of land reforms and resettlement of the displaced population, the problem of land conflicts still exists despite efforts to manage them. Many papers have been written and many land policy documents have been initiated by the successive Governments but the issue remains unresolved.

Political multi party activism which started in late 1980s resulted to introduction of multi party democracy with first elections held in December of 1992. During and after the said activism land reforms remained a central part of political and economic activities. Kenyans have been agitating for land reforms with arguments that land was being dished out to influential and politically advantaged individuals in expense of the poor, needy and deserving cases. The problem of land conflicts has been worsened by successive ethnic violent clashes which have resulted to displacement of people who have been thought to be foreigners in specific areas.

1.3 Statement to the problem

Man is said to be a land animal and land matters mightily to him.²⁰ The fight for land rights in Kenya did not bear fruits as the succeeding laws did not substantially change the pre-independence laws. Those who were dispossessed did not get back their land. The land which was recovered by the government from the settlers went to those who were in government and those who could afford to buy.

The Kenya Constitution now recognizes the fact that there have been historical injustices which need to be redressed. The Constitution did not only create NLC but also made it mandatory for the parliament to pass law creating the commission. In a country where leaders and politicians hold instruments of power it would have been easy for the parliament to fail to enact the law as envisaged. However the drafters of the Constitution must have foreseen this possibility when they came up with Article 261 of the Constitution. Under this Article if the parliament failed to enact any of the laws provided for, it stood risk of being dissolved. The Article gives the procedure through which the parliament may be dissolved in the event it fails to enact any law within the stipulated period. Passing of the NLC Act is a positive step towards addressing the historical land injustices. The president assented to the Act on 27th April 2012 but it commenced on 2nd May 2012.

The NLC is mandated to address historical and present land injustices. The mandate is given under Article 67(2)(e) of the Constitution and section 5(1)(e) of the NLC Act. The NLC is one of the

¹⁹ Ibid.

²⁰ Bentsi-Enchil Kamena, Ghana Land Law (Africa University Press 1964) p 3.

independent commissions established by the Constitution of Kenya. It was a culmination of many years of clamour for constitutional and land reforms which can be traced back to 1989 after the infamous queue voting general elections of 1988.²¹ The constitutional review process which followed was not easy as accusations and counter accusations with differences and conflict of ideas and process threatened to derail the process. Kenyans were particularly concerned that the independent constitution was passed and adopted without the input of the people. It was therefore a foreign document to them. In addition the independence Constitution had been mutilated with amendments which people interpreted to be entrenchment of dictatorship and utilitarian leadership in the country. The notable and infamous amendments of 1982 which made the country a one party state followed by the 1988 queue voting were the climax for bad governance which threatened the very existence of the country. Historical land injustices were one of the main issues at the centre of the governance and clamour for reforms.

The road to the promulgation of new Constitution for Kenya was a rough one. Many lives and property were lost. Blood was shed and cohesion of the country was shattered. Kenyans went for referendum twice. The first one was in November 2005 where the voters returned a verdict rejecting the proposed Constitution. It has been said that the rejection of the Constitution was not much about the contents but as a result of political differences between the leaders of the two camps. There may be truth in it because immediately after the rejection of the draft, the then president sacked cabinet ministers who had led the campaign for rejection of the draft Constitution. Again the leaders of the opposing camp were later to come together and form a political party. The second referendum was held in August 2010 where a majority of the voters approved the draft. New Constitution was promulgated on 27th August 2010.

The new Constitution had far reaching provisions in respect of administration of land and land laws. The whole of chapter five of the Constitution is dedicated to land. It has set out the principles of land, classification of land, land tenure and holdings, sets up an ELC and the NLC. This paper will be restricted to discussing one function of the NLC which is provided for Article 67(2)(e) of the Constitution and section 5(1)(e) of the NLC Act.

The establishment of the NLC was a realization of the Kenyans' dreams for solution to many issues and problems surrounding questions of land in Kenya which has been very emotive since the onset of the colonization in the late 19th century. The mandate of NLC is spelt out in Article 67(2) of the Constitution. The mandate is replicated in section 5 of the NLC Act²² as follows;

- a. To manage public land on behalf of the national and county governments;
- b. To recommend a national land policy to the national government;

²¹ D. Onyancha, The constitutional Referendum of Kenya: Its nature and purpose, its judicial basis and its socio political consequences, LLM Thesis 2005.

²² Act number 6 of 2011.

- c. To advise the national government on a comprehensive programme for the registration of title to land throughout Kenya;
- d. To conduct research related to land and the use of natural resources and make recommendations to appropriate authorities;
- e. To initiate investigations, on its own or on a complaint, into present or historical injustices and recommend appropriate redress;
- f. To encourage the application of traditional dispute resolution mechanism in land conflicts;
- g. Assess tax on land and premiums on immovable property in any area designated by law;
- h. To monitor and have oversight responsibilities over land use planning throughout the country.

The NLC consists of a chairperson and eight members appointed in accordance with the Constitution and provisions set out in first schedule to the NLC Act.²³ The schedule provides that the president, in consultation with the Prime Minister shall within fourteen days after the commencement of the Act and whenever a vacancy arises constitutes a selection panel. It goes on to give the composition of the selection panel. Under the proviso to the schedule after the first election under the new Constitution participation of the prime minister was abolished. The reason for this was that the Constitution promulgated in 2010 and legal system does not have provision for office of the Prime Minister. It is this panel which should recruit the chairperson and members of the NLC. Qualifications for one to be appointed as the chairperson and a member to NLC are provided for in section 8 of the Act.

The Constitution and NLC Act have presented the country with an opportunity to redeem the sorry state of land injustices and therefore it is important to carry out the process to avoid worse situations than before. If the opportunity is not used, people may feel betrayed by the system. It is very disappointing when people are aware that the law which may better their lives exists yet the same is not being implemented. It is better for situations to remain bad or worse when there are no laws available to remedy than when there is a law which is being ignored. In such situations people may resort to self-aided remedies which at the end of the day breeds chaos.

In Brazil, a movement calling itself ‘The Landless Workers Movement’ staged protests in 1996 by blocking a motor way which resulted to many casualties after confrontation with armed police.²⁴ The movement has gone on to occupy large estates compromising security and economy.²⁵ This would be a repercussion when a section of the population feels discriminated. In December 2012 some internally displaced Kenyans camped at Nyeri District Commissioner’s office demanding

²³ Section 7 of the National Land Commission Act. Number 5 of 2011.

²⁴ G Meszaros, *Taking the Land Into their Hands: The Landless Workers Movement and the Brazillian State* (Wiley on behalf of Cardiff University 2000) p 521.

²⁵ *Ibid.*

resettlement. They went ahead and attempted to return their national identity cards to the government arguing that they were not citizens and did not need cards.²⁶ Of recent there have been cases especially in coast and rift valley regions where people have gone on to by force occupy private lands which they deem to have been unjustly taken from their forefathers. These are indicators of a bitter and needy population which should not be ignored.

It should be noted that before the advent of colonialism, conflicts on lands were few if any and whenever they occurred they were resolved efficiently by elders or local leaders. There were no squatters or landless population. Advent of colonization changed the situation and it eventually created a class of landless and displaced people. When the country gained independence, there were hopes that those dispossessed will be resettled on their land or compensated with allocation of land elsewhere. The enactment of the current land laws was informed by these facts.

This paper will look at the formation of the NLC and whether the same is suitable and competent to carry out the specific mandate of addressing historical land injustices. The research will identify what kind of land injustices were committed against Kenyans and whether the same are capable of being redressed using the current legal system particularly Article 67(2)(e) of the Constitution and section 5(1)(e) of the NLC Act. It should be born in mind that as the redress is done, the right of others are taken care of. The NLC should avoid redressing injustices by committing other injustices. The research will therefore be limited to the legal means through which the NLC may carry out the mandate and avoid future conflicts associated with land.

The NLC has since made regulations and a hand book on how to carry out their mandate. The Act²⁷ gave the NLC a maximum of two years from the date of its appointment to recommend to the parliament appropriate legislation to provide for investigation and adjudication of claims arising out of historical land injustices for purpose of Article 67(2) (e) of the Constitution. However there is a proposal to amend this section to give the NLC powers to investigate and deal with historical land injustices without necessarily having a substantive legislation.²⁸ The NLC had made the recommendations of legislation to parliament. However political intrigues have played out yet again as debates on the bill point to serious disagreements and it is doubtful whether it will see the light of the day. The recommendations came way after the two year period after inception of the NLC. We can therefore say that the NLC started on the wrong footing as far as this specific function is concerned.

The problems and issues faced by Kenyans in relation to ownership and use of land are not new. There have been several attempts to address them but the establishment of NLC is so far the best. It is an opportunity Kenyans cannot afford to miss. To make good use of the opportunity the NLC must be structured and given Constitutional and legislative framework which will enable it carry out its mandate and relevant to this research the mandate of addressing historical land injustices.

²⁶ Daily Nation, Thursday December 2012 p 11.

²⁷ Section 15 of The National Land Commission Act no. 5 of 2012 Laws of Kenya.

²⁸ Lands Laws (Amendment) Bill 2015 published on 18-08-2015.

The framework is so far provided in Article 67(2)(e) of the Constitution and section 5(1)(e) of the NLC Act. It is this framework which this paper looks at to ascertain whether it is adequate to address the challenge. The framework the NLC has initiated has not been tested and noting that the term of the current commissioners is about to come to an end, it is doubtful that any meaningful purpose in terms of addressing historical land injustices will be served. The NLC is currently deep into reviewing the grants pursuant to its mandate under section 14 of the NLC Act. This is the only function the NLC has handled with some interest and seriously. This paper will look at the efficacy of the NLC and its structures in addressing current and historical land injustices. Of concern would be the question why it has not been possible to deal with the land problems despite there being structures and institutions before the creation of NLC.

1.4 Objectives of the research

a. Main objective

To find out whether the NLC can effectively address the issue of historical land injustices.

b. Specific objectives

To assess whether Article 67(2) (e) of the Constitution and section 5(1)(e) of NLC Act provides the NLC with necessary powers to address historical land injustices.

1.5 Research questions

a. Can NLC effectively address the issue of historical land injustices?

b. Do Articles 67(2) (e) of the Constitution and section 5(1)(e) of NLC Act provide the NLC with necessary powers to address historical land injustices.

1.6 Hypotheses

a. Article 67(2) (e) of the Constitution of Kenya and section 5(1) (e) of the NLC Act are good laws which if applied properly would lead to redressing historical land injustices in Kenya.

b. The NLC can effectively use its mandate under Article 67(2) (e) and section 5(1) (e) of the NLC Act to unravel and solve historical land injustices.

1.7 Research methodology to be used

The main method to be adopted will be desk research in library and internet.

1.8 Theoretical framework

There are a number of theories and jurisprudential approaches to law. This paper will adopt the natural law theory. The natural theory of law proponents hold that the law should ascribe to a higher standards of a super nature. To them the law should not be applied exclusively to the letter without looking at the higher standards. The written law or law made by human should measure to the higher standards and based on what is right or wrong. Cicero, a Roman orator, one of the

natural law theorists says that it is a sin to alter the natural law nor is it allowable to attempt to repeal any part of it and it is impossible to abolish it.²⁹ Law must carry moral values. Natural justice could be found in innate conscience-driven ideas of fairness, rightness and wrongness; it is subjective and differs from one person, society and generation to the next.³⁰ If one adopts this theory it would follow therefore that the acts of dispossessing the indigenous Kenyans of their land by use of law was immoral and wrong. This was not good law and according to this theory the acts were unlawful.

According to Thomas Aquinas, unjust law is no law and failure by any system to respect common good, limits to authority and unfair imposition of burdens to citizens is unjust law.³¹ He goes on to say that human laws are of no validity if they are contrary to the law of nature.³² While addressing the question of historical land injustices, one may like to ask whether the laws used during those eras were unjust. One may argue that no land was taken away from the owner illegally because there existed a legal system allowing the government and concerned institution to do and act as they did. Could there be a distinction between what is legal and what is just? Can a legal process be unjust? Protection of human rights should assure man that he shall live his life free from fear and want for realization of his dignity, worth and development.³³

In this research it is intended to compare the natural law theory to the different kinds of historical land injustices in Kenya, both past and present. In the pre-colonial times, people held values to the land. Every member of the community was entitled to ownership of a portion of land. It was not for the father or any head of the family to decide whether their child would get land or not. It was almost guaranteed to every member of the society safe those who may have been ex-communicated or banished from the society. This was close to the Karl Marx's theory of communism. The land belonged to the community. Karl Marx argues that individual property ownership is a selfish ideology meant to oppress the poor in order to keep the rich in power.³⁴

During 1960 Lancaster negotiations for independence for Kenya, the British held on to the position that the white settlers were to be compensated for loss of their farms. It was agreed that African access to white highlands would be through purchase of land either under willing buyer willing seller schemes or through purchase by post-colonial state for resettlement and re-distribution.³⁵ Ultimately the purchases were done but the poor and landless people did not manage to purchase. They were left out. This mirrors Karl Marx's theory and position on capitalism. Even where the post-colonial government passed a policy of squatter schemes, the same position prevailed. The

²⁹Cicero, Republic III.xxii.33 in *De Re Publica* (Harvard University Press 1928) p 211.

³⁰ Peter Halstead, *Human Rights* (2008-2009) (Hodden Education 2008) p 14.

³¹ Brian Bix, *Jurisprudence Theory and Context* (4th edn. London Sweet & Maxwell 2006) p 68.

³² *Ibid.*

³³ KG Inoti, *Emergency Powers in Kenya; A study of the Extra-Ordinary Executive Powers Vis-a-Vis the International Covenant in Civil & Political Rights, 1966* (LLM Thesis University of Nairobi 1989) p 1.

³⁴ Stanford, '*Encyclopedia of philosophy*' Dec 19 2005 p 20.

³⁵ TO Mweseli, *Essays On Land Law; The Reform Debate in Kenya* (University of Nairobi 2000) p 22.

post-colonial government initiated a settlement Fund Trust and offered the same to settlers at a price.³⁶ The settlers would not get any freehold title until they had complied with certain terms and conditions one of which was payment of what was called land loan.³⁷ Again the landless and poor were short changed.

The crafting of the law by the colonialist emphasized mostly on positivist approach to law. The government would simply pass the law and implement it without giving a thought to its effects on the larger population. They applied the law as it was. For instance section 89(1) of the Land Registration Ordinance³⁸ and its successor³⁹ was in essence oppressive to the large portion of the society. Few Kenyans were educated and were not aware of these capricious provisions of the law. The provisions continued to exist and many lost property to first registered owners whether or not they were in occupation of the lands.⁴⁰ The positivists hold the view that the law is what it is rather than what it ought to be. This approach has no moral approach in it. According to this theory, law should be applied as it is no matter how oppressive it seems to be for anyone. Its position is that legal rules imposed by particular states or leaders of societies on those within their power and jurisdiction is the real law.⁴¹ To follow law to the letter without digging into the circumstances surrounding a particular case or the basis of a conflict could be termed as unjust but not illegal. The NLC has been given mandated to unravel this confusion. It is said that ignorance of law is no defence. Many of the people who lost land to those who were registered as first owners may not have had knowledge of the provisions of the laws under which registration was being carried out. This state of affairs existed in the Registered Land Act until the Act was repealed by Land Registration Act in 2012. It can therefore be said that that category of citizens suffered historical land injustices which are not necessarily illegal.

There other theories of law which this paper will not adopt but it is deemed important to mention. There is what is called sociological approach. Roscoe Pound, one of the proponents of this approach said that, one of the social factors for consideration in making, interpreting and applying the law is allowance of possibility of a just and reasonable solution of individual cases.⁴² The purpose of the law is to further and protect interest of the society.⁴³ According to this theory it would mean that the law used if any to commit these land injustices against the people was not legitimate and redress on that account is called for.

³⁶ Wanjala (n 12) p 33.

³⁷ Ibid.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Wanjala (n 12) 25.

⁴¹ Halstead, (n 30) 14.

⁴² R.W. Dias, Jurisprudence (3rd edn. London Butterworth 1970) p 496.

⁴³ Ibid p 481.

Daphna Lewinsohn- Zamir⁴⁴ in his writing describes two other theories which may be applicable in this research. There is what he calls occupation theory. According to this theory a person who finds and takes possession of an ownerless object is the rightful owner and is entitled to control over it.⁴⁵ This appears to have been the position taken by the settlers when they asserted that they were coming in to possess unoccupied land in Kenya. The colonial government and settlers assumed that the idle land belonged to no one and went ahead and described it as unoccupied and waste⁴⁶ which was not the correct position. The fact that land is not in active use does not mean that it belongs to no one. In any event communal land was used for communal activities like grazing of cattle. To apply this theory the settlers and colonial government were assuming that they were the first to possess it. As Zamir puts it, first possession is an act of private will and declaration of intention to acquire and establishes a natural right that the state must respect and preserve.⁴⁷

Another theory mentioned by Zamir is ‘the labour theory’.⁴⁸ This theory is attributed to Locke, and bases the right to property on the right of the individuals to the fruits of their labour and, like the occupation theory, views property rights as natural rights, existing quite apart from any provision of positive law.⁴⁹

This paper will adopt the natural law theory. Before the advent of European settlers in Kenya, land ownership system was not individual based. The land belonged to the community and everyone was entitled to ownership and use of their family land. The introduction of foreign tenure system where ownership was made individualistic had the effect of making many of ignorant inhabitants landless. Many lost their land through the registration system. The same was perpetuated even after independence using similar laws. This is the main form of historical land injustices which the NLC should investigate and make recommendations on. Use of law as it has resulted to the injustices. Natural law approach should be adopted to enable the NLC achieve its objectives of addressing historical land injustices. We can no longer hide behind the law to perpetuate these injustices and expect them to just disappear.

1.9 Literature review

Land has been a subject of debate since the European settlers arrived in Kenya towards the end of 19th century. This debate has been both written and unwritten. Several proposals have been made and government policy papers prepared in an attempt to end this problem. Smoking C. Wanjala agrees that there is need to address the question of land ownership.⁵⁰ According to him, there are

⁴⁴ D.L. Zamir, *Compensation for Injuries to land caused by Planning authorities: Towards a comprehensive Theory*, (University of Toronto Press 1996).

⁴⁵ *Ibid* p 50.

⁴⁶ Wanjala (n 12) p 28.

⁴⁷ *Ibid* 35.

⁴⁸ Zamir (n 44) p 45.

⁴⁹ *Ibid*.

⁵⁰ Wanjala (n 12) p 41.

gaping questions and uncertainties as courts have made different decisions in similar circumstances. Some courts have ruled that registration under Registered Land Act⁵¹ extinguishes customary law rights with people living as family being threatened with eviction by registered proprietors.⁵² Some courts have imposed a trust upon the registered owner.⁵³ The court of appeal is yet to make conclusive decision on the issue.⁵⁴ Wanjala suggests three steps to deal with the problem as follows.⁵⁵

- Step 1 - He calls for abolition of freehold tenure and creation of way for dynamic redistribution of land in future. He calls for leasehold term inviting the government control over all land in Kenya.⁵⁶
- Step 2 - He suggests introduction of co-operative land ownership and use alongside individual ownership. The basis of this will be found in many institutions like family or clan and where they are lacking the basis would be created by the law in conformity with powers conferred upon the government by regime of leasehold ownership.⁵⁷
- Step 3 -He calls for revitalization and concrete implementation of regulatory powers of the state for purposes of the efficient land use and conservation.

His position is that once the above is done there will be room for a more detailed and researched study.⁵⁸ What this means is that he sees his suggestion as not a complete solution to the problem of land conflicts but a gateway to more detailed research and study.

His suggestions especially the first step may not be tenable in the current environment in the country. Article 40 of the Constitution of Kenya guarantees protection of right to property. Abolishing freehold tenure will mean the government should compensate all the freehold owners a situation which may not be attainable due to political, social and economic factors.

In their paper Nicky Nzioki, Catherine Kariuki and Jennifer Murigu have made observation of the land problems in Kenya.⁵⁹ They observe that Kenya has lacked clear national land policy since independence until the year 2002 when a task force was appointed to come up with one.⁶⁰ Of the five institutions proposed by the task force's draft national policy⁶¹ only two have been recognized

⁵¹ Now repealed by Act number 3 of 2012.

⁵² Wanjala (n 12) p 35.

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ Ibid p 40.

⁵⁶ Ibid.

⁵⁷ Ibid p 41.

⁵⁸ Ibid p 40.

⁵⁹ N. Nzioki and Others 'Implementing Law Reform Policies in East African Countries: The case study of Kenya' (2009).

⁶⁰ Ibid p 268.

⁶¹ The proposed institutions were, The national Land Commission, The District Land Boards, Community Land Boards, Land Court Division and District Land Tribunals.

in the Constitution which are the NLC and Land Division Court.⁶² They acknowledged that the greatest challenge to land reform will be in the implementation stage.⁶³ They argue that the implementation will entail amendment of the existing laws, the drafting of new laws, the harmonization of existing laws and scrapping of the redundant ones. However the authors do not go on to suggest what should happen after this.⁶⁴ True, new laws have been drafted and passed and redundant ones scrapped but the challenge does not stop there. There is need of going beyond this and doing a comprehensive research on how the new existing laws shall tackle the issue of land reforms. To narrow these observations to suit this paper, one would not miss the recommendation of formation of an institution like the NLC and land division court.⁶⁵ This paper does not concern itself with land reforms or other mandates of the NLC. The question to be answered here is the efficacy of NLC to carry out its mandate under Article 67(2)(e) of the Constitution and section 5(2)(e) of the NLC Act which is principally to address historical land injustices. It is however acknowledged that the formation of the NLC was one of the many areas of land reforms Kenyans were yearning for when they passed the new Constitution in August 2010.

The Kenya situation may be compared to post-apartheid South Africa. South Africa's Constitution of 1996 confirmed protection of private property rights but qualified them by providing for state expropriation and also mandating a three pronged programme comprised of land restitution, land re-distribution and land tenure reform.⁶⁶ The fact that land reform is entrenched in the South Africa Constitution and in the government policy was a victory for transformation agenda in South Africa.⁶⁷ Similarly establishment of NLC Act is a victory for Kenyan which will go a long way in addressing historical land injustices if properly handled.

1.10 Chapters breakdown

The chapters in this paper are broken down as follows:

a. Chapter 1- Introduction

This chapter gives introduction on the land ownership system in Kenya before colonial times. It also gives a brief history analysis of the research paper, theoretical framework and research methodology to be used.

b. Chapter 2-definition and extent of historical land injustice in Kenya

In this chapter, the paper will define what constitutes historical land injustices and origin of laws governing land use and ownership. The discussion is restricted to the sections of the land which

⁶² Article 162(2)(b) of the Constitution of Kenya.

⁶³ Nzioki (n 59) p 278.

⁶⁴ Ibid.

⁶⁵ The court is officially known as Environment and Land Court which is of the status of the High Court.

⁶⁶ R Hull, Land Restitution in South Africa: Rights, Development, and the Restrained State (Canadian Association of African Studies 2004) p 655.

⁶⁷ R Hull, A Political Economy of Land reform in South Africa (Taylor and Francis Ltd 2002) p 225.

affect right to occupation and use. The sections of the law which have gaps and capable of abuse causing injustice to any land owner or occupier are given emphasis. Apart from the current land laws⁶⁸ the chapter also looks at the repealed laws⁶⁹ and tries to find out whether the establishment of NLC is a progressive step in attempts to redress historical land injustices. The chapter will also discuss causes of historical land injustices and ways of dealing with them.

c. Chapter 3- The Laws on Historical Injustices.

In this chapter the paper looks at the establishment of the NLC and its functions as relates to addressing historical land injustices. It also looks at the current establishment of NLC and whether the same will be adequate to carry out the mandate under section 5(2)(e) of the NLC Act and Article 67(2)(e) of the Constitution. In this chapter the paper will attempt to establish whether the framework is adequate to address the historical land injustices.

d. Chapter 4- Conclusion and Recommendations

In this chapter the paper draws conclusion from the data and information so obtained. The conclusion will analyze whether Article 67(2)(e) and section 5(2)(e) are adequate to enable the NLC recommend address the perennial problem of historical land injustices in Kenya and make remedial measures and if possible which areas. It also proposes the methods and possible legislations capable of attaining the goal of addressing historical land injustices.

⁶⁸ The Land Registration Act, The Land Act, National Land Commission Act and Environmental and Land court Act, Laws of Kenya.

⁶⁹ The Way Leaves Act, The Land Acquisition act, The Indian Transfer of Titles Act, The Government Lands Act, The Registration of Titles Act, The Land Titles Act and The Registered Land Act.

CHAPTER 2

DEFINITION AND EXTENT OF HISTORICAL LAND INJUSTICE IN KENYA

2.1 Introduction

This chapter defines historical land injustices in the context of Kenya's history and provisions of the Constitution and the NLC Act. It will also discuss the extent to which historical land injustices were committed against victims by both colonial and post-independence governments and effects of the injustices. The chapter also looks at the possible causes of the injustices and probable solutions to the same. At the end of it there is a short conclusion on issues discussed.

2.2 Definition of historical land injustices

Injustice as noun is described as the quality or fact of being unjust. It can also be defined as inequity; a violation of the rights of others; unjust or unfair action or treatment or an unjust or unfair act; wrong.⁷⁰ Blacklaw dictionary defines injustice as denial of justice. The same dictionary defines justice as constant and perpetual disposition to render everyman his due.

From the above definitions we can deduce that historical land injustice are those acts which have been committed against a person or group of persons in respect to issues related to land ownership or right to occupy and possess the land. They are the unfair acts of commission and omission which denies one his due or rights. As observed before, these acts need not be illegal. They may be in conformity with the law existing at the time in question but are on the look of it from the moral perspective unfair and unjust. There is a thin line between injustice and discrimination. Discrimination may not necessarily be injustices but where such discrimination leads to unfair treatment of an individual or identifiable group of people that can be termed as injustice.

Neither the Act nor the Constitution defines what constitutes land injustices. Perhaps the parliament should seize this opportunity to give definition of what constitutes historical land injustices in the proposals to amend the land laws which is currently under debate. The injustices may have been committed by individuals, institutions or government or government institutions. They may have been based on gender, age, one's background, race, political or economic and social status of the person or group of persons. The following is a brief outline of these injustices which may not be exhaustive and more categories are bound to be identified as the NLC receives complaints or discovers areas where it may be thought that injustices were or are likely to be committed to a certain class of people or individuals.

a. Gender

This is an area which cuts across almost all the communities in this country. Women have been more affected than men in this area. Women make up 70% of Africa's farmers and yet for most part are locked out of land ownership by customary laws.⁷¹ Traditionally a woman was not entitled to own land neither were they allowed to inherit their fathers, husbands or relatives. The

⁷⁰ www.dictionary.reference.com/browse/injustice. Accessed on 6-07-2015 at 12.25 pm.

⁷¹ M Diop, The Nairobi Law Monthly Vol 4 Issue no. 7 August 2013 p 12.

assumption was that they will have a right of ownership and occupation in the homes where they would be married or through their male children. This was so serious that failure to bear a male child was almost like a curse and spelt doom to a woman. Unfortunately a quite number of the population still believe in some of these traditions.

Customarily, inheritance of property has been biased against women and husbands are acknowledged as holders of title to land.⁷² This even extended to law of inheritance. The customary law of inheritance even applied to registered land until 1981 when the Law of Succession Act Chapter 160 of the Laws of Kenya was enacted. Under the customary law a woman was not entitled to inherit her father's land and other properties. The brothers were the sole inheritors while unmarried women were entitled to use their father's land for support during their lifetimes after which it would be shared between the male heirs. There was assumption in pre-colonial periods that where land was held communally, marriage gave the married woman access to the land of her new family and therefore rights of access to her parent's clan land should be forfeited.⁷³ Unfortunately when the land tenure system changed in law, these assumptions and customary beliefs did not change thereby causing injustice and prejudice to women. Even today male are still fighting their female siblings in court based on these customary practices and beliefs. Despite courts' interpretation and application many people have continued to argue that the Act does not apply to agricultural land as purportedly excluded by section 32 of The Law of Succession Act. However the proviso to that section only exempts those areas as may be specified by the minister for agriculture by Gazette.

When the laws and regulations on ownership was introduced in the country they did not make matters better for the woman. Despite UDHR Charter providing for recognition of inherent dignity and equal and inalienable rights of all members of human family is the foundation of freedom, justice and peace in the world,⁷⁴ women in the country continued to be at the mercy of men who dominated political dispensation in terms of ownership of land.

The laws which have subsisted at various periods in the country have not shielded women from exploitation and discrimination by men and relatives. ICCPR adopted in 1966 obligates the state parties to bring their laws and practice in conformity with the covenant's provisions. Kenya was therefore under obligation to right any discrepancies that may have existed as a barrier to realization of women rights, land issues included.⁷⁵

b. Age

The youth in this country have not been lucky either. In almost all policies they have been classified together with women and have suffered the same injustices. Identification documents are pre-requisite to one being issued with ownership documents in respect of land. There are some areas in the country where issuance of an identity card to a young person has been a taunting task

⁷² Wanjala (n 12) 207

⁷³ Wanjala (n 12) 225.

⁷⁴ Preamble to the Charter.

⁷⁵ Kenya acceded to the covenant on 1-05-1972.

especially the border areas where insecurity has been cited as excuse to unjustified screening and discrimination.

Cultural beliefs and practices have also played a role in discrimination of the young people in issues related to land ownership. Whereas the older generation who were adults at the time of independence had an easy way of obtaining titles to the land they were living and working on, they turned the acquired land to their personal use with exclusive discretion to who to bequeath the land to. Where such lands were originally owned communally or in the line of families and clans, the same was deemed to be hereditary with almost every young member of the society guaranteed some portion of the land. With advent of land ownership system inherited from the British regime, the young people lost the automatic rights and were left to the mercy of their fathers and older relatives. Some of them have had results of creating landlessness.

The 1955 laws in respect of sanctity of first registration did not help matters as once the older person in the family or clan became the registered owner, it was difficult to claim any portion of land from him. This led to unending litigation and animosities which have succeeded generations and fueled unending land conflicts. Due to growing social instability the lack of access to land by the youth is an increasingly serious condition for social violence.⁷⁶ This is a unique kind of historical land injustice.

c. Background

This has been the significant and most common form of historical injustices committed on majority of the victims. When the British government introduced their rule in the country, for some reasons some people found themselves on the favourable sides of the government. In order for the colonial government to have effective rule, they entered into some forms of collaboration with the traditional rulers and where traditional methods were not established, the government imposed some local people as chiefs and gave them titles and powers over the residents. As expected, these chiefs and rulers got favourable treatment from the government and in the process they acquired huge chunks of land at expense of the lowly and those who rebelled against the British rule.

Obviously the descendants of these chiefs and collaborators benefitted from these injustices. This scenario was replicated after independence when the land of departing settlers went to those who were favoured by their status rather than those who fought for the land. Freedom fighters were too busy and engaged in the fighting for independence that they did not find time and facilities to endear themselves to the system or even get resources to buy land from the departing settlers. Subsequent acquisition of land by the government to settle them became a cropper when those lands went to undeserving cases.

The land injustices are not confined in rural areas only but also in cities, towns, markets and other urban areas. In urban areas people have settled in congregation of classes. There are people who have settled in areas for which they do not hold titles. Majority of these people live in slums and other informal settlements. Title deeds were issued to other politically connected or influential

⁷⁶ Wanjala (n 12) 208.

people. They face eviction every other time. Inhabitants of cities also need access to land to live legally without fear of eviction. NLC will be called upon to investigate how these tiles were issued.

d. Race and tribalism

While these two words are not synonymous, their effects in our country are almost similar. Favouritism based on tribe or race was common during the colonial times and after. The colonial government segregated people in classes according to their races. Even schools were classified on basis of one's race. The white race was given land in fertile areas while the black race was moved to reserves, arid and semi-arid areas. Even judicial system was dual race, one for Africans and another for immigrant races. For instance in 1904, the government passed an Ordinance which empowered the commissioner to declare any district a 'special district' and remove natives from a special district.⁷⁷ The Commissioner then operated both as an administrator and judicial officer. Even where Africans were allowed to own land, they could not use it freely. A couple of racist laws were passed by colonial government restricting the crops Africans could grow and a number of livestock they could keep. He who owns land should be free to use it for any type of farming while at the same time being free to sell his skills and labour for whatever wage, salary or profit he can get.⁷⁸ This was not the position in the colonial period. In addition to restricting the type of farming Africans could carry out, the colonial government devised policies which in essence left Africans with no alternative but to work in white farmers' farms where wages and salaries were dictated by the employer.

The problem of tribal and ethnic clashes on issue related to land has been with us all through. There has not been a definite solution to these animosities despite several commissions and inquiries having been carried out. Interestingly and especially in the troublesome 1990s the clashes always coincided with general elections.

e. Economic/social status

Brian Barry posits that, social and economic inequalities must be arranged in such a way that they are both to the greatest benefit of the least advantaged, consistent with the just saving principles and are attached to offices and positions open to all under the conditions of fair equality of opportunity.⁷⁹ The history of land ownership and occupation in this country tilted to the opposite of Barry's position.

The colonial government promoted policies which were favourable to the economically endowed at the expense of the poor. Kathurima G. M'inoti says that the colonial policies entailed not only the arrogation of superior and dominant status to the immigrant settlers vis-avis the indigenous

⁷⁷ Removal of Natives Within Special Districts Ordinance 1904 (No. 1 of 1904).

⁷⁸ Kamena, (n 20).

⁷⁹ B Brian, *The Liberty of Justice*, A Critical Examination of Principal Doctrines, A Theory of Justice by John Rawls (Oxford University Press 1975) p 9.

populations but also a corresponding denial of the dignity- worthy of the so called ‘backward races’.⁸⁰

When at independence, the government adopted a policy of willing buyer willing seller to acquire land from the departing settlers, it set up stage for perpetuation of economic injustices to the many impoverished citizens. The genuinely needy people were those who had been uprooted from their ancestral land. Land being the main means of production and creation of wealth, deprivation of the same meant that the previous owners were oppressed economically. How it was thought that such persons could by any chance buy their land back is beyond imagination. Many of these people are still reeling from the effects while the descendants of paramount chiefs and collaborators own huge acreage of land. Even where land was distributed to the landless after independence, the same were parceled out in small and unreliable pieces which later led to increasing social marginalization and landlessness.⁸¹ The Constitution now obligates the parliament to enact a law to provide for maximum number of acres one can own.⁸² A bill has been drawn to pass this law which proposes a maximum of 25 hectares although the same is already receiving criticisms and opposition. There are arguments that this is another form of land injustice. The NLC should come out and make contributions to this bill and propose the manner the Government should deal with extra acreage to be received from the persons owning land above the maximum.

Land is a key asset for production. Therefore social welfare and reproduction in urban and rural contexts, equitable access and use must be regarded as the central concern at national and local levels.⁸³

f. Political

Politics have played a big role in perpetuation of historical land injustices in this country. Ever since all land in Kenya was declared crown land in 1915, political patronage in acquisition of land has been evident. The Crown Land Ordinance 1915 was succeeded by the Government Lands Act which has been used by successive governments to grant land to those who are politically correct. In some instances, land has been allocated to those close to the political leaders or cronies whereas the same is in occupation of some other people in some instances even what they could call ancestral lands. Majority of these are in the coast region.

In the first year of independence, the country’s leadership was embroiled in too much politics between the ruling party KANU and the opposition KADU. The ruling party was preoccupied with resolving serious divisions within itself and containing and subsequently subduing KADU and dealing with explosive issue of resettlement of Africans on settler’s farms that little attention was given to development policies which resulted in endorsement of the existing policies.⁸⁴ The

⁸⁰ Inoti, (n 33) p 103.

⁸¹ Wanjala (n 12) 245.

⁸² Article 40 of the Constitution of Kenya.

⁸³ Wanjala (n 12) 213.

⁸⁴ JD Barken & Another, *Politics and Public Policy in Kenya and Tanzania*, (Praeger publishers 1979).

endorsement of the existing policies was later to become intertwined with land issues that the government was unable to tackle or if at all tackled them in haphazard and unfair manner. A solution to this pressing problem has never been found.

This situation fueled by political interests have promoted civil clashes with lasting negative effects on the ordinary citizens. Politics have once and again fueled skirmishes as the government watched a situation which made many to believe the government was either supporting the perpetrators or it was the perpetrator. For instance in 1996 two statements attributed to two politicians one banning Wangari Maathai from Rift valley lest she risked forced circumcision and another dismissing title deeds to land as mere pieces of paper were of major concern.⁸⁵ This was in mid of civil strife between two communities fighting for land in Rift Valley one claiming ancestral rights and another claiming right by acquisition. Many people were displaced from lands they had occupied for decades and statements by the politicians encouraged trespassers to invade the land of the displaced persons.⁸⁶ Instead of those displaced persons being returned to their lands the government in most cases looked for land elsewhere thereby seeming to endorse the invasion. There was no guarantee to the displaced that there would be no new claims in their new homes. If the country had laws then like the NLC Act it would have been in a position to handle the situation independently. What made people to believe that the clashes were politically instigated especially after the advent multiparty politics was that there were no such vicious clashes before even where there were serious disagreements between 1963-1964 and 1966-1969.⁸⁷

2.3 Causes of historical injustices.

Land injustices committed on individuals, groups and communities whether historical or present have long lasting effects and if not professionally handled may result into unmanageable crisis. It is the duty of the government and by extension NLC to ensure that the causes and effects of historical land injustices are mitigated to the minimum if not completely corrected and eliminated. Some identifiable causes of the injustices are discussed below.

a. Land scarcity

Where the land injustice is committed there is resultant effect of land scarcity. The displaced population causes strain on the available land causing a vicious cycle with displacements of other people.

It is incontrovertible that one of the reasons for the high incidence of landlessness and near-landlessness in some parts of the world is the shortage of land resulting from unequal access to lands between and among countries. Where there is shortage of cultivatable land, the potential of land conflicts is high as the populations tend to fight over it for survival. Individual land owners

⁸⁵K. Kimondo, In Search of Freedom and Prosperity, Constitutional Reforms in East Africa Kivutha Kibwana (ed) (Clari Press Ltd 1996).

⁸⁶ Ibid.

⁸⁷ K Kibwana, In Search of Freedom and Prosperity, Constitutional Reforms in East Africa Kivutha Kibwana (ed) (Clari Press Ltd 1996).

comprise minority of Kenya's population.⁸⁸ However even these individual rights have been unpredictable due to contestations which have been caused by; Creation of private rights from trusts land without consulting the indigenous communities; Creation of private holdings in group ranches areas without considering the compatibility of land uses and the interest of the broader community; Existence of gross disparities in land holdings between people living in the same area and long lingering historical injustices which have remained unresolved.⁸⁹

These contestations make security of tenure uncertain as mere possession of title to the property does not guarantee uninterrupted enjoyment of the property.

b. Low productivity in agriculture and underdevelopment

With majority of the population displaced from their ancestral lands are in most cases confined into small holdings which are not enough for their subsistence leave alone reaping any commercial benefits from the work on the land.

Going by the definition of landlessness to be the inadequacy of land to provide the basic needs, it therefore leads to the conclusion that the higher productivity of land, the lower size of holding required for a sufficient level of living. Likewise, the greater the scope of outside employment subject to agriculture, the less the necessity of land as the chief source of income. Inadequate size of land holding may not influence much in countries where the scope on non-agricultural employment is rapidly rising. Low productivity in agriculture prevents a brisk acceleration of economic development and consequently put pressure on land due to population increase.⁹⁰ In their efforts to eke a living from working on land the populations in low productivity areas tend to enter or try to acquire more land and in the process the less powerful are displaced.

c. Mal-distribution of land

It is established that a majority of poverty-stricken countries attribute poverty to mal-distribution of land and other resources. An analysis of the same would be misled if it were based on the averages.

In most cases the mal-administration is deliberate and meant to swindle the indigenous owners of their land. The persons who are allocated the land don't use it effectively as they may have more land than they are able to work or effectively produce out of it.

d. Indebtedness of the population

During the colonial rule, most people lost the ownership of their land through the burden of debt. This was facilitated by a number of actors which included the adoption of western ideology on

⁸⁸ PK Mbote & Others, : Ours by Right; Law, Politics and Realities of Community Property in Kenya (Strathmore University Press 2013) p 35.

⁸⁹ Ibid.

⁹⁰ PA Nyong'o, The Land Question, Land Grabbing and Agriculture in Africa: *International Journal of African Renaissance Studies* (2013) 2, 23-31. (n 134).

land which made land to be a negotiable asset. Further, the absentee landlords would at time get involved in debts they could not pay up. This is because they aped the lifestyles of the whites in terms of consuming more than they could afford. Additionally, land gradually increased in value and as such, the money-lenders benefitted from dispossessing the land owners and peasants of their tracts of lands when they defaulted in payment. The money-lenders became the most notorious land grabbers due to the dependency they enjoyed from the peasants. The peasants on the other hand were dependent on the money-lenders due to several reasons such as increased revenue from the landlords. The peasants always fell into recurring debts especially when the money lender was the landlord. The landlords used to lend the money to the peasants since they had more capabilities than the ordinary money lenders. They usually forced them to pay up especially when the harvests were just about to be realized. Once the harvest was realized the peasants paid up with the larger part of their harvest leaving a small portion of the harvest for themselves meaning they had to borrow again. This habit ultimately led to selling of land by the peasant and even landlords. Therefore, the breakdown of indigenous value system, decline of handicrafts, integration of colonies into the world economy and growing indebtedness led to the increment of landlessness.⁹¹ This practice is not common in modern times.

A population which is heavily indebted to a few rich people will find it hard to get themselves out of the hard situation. This results into weak workforce and less investments hence affecting economic growth.

e. Poor and unjust legal frameworks

Land issues in Kenya have remained contentious, emotive and a hindrance to social cohesion and economic growth. When Kenya government launched vision 2030 it was acknowledged that there was no national policy on land which gave rise to poor and weak frameworks of administration and management.

The ineffective regulatory frameworks have been the root cause of most historical injustices involving land, proliferation of unplanned urban centers and conflicts between humans and wildlife. Other aspects related to land issues include uneconomic subdivisions of land, environmental degradation and unjust land distribution.

Efforts have been made to correct the land issues in Kenya by use of the Constitution and various Acts of parliament. In addition, the grabbing of land in Kenya involves deliberate bending of existing laws and enactment of new unjust laws. The laws would sometimes have certain loopholes that Kenyan elites took advantage of in the course of their land grabbing process. The Ndung'u Commission shed light on the main processes that were used by the elites to illegitimately acquire public land. The methods include; direct allocation of land by the president in conjunction with the commissioner of lands in most cases contrary to the law and allocation of land reserved for state ministries and corporations together with trust land as opposed to the Constitution, illegal

⁹¹ Wisborg, Poul. "Human Rights Against Land Grabbing? A Reflection On Norms, Policies, And Power." *Journal Of Agricultural & Environmental Ethics* 26.6 (2013): 1199-1222.

surrender of state corporation and ministry lands and subsequent illegitimate allocations and allocation of riparian and land reserves meant for public purposes. For instance Section 23 of the Registration of Titles Act Cap.281 of the Laws of Kenya,⁹² provided that a certificate of titles issued by the registrar to a purchaser of land shall be taken by all courts as conclusive evidence that the person named in it as the proprietor of land is the absolute and indivisible owner. In this direction, even if land was allocated irregularly, those who occupied it were not acknowledged. In fact, our courts have had the view that those squatters occupying the land which through time have been irregularly privatized cannot be said to have any locus standi. This implies they have no right to be heard by the courts of law because in accordance with the judges' views, they have lost nothing. This has victimized the poor and put them in a very susceptible position. An example is in Nairobi Dandora area where about 3,000 people were on 26th June 2012 ordered to be evicted from a land they had been occupying since pre independence because some other people acquired titles to the government land in 1997.⁹³ The court ordered that since the plaintiffs did not hold title to the land, they could not have a claim on it. Legitimacy of a title is central to enjoyment and use of the land.

Land as social relations will mostly depend on acceptance of one's neighbours of the legitimacy of their claims and it is this acceptance that makes people keep off.⁹⁴ Where the neighbours (squatters) do not recognise legitimacy of a title, there is likelihood of conflicts which most of the times are violent.

The rigid and unjust provisions of the land laws prevailing before the new constitution tied the government's hand. Land could not just be acquired for redistribution to the landless Africans at independence without full and prompt compensation to settlers and other large land owners.⁹⁵ This was the beginning and retention of colonial laws and policies which entrenched the injustices committed before the independence. As the NLC discharges its mandate of addressing the historical land injustices the sequence of land acquisitions by individuals, state and corporations using these laws will be an important point of consideration.

f. Activism

Despite the fact that there are many land rights non-government organizations in Kenya, land activism in Kenya has been low. Civil activism is one of the ways citizens can be insulated from government excesses. African leaders have been branded as enemies of the civil societies rather than custodians of the societies.⁹⁶

In an effort to overcome the problems related to evictions, informal settlements residents who have been threatened with eviction, joined up together and formed Federation of the Urban Poor

⁹² Now repealed.

⁹³ Nairobi HCC number 298 of 2003; Judgment of Justice Okwengu.

⁹⁴ Mbote (n 88) 35.

⁹⁵ Wanjala (n 17) p 31.

⁹⁶ Ibid p 26.

(*Muungano wa Wanavijiji Maskini*). This organization was formed with an aim of defending and advocating for the urban poor rights, dealing with illegal land space allocation among others. Other non-governmental organizations include *Kituo Cha Sheria* (Legal Aid Centre) which aims at offering legal representation and advice to the poor. However, various evictions and demolitions in Kenya have taken place at their watch.⁹⁷

There are other civil society organization which were formed mostly in 1990s but their achievement in terms of protecting the ordinary citizen from land injustices have not been notable especially where the leaders of the organizations are not sufficiently funded or are led by corrupt and selfish officials whose intention is simply to attract donors and gain popularity. Some of them end up fueling further impoverishment of the people they are supposed to protect. An example is the moribund organization formed to assist resettlement of post-election violence of 2007/2008 in Kenya. The displaced persons who were meant to be assisted by the formed group ended up demonstrating in the streets and at the government offices against their leaders who they accused of using their position to enrich themselves at the expense of the displaced persons.

2.4 Extent of present and past historical land injustices

Historical land injustices date back to the pre-colonial government policies to secure land for their own economic use and other activities as a result of the acute shortages of raw materials for production in Europe.⁹⁸ Europeans who settled in Kenya were mainly British as a result of Kenya being a protectorate of British Empire.

Kenya's traditional land ownership systems became inconsistent with development and modernization practices which came with advent of the British rule. In 1897, the then commissioner of her Majesty argued that since Africans did not have titles to land, it was not possible to obtain treaty or negotiate any sales with them.⁹⁹ This thought was later to be used to declare that the whole land in Kenya belonged to the state. It set stage for many acquisitions of land previously considered to be owned by Africans. The proclamation by the commissioner in 1897 appropriating for public interest subject to any right of ownership which may be proved to his satisfaction all lands on the main land beyond Mombasa situated one mile on either side of the line of Uganda whenever finally constructed¹⁰⁰ set stage for more unfair acquisition of land from Africans. For instance, to support the railway line completed up to Lake Victoria in 1901, the British had begun issuing land certificates to settlers in 1890s. Land leases which were at first given for 21 years and renewable were later extended to 99-year certificates.¹⁰¹ The land ordinances and homestead rules of the colonial government had the effect of declaring land not occupied, cultivated, or grazed by natives at the time as "waste lands" to be considered "crown

⁹⁷ LO Apiyo, 'Land Grabbing, and Evictions in Kenya, (Legal Aid Centre, 2013) p 1.

⁹⁸ WEJ Plessis, "Africa Indigenous Land Rights in Private Property Paradigm", Land Power & Custom, p 100.

⁹⁹ Ogendo, (n 5) p 10.

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

land” or “ public land” available for lease. Reserve boundaries significantly altered the ecological balance between man, animals and land.

From 1912 to 1925 labour laws encouraged Africans already displaced or experiencing population pressure due to European settlement, to settle on land acquired by the European as labour tenants. This African labour was critical factor in the success of European estates. So much was this labour needed that at times the stated policy was to force Africans out of the reserves to work in European farms.¹⁰²

Before 1918 the situation of squatters was neither harsh nor restrictive. They could cultivate or graze an unlimited amount of land or cattle.¹⁰³ They were free to trade and settled most disputes by their own councils of elders according to customary law.

However after 1918, the indigenous Africans, legally had no recourse to settle grievances, and European settlers were free to administer punishments upon their tenants. In this period, however, settlers tended to be restricted in order to keep the labour force in place. For example statistics showed that; in 1919 Nakuru District (now Nakuru County), 8,000 of 9,116 Africans were squatters; in 1921 Laikipia District (now Laikipia County) had 58 settlers and 18 squatter families and by 1923 the same Laikipia district had 166 settlers and 1,481 squatters.¹⁰⁴ As time went by and land taken from the original owners by settlers, squatting became a major problem. The government and settlers began to use established laws and systematic practices to contain the original inhabitants.

As settlers became established, they began to restrict the privileges of tenants. The amount of land and cattle were increasingly limited by force and ordinances. The number of working days was doubled, and all family members over 16 were required to enter into contractual labour agreement or leave the farm.¹⁰⁵

In 1927, 1,261 natives were taken to court under the Resident Native Labourers Ordinance. 1,050 of these were convicted by the colonial government for contravening the labour agreements. This was meant to discourage native Africans from laying claim to their ancestral land. So harsh became the conditions that after 1927, more Africans returned to the Reserves than those who opted to settle as tenants. In the long run however, the movement and settlement of squatters on European farms¹⁰⁶ continued and should be seen as a major cause of spontaneous human settlements.

The British had come with them, the English legal notions of land ownership, which favoured individual land ownership over the communal ownership predominantly in the African traditional

¹⁰² This situation was obtainable through implementation of the Crown Lands Ordinance.

¹⁰³ M Tiampati, *The Maasai Land Dispossession* (Partnernews, 2004) p 8–10.

¹⁰⁴ Ministry of Finance and Economic Planning, *Kenya Agricultural Census report*, 1963.

¹⁰⁵ WTW Morgan, “The White Highlands of Kenya”, *Geog. J.*, Vol. 129, and “*Kenya European and Asian Agricultural Census 1960*”, *E. Afr. Statistical Dept.*, 1961.

¹⁰⁶ Squatters in Taita Taveta County invaded land belonging to the Basil Criticos family. Records show though the parcel of land legally belongs to the family while the indigenous people believe they have legitimate customary claim over it.

set up. There is an ancient principle in English property law that freedom of alienation is the essence of ownership. Unlike British settlers, Africans were not allowed to freely alienate any land within the protectorate. Individual ownership connotes the use and abuse of land resources to the exclusion of all others, where defined and indefeasible rights and interests over land were recognized and registered to exclude all others. The effect of adoption of this English land ownership system by the colonial government dislodged many indigenous African inhabitants from their parcels of land. They were rendered squatters in the very same parcels of land they had settled in and owned in the traditional sense before the advent of colonialism.

Over the years acts by the state and individuals appeared to have been well intentioned but their resultant effects were isolation and discrimination. For instance, between 1956 and 2006, a total of 1.92 million parcels of land on 8.09 million hectares have been registered under the sub-division of Trust Land Registration of individual titles and more than 4.3 million titles issued. So far, over 268,000 families have also been settled in 459 schemes on over 1.2 million hectares of land, while 401 group ranches with 65,000 members, occupying about 2.0 million hectares have also been incorporated and registered.¹⁰⁷ It has turned out that some of these group ranches were misused by their officials and their land sold to persons who were not members. Currently a problem is brewing up in Kajiado and Narok counties where the original members of some group ranches are claiming that their land which was sold out to non members were communal land and have threatened and in some instances overtly entered and occupied the lands. Coupled with this, increased population has led to unplanned settlement, haphazard development and increased pressure on prime land. The pressure has in turn caused intense competition, giving rise to conflicts evidenced from the pre-colonial days.¹⁰⁸

The current land administration system and policy problem date back to 1894 when the colonial authorities established legal framework borrowed from Britain and India.¹⁰⁹ The settlers, under the leadership of Lord Delamere and William McMillan, successfully lobbied the government to enact some laws, which would compel Africans to work in white farms at minimum pay. So as to end the competition posed by Africans, the squatter scheme was abolished and Africans were banned from engaging in some activities, such as cash crop farming or rearing big number of animal on European farm. Having effectively dealt with the issue of competition and flooding of the market by African farmers, the government at the insistence of the settlers also passed a raft of laws which, among other things, made it compulsory for all adults to pay hut tax. The colonial rule also fueled major challenges experienced under landlessness and tenancy.

Although it is generally agreed that land was communally owned before the advent of colonial powers, it is hard to squarely identify the system of land tenure which prevailed then. This is because of lack of adequate and authentic literature on the subject; existence of faulty

¹⁰⁷ Republic of Kenya. Kenya National Audit 2006

¹⁰⁸ DM Etherington, '*Land Settlement in Kenya: Policy and Practice*' E, Africa. Econ. Rev. Vol. 30 No. 1 June 1963, pp 21-32.

¹⁰⁹ The application of India Transfer of property Act in Kenya and other statutes of General interpretation.

anthropological, ethnographic and historical accounts on traditional land tenure by western researchers and the diversity and complexity of traditional society.¹¹⁰ In those days there was no defined lands office. For one to acquire land, he simply drew a sketch plan of a river or tree and whatever struck one's fancy and then drew a square around the particular bit of land and sent that in for approval.¹¹¹ Only the settlers were allowed to do this. In the final analysis expropriations of land depended on power rather than the law but both the settlers and the protectorate administration regarded the latter as important.¹¹² Through such awkward methods of acquisition by the foreigners, the indigenous people lost land.

The British government is known to have boasted of bringing development to its colonies and having no regrets of their operations during the colonial periods. The British Attorney General is quoted having said that,

*'many a colony which today enjoys or is in the eve of acquiring full self-governance and independence politically, coupled with steadily rising standards of material life, would have remained in a state of anarchy and undevelopment had it not been for British colonial enterprises intended as it always was to lead the dependence countries forward to self-government.'*¹¹³

He went on to stretch that Britain had little to be ashamed of and much to be proud of in the history of her overseas possession.¹¹⁴ Did this mean that Britain possessed anything or anyone outside its territory? This statement underscores the contempt with which the colonial government treated the Africans. Bringing development and good governance to people does not justify mistreating those people and committing injustices to them. In any event the British and its settlers benefitted more from the colonization than the Africans did. The European government and settlers had wrong assumption that Africans did not have any form of governance before the colonization. The same mindsets and prejudice are shared by some indigenous communities against their fellow Kenyans. Sometimes it is these prejudices which have caused violent conflicts in this country but fueled by land ownership. It must be tackled head on.

The consequences were almost the same in all colonized countries even if the motives were different in different countries. The freedom fighters in Kenya waged war to dislodge unjust order of land system where fertile highlands went to the settlers but the independence Constitution of 1963 & 1964 entrenched the then existing property and land ownership system.

The constitutional provisions were backed up by subsequent legislative provisions, administrative policies as well as court decisions.¹¹⁵ In 1957, the Swynnerton plan made recommendations that

¹¹⁰ Wanjala (n 12) p 25.

¹¹¹ Oendo (n5) p 15.

¹¹² Ibid p 17

¹¹³ B Hollander, Colonial justice (Bowess and Bowess 1961).

¹¹⁴ Ibid.

¹¹⁵ Wanjala (n 12) 245.

land holdings of families be consolidated into one, followed by adjudication of property rights in that land and registration of individuals as absolute owners of the same land. This reform came at the same time with tumultuous political climate of 1950s which was centered on land issues. Manifestations of these unpopular reforms and policies bordered on several factors. One factor was that, land belonging to freedom fighters was granted to those who were loyalists during Mau Mau revolt and law was passed to insulate the loyalists from contesting claims. African Courts (Suspension of Land Suits) was passed in 1957 to bar all litigations to which the Swynnerton rules applied. The other factor was resettlement programs through which the government allocated land to squatters in areas where they had not come from which set stage for the resettled persons to be regarded as outsiders. The post-independence leaders failed to draw a cohesive national polity which led people to form tribal or ethnic alliances in order to access resources and development. This was escalated by successive governments when they used allocation of public land to its supporters and cronies in order to gain favour or ensure political patronage. The fourth factor was the persistent customary practices and beliefs which heavily marginalized and excluded women and youth from land ownership.¹¹⁶ These situations still obtain today despite much women and youth activism although the magnitude has gone down.

The progressive and unfair acquisition of land from indigenous inhabitants mostly of African extraction was fueled by the desire to extract natural resources from the lands while in others it was based on desire to take over the most suitable lands. The European institutional arrangements were based on established practices in Europe. The intervention from European countries undermined the cohesion of the villages in the African context. The landlords were recognized as landowners and were accorded unlimited rights to the land. They could dispose the land as they deemed fit and could even use the land as collateral without any mention of village community. The landlords would raise rent without logical reasons behind it.

Land rights in Kenya became highly tenuous when the protectorate authorities declared all land to be crown land. Land was alienated from customary systems without any form of compensation. The British land tenure system accorded recognition to land rights which were secured using individual freehold title. Consequently, most lands were left unregistered and susceptible to appropriation by settlers.¹¹⁷ Settlers wanted to secure titles to land as it is understood in English property law such as freehold or long leases and not just rights of occupation. This was fueled by belief by protectorate authorities that Africans collectively or individually had no title to land.¹¹⁸ To them the occupation by Africans meant nothing more than just that; occupation.

The British initiated and implemented the “native reserves” policy. Native Lands Trust Boards were responsible for administering the land reserves which basically meant to settle Africans on these reserves as they deemed fit. Some communities like the Maasai negotiated treaties with the

¹¹⁶ Mbote (n 88) p 35

¹¹⁷ Paul Syagga, 'Public land, historical land injustices and the new Constitution,' *Constitution Working Paper Series No. 9* (2013)

¹¹⁸Ogendo (n 5) p 13.

British for the reserves but these were not sufficient for full protection of land. Migrant settlers envisaged their mission to be to provide capital to assume the critical role in getting the colony on its economic feet and obstinate determination to forge the colony into a white man's country. Towards these ends therefore, large tracts of land had to be put at the settlers' disposal a move which entailed divesting the Africa tribes of title to their ancestral lands.¹¹⁹ Once land was made available to the settlers, there arose need for dependable labour which was identified from the Africans. This coupled with subtle and unpopular methods such as taxation, creation of positions and appointment of chiefs and restrictions of Africans to reserves and adoption of African only identification system escalated the problem of African being displaced from their ancestral land.

A commission¹²⁰ formed by the colonial government in 1953 which worked up to 1955 foresaw adverse consequences would flow from individualization of land tenure but went ahead and recommended individualization arguing that the benefits of it outweighed the resultant ills.¹²¹ As witnessed later the opposite happened. The government proceeded with these reforms on assumption that it was possible to reduce group land rights into individual land rights without any problems. The results of these programs were extinguishment of land rights of some family members, encouragement of cheating and injustice within the family and subversion of individual tenure so that the titled family member continued to hold the land for family in keeping with customary law. As a result the untitled family members lost their lands rights to the one holding the title creating people who are in essence squatters in their own land.¹²² Without title to land people were unable to improve harvest from the small holdings they had to raise their living standards.¹²³

During the colonial period, most ethnic groups lost land with some losing more than others. In 1902 a law was passed¹²⁴ by the protectorate authority which allowed the commissioner to sell freeholds in crown land to any purchaser in lots. It is estimated that approximately 560,000 acres of land most of them homesteads plots of 640 acres were sold under these provisions.¹²⁵ These types of laws had the effect of conferring upon the protectorate administrators enormous discretion to dispose of land within the protectorate. The laws were vague which situation left the authorities with powers to determine more or less on ad hoc basis what waste and unoccupied lands were.¹²⁶ Statistically, 0.25% of the population, about 30,000 white settlers, was in total control of a third of the arable land. For instance, the arrival of the settlers in central Kenya displaced millions of people to Rift Valley. The white settlers were not satisfied by the central Kenya land. They started moving towards the west where the displaced people from central Kenya had settled. By doing so they

¹¹⁹ Inoti (n 33) p 103.

¹²⁰ East African Royal Commission.

¹²¹ Kibwana (87) p 179.

¹²² Ibid p 183.

¹²³ Diop (n 71).

¹²⁴ Crown Land Ordinance, 1902.

¹²⁵ Ogendo (n 5) p 13.

¹²⁶ Ibid p 14.

expatriated the lands making the indigenous people their tenants. Tension grew between the squatter farmers and the landlords, who were the settlers. This led to resettlement programs that involved repatriations of original owners of the land.

Land losses by the indigenous people were exacerbated by the commercialization of the local economy around them. As a result of this there arose a class of some wealthy people who gained their wealth of land through grabbing from the poor. In addition, this commercialization was spurred by the British trying to modernize the African way of farming. This attempt only met new resistances. These farmers were opposed to the new methods of farming as instructed by the settlers. There were people who also lost land through the creation of protected lands. They had been occupying the central Rift Valley and the Loryu Plateau and were in effect moved to two reserves namely: the southern reserve (the semi-arid Ngong) and the northern reserve (the fertile Laikipia plateau). The initial settlement lands were put under protection not to be entered by any African.¹²⁷

The settlers saw the need to protect their lands. They did this by gaining a stronger voice in the Legislative Council (LEGCO). It was imperative that essentially repressive laws be resorted to in order to keep the repressed people permanently quiescent.¹²⁸ In addition, they introduced the hut tax and granted the landless Africans less land with their labour as the means of payment for the small pieces of lands they got. However, after a number of years passed, resistance by the Mau Mau rebellion from central regions and other parts of the country took root. There was general discontent towards discrimination and exploitation of ex-servicemen who had served in the Second World War coupled with sustained clamour for return of lands alienated by settlers.¹²⁹ At the end of Second World War, most Africans were living in squalid poverty due to increased pressure on land and resultant overcrowding and depletion of soils. Restrictions of Africans to reserves which had resulted to acute landlessness did not help matters. Africans became squatters in settlers' farms and were subjected to starvation, low wages and harsh labour conditions. It was at the height of this rebellion that the colonial government declared a state of emergency on 20-10-1952 in order to quell the agitation for independence center to which was land restoration.

The state of emergency was declared when it became apparent to the Governor that Africans were not going to relent.¹³⁰ It was as a result of these injustices that the Africans resorted to seek justice in extra-legal ways. Emergency is generally understood to mean a state of grave danger to public order and safety which cannot be contained within the framework of normal time government controls and restrictions.¹³¹ This declaration was thought not to have met this threshold. After the declaration of emergency, the Governor went on to make regulations which gave him all-pervading

¹²⁷ Kenya Land Alliance, "National Land Policy in Kenya: Addressing Historical Injustices" Issues Paper No. 2/2004

¹²⁸ Inoti (n 33) p 103.

¹²⁹ Ibid p 130.

¹³⁰ Ibid p 131.

¹³¹ Ibid p 13.

powers. Squatters were being evicted from settlers' farms but during the 1952-1960 period both the innocent and guilty were bundled together due to communal punishment.¹³²

Instead of containing the alleged rebellion, the declaration of emergency escalated the resolve by the Africans to fight for their land. The rebellion was fought majorly for Africans' rights to own land. These efforts paid up as after vicious confrontations which claimed many casualties, the British government conceded and embarked on agricultural reforms whose aim was to empower the Africans but however continued to strip the Africans some of their land and protections.

After the state of emergency was over, the government for the first time allowed Africans to own licenses for growing coffee. In the LEGCO, modifications were made to accommodate some African representatives. This however came at a high cost and loss of lives and property with approximately 11,000 Africans killed for every one hundred Europeans killed.¹³³ In 1960, the first Lancaster meeting was held; a first of its kind given that Kenyans were involved for the very first time in the deliberations of the meeting. During the meeting, a controversial provision was initiated. It was a bill that sought to secure the rights of Africans to own property. The settlers wanted their land rights to be protected despite independence being imminent while the Africans wanted land reforms and resettlements. There were genuine concerns that landlessness would reassert the aims of the Mau Mau for land redistribution. As a result, the administration opted to protect the rights of the settlers and at the same time please the Africans. They did this by agreeing to take private property from the settlers and only give compensation in return. However, the land re-acquired by the state would only be used for public purposes. The meeting did not however come to an agreement on the public purposes that justified land acquisition by the state. In subsequent meetings at Lancaster, the administration pressed for willing buyer willing seller approach of distributing land. This did not augur well with the Africans who saw no need for them to buy land that was acquired forcefully from them.

In February 1960, Michael Blundell formulated and championed a plan where the government would either buy or allow settlers to continue owning the 3,600 European agricultural holdings. Britain was to provide money for buying land while the World Bank would finance development through another loan. A new Land and Settlement Board would choose settlers who had to be confirmed by presidents of regional assemblies. This policy known as the Yeoman Scheme was established where land was meant for experienced farmers who had capital. The beneficiaries were required to contribute each so as to secure land at the White highlands. The transition of land from whites to Africans was shaped by the policy of forgive and forget adopted by Kenyatta in a bid to avoid panic flight by white farmers. It was also meant to win the support of Britain instead of compulsory occupation of lands occupied by the whites. Under this scheme, 350,000 families were to be settled on the land purchased at a cost of Shillings 255 million out of which Britain was providing 21 million to be paid back in 30 years.

¹³² Ibid p 133.

¹³³ Nyong'o (n 90)

After independence there were positive steps to address the issue of landlessness among Kenyans. For instance government statistics indicate that between 1960 and 1968, two million acres of land in Rift Valley formerly owned by whites was purchased. Ultimately 1.1million acres were used to settle between 45,000 to 50,000 families or 250,000 people.¹³⁴ The land was directly purchased by the Central Lands Board.

However funds for settlement dried up and the government could not buy four million acres of land which was being used as plantations and ranches. Some of these prime lands were passed on to Agriculture Development Corporation which was supposed to hold it in trust for the government for future use, especially in research. Apart from the government settlement, some people directly bought land from white farmers on willing buyer willing seller basis and by 1969, a total of 1,260 acres had been bought. Under another type, Haraka settlement Scheme, 13,000 families were settled on small parcels of land which had been subdivided from rundown or abandoned white owned farms.¹³⁵

Between 1964 and 1965, the government allocated 200,000 acres of the land it purchased to cooperative farms. Most prominent of these was the OI Kalou Scheme in Nyandarua, where 2,000 families got 2.5-acre private plots each. In the new settlements, several hundred white farmers' houses and 100 acre plots with farm houses code-named Z plots were reserved by the lands and settlement Minister Jackson Harvester Angaine for sale to senior community figures. By 1964 Kenyans were already pushing the British for a second 'million –acres scheme' which would focus on large farm transfers.¹³⁶

After lengthy deliberations with Kenyans, led by Bruce Mckenzie, it was agreed that \$18 million would be loaned to Kenyans between 1966 and 1970. Of this, only 6 million was to be used for farm buy –outs where 100,000 acres a year could be taken over of which 20,000 acres would be reserved for subdivision and settlement schemes. The Agriculture Development Corporation was to buy the remainder as single farms. Since independence, 163 Settlement¹³⁷ schemes have been established across the country covering 1 million hectares on which 186,000 families settled.

Whilst most attention was focused on the former white highlands, individual land registration consolidation and the issue of the land titles and consolidating fragmented holdings for long term agriculture improvement to reduce the cost of land litigation and the fear of land expropriation.

¹³⁴ K. Kanyinga “*Kenya Experience in Land Reform: the ‘million- acre’ settlement scheme*” (I.D.S. 2000).

¹³⁵ Ibid

¹³⁶ Ibid.

¹³⁷ The independence government proposed settlement schemes as a mitigation measure on land issues at the time and secured funds from the World Bank and the government of the United Kingdom to purchase extensive mixed farms to settle the landless, unemployed and under- employed peasant farmers where the land had been taken up by the settlers in the Kenyan highlands.

Towards the eve of independence, the One Million Acre Scheme was established in 1962 where a number of African farmers were to be settled in holdings.¹³⁸ The settlement was put into the following categories;

- a) High density which were for low income holdings of 40 acres each covering 180,000 acres.
- b) 'Z' holdings which were carried around homesteads of former European farmers. These were allocated to local politicians, urban workers and other so called leaders. One would ask whether it was justifiable for these people to be categorized for resettlement.
- c) Squatters' settlement schemes which were done by the government in 1965. These were meant to settle squatters on abandoned or mismanaged European farms. They consisted of small holdings of 10 acres. The farms acquired by the government because of mismanagement were not allocated to landless or the needy but went to affluent people.¹³⁹ As an example, in 1967 the minister for Agriculture took over for purposes of management a farm measuring 200 acres from its owner on grounds of mismanagement as the law allowed then. Instead of putting it into use, the minister allowed exchange of hands in respect of the land between some other people before the same was given back to the owner's family. All this time the land was occupied by other people which situation has to date been a subject of protracted court battles between the later buyers and the persons claiming to have been the original inhabitants.¹⁴⁰

This scheme was meant to ensure that the large land owned by the colonial land-holding structure was not shaken by any means of redistribution. This changed in 1962 when the colonial governments decided to accommodate 35,000 landless and land-poor Africans. They also re-negotiated the terms of land purchase of approximately 1.2 million acres from the settlers at a cost of 25 British pounds.¹⁴¹ Most white settlers sold their lands to Africans during the independence period and returned to their respective countries. As would be expected those who afforded to buy the lands for departing settlers were the political and working classes.

When KANU came into power at independence there was an attempt to restitute land to most of the communities residing in Kenya.¹⁴² However, the fundamentals of the colonial tenure system of land remained unchanged even after independence. Colonial laws discriminating against non-European were removed from the statute books but the fact remained that, while decolonization ended the formal supremacy of British law in Kenya it had relatively little effect on the actual shape and contents of legal superstructure through which state domination continued to be

¹³⁸ Wanjala (n 12) 32.

¹³⁹ Ibid p 32

¹⁴⁰ Malindi High Court Land Case Number 171 of 2013, Vros Produce Ltd & Another –vs- Joseph Msungu Nyoka & 526 others.

¹⁴¹ Ogendo (n 5).

¹⁴² Nyong'o (n 90) p 23-31

exercised. The legal structure basically remained the same.¹⁴³ The unequal relationship between the customary tenure and statutory system with addition to retention of ethno territorial administrative units were maintained. Most of the Crown land became government land while the native lands became the Trust lands. These lands were managed by the county councils and other statutory trustees instead of traditional institutions.

The lands owned by the outgoing settlers did not revert to its original owners. Through the Settlement Fund Trustee (SFT), the government embarked on a redistribution program. It targeted the landless Kenyans. However, when politics were involved, it became a scheme to benefit few Kenyans who had the means to purchase lands. This resulted in lands falling into new hands other than those it customarily belonged to. This was because most of the customary owners did not see the logic or justification for buying land that they considered to be theirs and others did not have the means nor the capital to purchase land that initially belonged to them. By 1977, a quite number of highland settlements owned by the settlers were in the hands of Africans. Most of the initial owners of the land did not acquire the land back.¹⁴⁴ This can be classified as a historical land injustice. Those who benefitted from these arrangements were not the original owners and happened to be at the right place at the right time. Majority of the original land owners remained landless or with very small acreage.

In 1970s there developed a culture of land grabbing within the ranks of the rulers, politicians and other influential people. The genesis of land grabbing in the 1970s was rapid population growth and urbanization. Urban areas witnessed an increased population from two million in 1979 to six million in 1999.¹⁴⁵ The effect of this population explosion was the emergence of unplanned urban centers and population clusters as land meant for agriculture was used for urban settlement. It is instructive that in 1978, a World Conference on Environment was held in Paris which changed national land policies around the world, including Kenya.¹⁴⁶ It was resolved that every country must come up with Human Settlement policy. Consequently the Human Settlement Strategy of 1978 paved way for the categorization of urban centers based on their capacity to grow and provide services.

With time the impoverished population began making demands for land reforms. The first occurrences of serious land rights demands were witnessed in the 1990s. The country started the decade with a series of revolts triggered by dissent towards the government over what critics termed as corruption and theft of public and private lands. Anglican Bishop Alexander Muge had told the government to stop theft of land before he was killed in a road accident. Land right demands would also crystallize into agitation for second liberation in the 1990s and usher ethnic clashes in 1991, which caused displacement of thousands of Kenyans most notably in Rift Valley region. In the

¹⁴³ Kibwana (n 87) pg 220.

¹⁴⁴ Republic of Kenya, Report of the Commission of Inquiry into Illegal/Irregular Allocation of Public Land, (Government Printer, Nairobi, 2004).

¹⁴⁵ National Population and Housing Census Report, Government Printer.

¹⁴⁶ Intergovernmental Conference on Environment Education, Tbilisi (USSR), UNESCO, 14 – 26 October, 1977.

build-up to the 1992 elections, land was used as a tool for raising campaign money as state owned parastatals were compelled to buy parcels of land from well-connected speculators at inflated rates. There were instances where senior government officers were cited as beneficiaries of public land.¹⁴⁷

Land meant for prisons, hospitals, schools and staff quarters was not spared. In Nairobi and other urban centers across the country, open spaces and parks, including cemeteries, were also targeted. Some 60,000 acres of forests land too were excised and chunks allocated for settlement or sold. Nairobi's Karura forest was excised and allocated even though it had not been degazetted. For example between 1990 and 1995, NSSF spent Kshs. 32 billion in lands that turned out to be useless as it included designated road reserves. There were instances where individuals had been allocated an official residence belonging to the police station bosses and public slaughterhouses.¹⁴⁸

After years of operation without clear policy guidelines concerning land, the government embarked on a stock-taking mission of the wrongs in the land sector at the dawn of the new millennium.¹⁴⁹ To achieve this end, the government started correcting the malaise in the Ministry of Lands by establishing a Commission of Inquiry into the illegal and irregular allocation of Public Land (popularly known as 'The Ndung'u commission'). The commission established that some 200,000 illegal titles were created between 1962 and 2002 and close to 98 percent of these were issued between 1986 and 2002.¹⁵⁰ The commission further found that categories of public land affected included forests, settlement schemes established for the poor, national parks and game reserves, government civil service houses, government offices, roads and road reserves, wetlands, research farms, state corporations lands and trust lands.¹⁵¹

Beneficiaries of grabbed land included ministers, senior civil servants, politicians, politically connected businessmen and even churches and mosques.¹⁵² On acquiring titles, most grabbers would very quickly sell the land to state corporations at hugely inflated values. The irony was that state corporations would lose their land to grabbers for free, and then be pressured to buy other lands for millions of shillings. The commission recommended that the government should try to recover some of the land which had been grabbed and observed that given the very large number of titles involved there was need to establish a Land Titles Tribunal. The establishment of the Environment and Land Court under Article 162(2) of the Constitution of Kenya 2010 and the Environment and Land Court Act 2011 was in line with these recommendations by the commission. The court has exclusive and specific jurisdiction to handle land and environment matters. This is in effort to ensure efficacious disposal of cases involving land in shortest time possible.

The commission further recommended that laws relating to land, some of which had been inherited from the colonial government, be reviewed to take into account the changed political and social

¹⁴⁷ Kenya National Assembly Official Record (Hansard), 14th June, 2000.

¹⁴⁸ Ibid.

¹⁴⁹ 2000, Under the Millennium Development Goals, KNBS.

¹⁵⁰ Government (n 144) 243.

¹⁵¹ K Kanyinga, Struggles to Access Land: The "Squatter Question" in Coastal Kenya, (DIIS, June 1998).

¹⁵² Ibid.

equation. Although some of the most drastic recommendations of the commission like the revocation of the illegal titles and the repossession of the illegally acquired land have not yet been affected, the commission led to some positive developments.

The Ndungu Commission found that the land grabbing mania, which intensified in the 1990s, was triggered off by multiplicity of factors among them the powers conferred to the President by the Government Lands Act. The commission found that under the Government Lands Act (now repealed),¹⁵³ the president had powers to make grants of freehold or leasehold titles on unalienated government land to individuals or corporations. The president delegated some of these powers to the Commissioner of lands. This saw public land being allocated in total disregard to public interest.

According to Ndung'u report, ethnic favoritism played a significant role in the distribution of land as did corruption. Some communities gained a lot through corruption given that the government consisted of some very powerful politicians from these communities. This happened at the expense of other communities. The favored communities had access to settlement schemes in the Rift Valley and Coast provinces. Those in the government after independence acquired large tracts of land illegally. Instead of allocating the land formally occupied by white settlers to landless Kenyans, the sitting government used it for patronage purposes to establish support and set up alliances. This act outraged many communities which led to the beginning of tribal animosities. This trend continued and deepened in the succeeding governments. The Ndung'u report clearly indicates how unlawful land allotment mostly intensified during the times of competitive elections in the Moi regime. Dishing out of land on basis of political patronage was being done while Mau Mau militants, their descendants and many other Kenyans remained landless. Most of these individuals were forced to move to arid and semi-arid areas whereby they competed over water and suffered declining wellbeing. The early 1990s government election success strategies were centered on land issue. The executive controlled land ownership and consequently it controlled the votes cast because then, votes were cast in favour of those who promised better land deals. In addition, the political leaders' strategies also involved solving or initiating land grievances and political manipulation.

Violence is closely related to land disputes in Kenya. For instance, research has established that most of the violence cases reported in the Rift Valley have occurred in those areas with settlement schemes. In addition, Nakuru, Trans Nzoia, Kajiado and Laikipia have been the epicenters of most violence experienced in the Rift Valley.¹⁵⁴ This scenario may be classified as both historical and present injustice. Past because it has been happening for a long time even before independence and present because it still persists. People keep on being displaced after every conflict associated with land emerges.

¹⁵³ Chapter 280, Laws of Kenya

¹⁵⁴ Republic of Kenya, Draft National Land Policy, 2006.

Given this country's colonial legacy of land alienation and dispossession of entire local communities from their land, it was incumbent upon the post-independence governments to resettle all the displaced people and restore their rights over land. The political realities at the time however meant that a radical one track land restitution and redistribution programme could not be undertaken without upsetting the platform upon which independence had been negotiated. A cautious, land market-based and hybrid system of resettlement was preferred to a wholesale and massive land restitution programme. This meant that lands which had been lost to white and other settlers could not be entirely repossessed for restitution by the Government.

In addition, the Government adopted certain policies and laws that had been introduced by the colonial government. These policies and laws had fundamentally affected the land rights of certain communities in many parts of the country in a variety of ways. The decision by successive governments to continue with this colonial legacy has meant the intensification of these problems over the years.¹⁵⁵ Perhaps the problem would have been less serious if the little the government managed to get from departing settlers was distributed to deserving cases.

The squatter problem is a direct consequence of the colonial land policy and law. Ever since the Supreme Court declared Africans as tenants at will of the Crown following the promulgation of the Crown Lands Ordinance of 1915, the problem of landlessness has never really been resolved.¹⁵⁶ The definition of Crown land was simply stated as;

'crown land shall mean all public land in the protectorate which are for the time being subject to control of His Majesty by virtue of any treaty, convention or agreement, or by virtue of His Majesty's protectorate, and all lands which shall have been acquired by His Majesty for the public service or otherwise howsoever and shall include all land occupied by the native tribes of the protectorate and all lands reserved for the use of members of any native tribe'.

With this kind of definition, the natives were left at the mercy of the protectorate authorities on matters of land. This position was buttressed by decision of the Chief Justice Barth in the case of *Isaka Wainaina Wa Githomo & Kamau Wa Githomo -vs- Murito Wa Indangara, Nanga Wa Murito & the Attorney General*.¹⁵⁷ In this case, one Maina Wa Githomo and another, both Kikuyu, claimed that they were entitled to possession of a piece of land in Kabete which they alleged had been the subject of a trespass by one Muriot, also another Kikuyu. The plaintiff's claim rested on derivation of title by purchase from the Ndorobo before colonial settlement. In the alternative, the plaintiffs alleged that the defendants had been tenants at will on the land and that such tenancy had been determined by notice. Relying on the 1915 Ordinance the Chief Justice stated that;

¹⁵⁵ Nyong'o (n 90)

¹⁵⁶ Land Ordinance (Amendment) Ordinance 1928, No. 7.

¹⁵⁷ (1922-23) 9KLR 102.

*'In my view the effect of Crown Lands Ordinance 1915 and Kenya (Annexation) Order-in-Council, 1920 by which no native private rights were reserved, and Kenya Colony Order-in-Council..... is clearly inter alia to vest land reserved for the use of a native tribe in the crown... If that be so, then all native rights in such reserved land, whatever they were.....disappeared and natives in occupation of such crown land become tenants at will of the crown of the land actually occupied which would presumably include land on which huts were built with their appurtenances and land cultivated by the occupier... such land would include the fallow.'*¹⁵⁸

The import of the above holding was that should any land occupied by the natives become suitable for European settlement, it could be taken through an ordinary administrative action. This position was used to justify wholesale eviction or progressive encroachment by surveyed farms.¹⁵⁹

The dispossession of many Africans of their lands meant that only a massive resettlement programme could provide a solution to the problem of landlessness. However, the negotiations for independence extracted guarantees from the nationalist political leadership whereby white settler farmers who had opted to remain in the country could retain their lands. The consequence was that many displaced peasants never got back their land.¹⁶⁰

The colonial government introduced a system whereby those claiming ownership rights within the ten mile coastal strip could get titles under the Land Titles Ordinance. This process gave undue advantage to the few who were aware of the office of the Recorder of Titles. The majority of the local inhabitants at the coast were ignorant of this procedure. This state of affairs probably justifies the current constitutional requirement of participation of people in the law making process because if this was the position then, the local inhabitants would have been sensitized of the new provisions and they would have registered their rights. Due to lack of knowledge of the legal provisions then, the local inhabitants could therefore not lay any claims of ownership as envisaged in the Ordinance. All land inhabited by them was consequently declared Crown Land. Such land became trust land at independence. Land in the ten mile coastal strip at coast which belonged to illiterate Africans was registered in the names of Arabs and Islamised Africans.¹⁶¹ Many people of Arab origin had acquired titles to vast parcels of land within the ten-mile coastal strip. In other areas people from up country were able to acquire large areas of land through purchase of titles because of ignorance of the local people. This has led to substantial land resources divestiture to private ownership to the exclusion of local inhabitants.¹⁶² These factors combined have created a twin problem of absentee landlordism and landlessness.

The land policies which were relentlessly pursued by the colonial government and later continued or at very least modified by the independence government have generated deep rooted problems

¹⁵⁸ Ogendo (n 5) 53.

¹⁵⁹ Ibid p 54.

¹⁶⁰ Syagga (n 117).

¹⁶¹ Kibwana,(n 87) p 183.

¹⁶² Ibid p 205.

which at various times have threatened to destroy the fabric of Kenyan society.¹⁶³ During the constitutional reform hearings conducted by the Constitution of Kenya Review Commission, it emerged that this twin problem is a deeply felt grievance by the local coastal people. Many of the people are technically squatters on their own land. After the promulgation of the Constitution in 2010, many squatters have had a feeling of ownership of the land claiming that the land is their ancestral rights and injustice was committed against them. Many have resisted evictions and the owner's rights to claim possession. Tension has therefore historically existed raising calls for a law to return what was unfairly and illegally taken away from Africans by colonialists and even fellow Africans¹⁶⁴ or at least pacify these communities. Article 67(2)(e) of the Constitution and section 5(1)(e) of the NLC Act could be that law. The question is now on how to implement it without opening another chapter of conflicts which could take us backwards. This is an area the NLC should look into early enough.

2.5 Possible solutions

The fight for reparations of land injustices has been with us for a while now. There has been no law before which Kenyans could use to achieve these reparations. This issue of land injustices is not unique to Kenya. It is a worldwide affair. All societies necessarily bear the imprint of their own past. The magnitude of the effects of that past depends on a whole concentration of internal and external factors to each particular society. In 1978 Thabo Mbeki who was later to become the president of South Africa said that each society is presented as unique its birth and development products of accidental collisions and inter-connections and therefore incapable of scientific prediction and cognition.¹⁶⁵ Applying this statement, one could say that although the problem of land injustice is not unique to Kenya, circumstances differ from one country to another. So as we tackle the problem, we cannot seek solace in the fact that it has happened and it is happening elsewhere. We must develop our own ways which suits the circumstances and environment of our country.

Historical injustices can extent to several years or centuries but remedying or reparation of the same may become complicated with passage of time. American Indians who are now known as native Americans raised their grievances of mistreatments and discrimination with the League of Nations (precursor of United Nations) in 1920s but it was not until 1970 when the United Nation sub commission on prevention of Discrimination and Protection of Minorities recommended a study should be undertaken with the final report being made in 1984.¹⁶⁶ Reparations and solutions to the injustice may take a long period of time and challenges are bound to appear. This should however not discourage the victims or the government. It calls for a strict resolve and patience from both the victims and all the players.

¹⁶³ Wanjala,(n 12) p 171.

¹⁶⁴ Kibwana (n 87) p 181.

¹⁶⁵ In a speech delivered in Ottawa, Canada from 19th February to 22nd February 1978.

¹⁶⁶ Ibid.

Land grabbing is not an entirely new concept. It has been done before in many parts of the world. In the past, chronic land grabbing was perpetrated by the colonial rulers against the original inhabitants. The natives were forced to offer cheap labour to enjoy the produce of their own lands. The methods and ideas involved in land grabbing were established long ago. Through tracing the history of land grabbing globally one stumbles across certain ideas that were and still are in use in facilitating land grabbing. These ideas include the efficiency of grabbing land and establishing it as exclusive property through legal methods. It could take the form of creating a legitimate reason for taking over someone's land citing 'public purpose' and 'public interest' as the main reasons. There are factors that distinguish historical land grabbing methods and modern methods of the same. Firstly, the trend is persistently changing at a relatively faster rate facilitated by dynamics that are changing in the global regime of food. As we seek solutions to historical land injustices, it is important to close avenues or ways of future recurrence of the same problem. A way must be sort that will seal the loopholes existing in law and institutions to ensure that we do not slip back to the bad history.

There are examples of historical and present land injustices in other countries which are comparable to the situation in Kenya. The institution mandated to address historical land injustices should carry out research and comparative study of these other countries and benchmark on how the issue can be applied in Kenya noting that circumstances may be different. We can take few examples. Between 2007 and 2008 Saudi Arabia and South Korea acquired large tracts of lands in Madagascar to cultivate food for their people amidst the then prevailing food scarcity. It took some intervention of international community to remedy the situation. In Guatemala, a wave of legal land re-concentration has led to market led agrarian reforms under the auspices of the government's neo-liberal policies on land. These policies have led to increased susceptibility of the *haciendas* and disregard of *colonos*' (tenant farmers) and livelihoods of indigenous landless families and their social identities. The *colonos* have had to exchange their labour for them to live and harvest their produce on the farms. Initially, they only provided labour in exchange for payments from the landlords. Land grabbing has made most of them to be evicted from their own farms.¹⁶⁷

The United Nation has estimated that there are some 300 million people inhabiting large areas of the globe who can be described as indigenous or aboriginal.¹⁶⁸ Aborigines are descendants of the original inhabitants of a country or geographical area who were there prior to external settlement or colonization. Aborigines are nearly always dominated by late comers through conquest, occupation, and settlement or otherwise. Examples of Aborigines are Mayas of Guatemala, Aymaras of Bolivia, Inuit and Aleutians of Circumpolar region (formerly Eskimos). The Aborigines demonstrate fundamental and universal aspects of human rights involving among other

¹⁶⁷ Burnod and Others 'Competition over Authority and Access: International Land Deals in Madagascar' *Development & Change* 44 (2013) 2, 357-379.

¹⁶⁸ Halstead (n 30) 76.

things culture, economics, political rights, social security and fair treatment.¹⁶⁹ There are ways through which these situations have been handled with minimum damage.

Another example is the Widdmans family scandal in Guatemala. This family acquired 5,400 hectares of land in the Polochic Valley in the larger Guatemala. The family acquired a loan from the Central American Bank of Economic Integration. This money was intended to purchase a piece of land that was populated by Maya-Q'eqchi families who were in the process of purchasing the land through the government programme market led agrarian reform. The transaction was marred by financial challenges as the coffee price crisis was already looming in the country. The transaction had been slow but came to an abrupt halt when the Widdmans family arrived with the money at hand. The money was very high compared to the one the farmers were providing which needless to say sealed the deal. The Widdmans acquired the land and converted the farm into a sugar mill. They further demanded that the land be registered under National Property Register. This meant that the colono families initially existing in the area could now be evicted through “perfectly legal” means. The company eventually evicted the families violently burning houses and crops. The families were approximately 700. Death resulted during the confrontation between the company and the farmers. The government in 2012 finalized negotiations and agreed to relocate the evicted families. This is a typical case of the adverse effects of land grabbing. Many rights of the farmers were violated during the confrontation and the government did not offer support to the poor farmers.¹⁷⁰ Looking at an example like this one NLC should be able to identify how good intentions are converted to personal gains by perpetrators of land injustices. There are other similar occurrences in the world. Some 60,000 hectares acquired in Cambodia, 30,000 hectares acquired in Nigeria by the US Company Dominion Farms and 90,000 hectares acquired in Argentina by an Italian company Benetton in 2002.

The trend of land grabbing and other injustices has also been manifested in long-term leases, purchases or other forms of economic arrangements. Basically, most transactions in the modern day world range between 30 to 50 years and in special cases 99 years often with a renewal option. The trends have extended more globally with Africa becoming a hot spot. However, it has extended to global north and throughout South and Southeast Asia. These factors have captured the attention of many civil societies concerning the issue of land grabbing and they in turn highlighted the adverse effects of the same for the international community. This trend mostly affects the poor as they are unable to secure these long term leases. There are many leases about to expire and the decision of whether or not to extend them lies with the NLC. It is incumbent on the NLC to make decisions which will benefit the poor and correct the situation by considering granting leases to the inhabitants of the area without discriminating on the basis of economic or social status.

¹⁶⁹ Halstead (n 30) 77.

¹⁷⁰ G Hanan and Others 'Is Land Titling in Sub-Saharan Africa Cost-Effective? Evidence from Madagascar,' *World Bank Economic Review*, 21 (2007) 3, 461-485.

The fragile communities affected by these land grabbing practices are often left damaged without commensurate compensation. The media has also been instrumental in curbing some of the issue in some countries. In Madagascar, the media highlighted the issue of land that was leased to Daewoo Logistics for 99 years. This helped in stopping it. According to the World Bank, 45 million hectares have been leased between the 2005 and 2009. Land grabbing is usually done secretly and efforts are made to conceal the act. Most of the deals are never reported. This only exacerbates the situation further.¹⁷¹ Those that are reported are usually at very different stages. Some of the stages are either operationalisation or planning. In addition, the financing of the project can be termed as fluid as it can be stopped at any one time. Similar thing happened in Procana sugarcane plantation in Mozambique. The project was in due course whereby 30,000 hectares were being relocated. The project was halted when some of the investors backed out. The role of the media and civil activist comes out in such situations. The law now demands that there be public participation before major projects are carried out. The media should keep the people informed of major projects. In such cases land grabbing in the name of projects would be curbed.

Corrupt and unreliable empirical data concerning land use is real. This issue complicates the measurability of land grabbing. In the 2008 the international land grabbing penetrated Brazil with foreign investors acquiring extensive tracts of land in the country. This practice posed threats to the national sovereignty of Brazil. This stirred up a debate in the political environment as to whether or not the full land ownership should be accessible to foreign investors. This discussion has been evident in the highly influential conventional print media, which has been posting alarming numbers on this matter. For instance, the newspaper *Folhade São Paulo* – which has an extensive circulation in the country – stated that in the year-2010, “businesses and persons of foreign nationalities have been acquiring the equivalent of 22 football fields in Brazil thereby getting extensive tracts of land in Brazil”. This trend was known as foreignisation and would pose a threat to national autonomy.¹⁷² In similar cases the people of Kenya and the media should be ready to expose any grabbing disguised as developments or foreign investments.

In Uganda, Tree Farms and the Norwegian Afforestation Group, through the Busoga Forestry Co Ltd grabbed from 80,000 to 100,000 hectares of Bukaleeba Forest and replaced it with pine and eucalyptus. Some 8,000 persons from over 13 villages were displaced by this company. It was claimed that some of the local natives had intruded on the forest at the time of the political disorder between 1975 and 1985. The communities were amazed that the government ejected them and allocated the land to a single investor. The communities said they could as well have planted trees in the area – and that they have planted indigenous species, not the exotic ones planted by the company. There were no consultations with the local people about this eviction.¹⁷³

¹⁷¹ N McKeon, and Others 'Land Grabbing and Global Governance: Critical Perspectives, *Globalizations*' 10 2013 1, 1-23.

¹⁷² S Sauer and Another, Agrarian structure, foreign land ownership, and land value in Brazil. Paper presented in 2011 at the International Conference on Global Land Grabbing, 6-8 April 2011.

¹⁷³ International Fund for Agricultural Development, Republic of Uganda: Vegetable Oil Development Project,

Again this brings out the need for public participation. In case of such projects are needed the government should open up and find out whether the local community is capable of carrying out such projects before bringing in the so called investors. If it turns out that the local community can carry out the projects they should be given priority.

Another good and comparable example of historical land injustice is South Africa. The injustices in South Africa started long before the infamous apartheid policies. As early as 1807 the British administration prohibited importation of slaves to the country. The same government introduced Vagrancy Act directed at Khoi people. Under this law, all Khoi people who were not under employment of a white person were declared vagrants. To prove that one was not a vagrant, he had to produce a pass. To get the pass one had to enter into a written labour contract with a white employer. It was a measure intended to meet labour shortfall created by the ban of importation of slaves. It was used to drive those Khoi people who still maintained existence off their land and turn them into permanent wage earners and create means to direct this labour where it was needed.¹⁷⁴ Therefore the displacements of people were contributed to by a combination of factors, labour need being one of them. Apartheid was introduced in South Africa in 1948. Translated into English apartheid means apartness or separation. South Africans suffered many adverse effects which included the black population which comprised 70% of the citizens confined into small segregated parts of the country and forced to carry passes. The land in which the black people were confined in was inferior and their townships squalid.¹⁷⁵ This policy was in contravention of legal and human rights norms because, it produced hierarchy of races, enforced segregation on the society and arrogated to the ruling class and race the bulk of the state's resources and assets.¹⁷⁶ After abolition of Apartheid, South Africa established a Truth and Reconciliation Commission which investigated the injustices committed during the apartheid era and made recommendations for reparation. In Kenya there have been several investigations on the issue of historical injustices. In addition to the Ndungu report we have had a Truth Justice and Reconciliation Commission. Instead of implementing these recommendations in the past reports, the leaders have resorted to political wars based on the findings of the reports. In some instances those mentioned in the reports have gone to court to have their names struck out. Some have succeeded. As at now the Truth, Justice and Reconciliation Commission report has never been tabled in parliament or officially released to the public. The NLC should carry out the recommendations based on the findings of the said commissions.

Closer home we have a clinical example of Zimbabwe. Zimbabwe is one of the few African states that have successfully repossessed land from large scale land owners. The country was colonized by the Britain. The west apportioned land in the then Southern Rhodesia with the white farmers

(1998) http://www.ifad.org/evaluation/public_html/eksyst/doc/prj/region/pf/uganda/VODP.htm. accessed on 2-02- 1014 at 1 pm.

¹⁷⁴ Mbeki (n 165).

¹⁷⁵ Halstead (n 30) 89.

¹⁷⁶ Ibid.

taking larger parts of the region where they were engaged in large scale cultivation. Central plateaus were fertile with a lot of rain. This area was hence populated by the white farmers at the expense of the native Africans. The whites who owned 70% of the fertile lands in the country made a mere 5% of the entire population compared to 4,500 farmers. The country succeeded in repossessing land from the white farmers but the poor have remained impoverished as the repossessed land did not benefit them but the political elites. This is not a good way to go for a country and it is not a solution to injustices. The country should be careful not to commit more serious injustices in the name of addressing past ones.

The NLC may look at the redistribution of land as a solution or compensation for historical land injustices. Redistribution could involve giving to landless individuals land obtained from absentee landlords and underutilized areas or that land which may have been illegally acquired. The land redistribution programme should be meant to give back land rights that were lost during the time the historical injustices were committed. It can be done through a number of ways which includes the market approach. This approach means that the government buys large tracts of land from willing land owners and sells them to deserving households at concessionary or market prices. Nevertheless, there are hindrances to this process owing to the fact that there are a lot of Kenyans below the poverty line who cannot afford even these market prices.¹⁷⁷ In some instances the government has allocated land to poor people who in turn sell it due to poverty or other factors and end back to the same position of squatters. Across Africa, similar programme has had its ups and downs. In South Africa and Namibia, the governments have been accused of acting slowly on the job of redistributing land. The said governments initiated programmes of identifying those lands that are too large or underutilized. In addition acquisition of multiple lands belonging to a single individual were also considered. In Rwanda, the same approach has also been adopted. The government has also set the maximum land size one can own at 25 hectares. The Rwanda position can be applied in Kenya as the Constitution empowers parliament to enact law to prescribe minimum and maximum land holding acreages in respect of private land.¹⁷⁸ This provision has already attracted resistance from large scale farmers in Rift Valley region and its entrenchment and operationalization is likely to be an interesting process. It can also turn chaotic since there has been a lot of subdivision and transfers of private land and repossessing them by the government to carry out fresh registration can be difficult. The question of what will happen to the old titles and the demarcation between genuinely or illegitimately acquired land remains unanswered. The former land minister James Orengo was of the opinion that as much as the process is Constitutional, it is difficult to implement. The Minister may have been right because in our land laws discussed elsewhere there are no provisions for such a process. There is no clear definition or provisions that the lands which may be recovered should be redistributed to the persons against whom the injustices were committed. The closest the law comes to cover this is by giving the NLC powers to recommend remedial measures. That provision is not enough. There should be

¹⁷⁷ Kenya Land Alliance (2004) *Righting Wrongs: Historical injustices and land reforms in Kenya*, Policy Brief, Nakuru: Kenya Land Alliance.

¹⁷⁸ Article 68 (c)(i).

unequivocal statements in the law giving NLC or any other body powers to distribute the land to the landless.

Elsewhere in the world, land ceiling approaches have been implemented. In India for instance, the government has set limits to the amount of agriculture a family or/and individual can own. Laws have been enforced to empower government officials to take possession of land in excess of the ceiling and to redistribute the excess land to the landless. The laws vary from state to state with other countries having stringent laws on the issue. However, most of these laws have become ineffective in most countries. One of the reasons is that land records are incomplete and outdated. It is always a difficult and complicated process to amend title deeds and land maps after properties are compulsorily obtained and owners compensated. Such cases could occur where land is compulsorily obtained for the construction of other facilities like roads or other public projects. Unfortunately, individuals looking for land to purchase can unknowingly fall victim and purchase such land. Secondly, the loopholes in law have been taken advantage by the landowners. The compensation paid for the repossessed lands has been in most cases inadequate which has made it to be very unpopular with most landowners.

The question of redistribution of land has been a challenge in other countries and it is not expected to be different in Kenya. In South Africa, the redistributed land benefitted only a small percentage of the landless which in most cases appeared biased.¹⁷⁹ In some other countries like Brazil, expropriation of land was the approach applied in redistributing land. The landowners were required by law to declare the details of the farms regardless of the size of their holdings prior to the expropriation programme. Based on the size and the use of the farms, they were put into four broad categories. Those farms that were large and unused were pinpointed and marked for expropriation. The funds for this programme were obtained from the issuance of the 20-year public bond. Our laws do not have such provisions and if the NLC were to attempt to redistribute land in similar way they are bound to be met with a lot of litigations. The only way this can work in our system is by passing a law which clearly gives the NLC powers to redistribute land in the country.

In Zimbabwe there exist law which could guide the government on redistribution of land but it has been faced with abuse of power and privilege. The Land Acquisition Act gave the government power to designate certain agricultural land for future legal acquisition and expropriation by government for purposes of resettlement and redistribution under the expropriation laws which provides compensation.¹⁸⁰ Although an attempt has been made to use this law to redistribute land to the landless, the same has been done haphazardly and with forceful evictions of targeted farmers without compensation. The process used does not have systems of ascertaining that those who get the land are the landless or deserving cases. The rural masses have been abandoned to the dictates of unaccountable chiefs most of whom are colonial creations. The communal land system in Zimbabwe also manifests great exclusion of women from ownership and control of land and its major products. The political process has been unable to effectively tackle redistributive problems caused by rigid and restrictive constitutional property clauses rendering it powerless in addressing

¹⁷⁹ E Lahiff, Land Redistribution in South Africa (The World Bank, 2009) p 5.

¹⁸⁰ Wanjala (n 17) p 247.

the issues.¹⁸¹ If we were to have this kind of law the same should have strict guidelines on who and what classes of persons are eligible to benefit from the redistribution.

Back at home, resources required for land restitution will be a challenge to acquire given that the ownership of land is heavily skewed. This is because the land restitution is very costly in terms of funds required to compensate for repossessed lands and financing the operations of the establishments charged with the responsibility of land restitution. The restitution programme should be done in phases with a clear objective criteria and a well mapped out plan prior to the commencement of the entire programme. There is need to publicize the activities of the programme so that transparency can be guaranteed. This will also ensure that bias is reduced if not completely eliminated.

The legal framework giving effect to Constitution of Kenya eliminates the restrictions of previous land laws on repossessing illegally acquired land. It eliminates the previous provisions on absolute indefeasibility of first registration. It also broadens the grounds for annulment of title, lessening the burden of proof for such and for courts to grant such orders. Additionally, though it still grants protection to innocent third party purchasers for value and without notice, it makes it easier to indict such protection. It also provides for an inclusive review of all previous public land allocations to establish their legality. Lastly, it specifically allows the registrar of lands, under direction from the NLC to cancel title for illegitimately acquired land. These are some good legislations which if implemented in good faith and following well laid down procedures can go far in addressing the injustices.

2.6 Conclusion.

As seen above the extent of historical land injustices in this country go back to a long time. The law has evolved from time to time but it has not been helpful in addressing the concerns of the Kenyans in respect of the land use and administration. From the time of fight for independence all through to the clamour for a new constitution in 1990s and the first decade of the 21st century, land use and administration has been at the centre.

Consultations, policy papers, commission's reports and taskforce reports have not been helpful because, either they were inadequate or those who were mandated to implement the reports were not willing to implement or operationalise the same for several reasons. When a new constitution was promulgated in 2010, it was thought that the same will bring to the end the suffering of the Kenyans including the issues of land use and ownership.

The Constitution has a whole chapter dedicated to land. It recognizes that there have been historical land injustices on Kenyans. It establishes the NLC and gives it mandate to investigate on its own or upon complaint by any person to investigate and recommend appropriate actions in respect to historical land injustices.

¹⁸¹ Ibid.

The extent of land injustices cannot be wished away. It is not the first time attempts are being made to address this issue in Kenya and elsewhere. The law is in place and what NLC needs to do is identify the land injustices, carry out research on how it should be addressed and involve all the stakeholders in so doing. The NLC has the mandate to make recommendations on how these injustices can be addressed. These recommendations may extend to reviewing past reports and making of new laws. The next chapter looks at the law establishing NLC and its mandate to find out whether the same is adequate to address historical land injustices in Kenya.

CHAPTER THREE

THE LAW ON HISTORICAL LAND INJUSTICES

3.1 Introduction

In the previous chapter the origin and extent of historical land injustices were discussed. Possible solutions were also suggested in the said chapter. With the injustices identified and challenges known the next question should be what mechanisms should be put in place in order to achieve the objective of addressing historical land injustices.

The mandate of addressing the injustices is vested by Constitution on NLC. The Constitution makes it mandatory for parliament to pass a law to operationalise Article 67(2)(e). This chapter analyses the law creating the NLC and operationalising Article 67(2)(e) of the Constitution in so far as it is geared towards addressing historical land injustices. At the end of the analyses one would be able to establish whether the law as it is, is adequate to enable NLC or any other institution address the injustices.

3.2 Background of the law

When the process of the constitutional review began in late 1990s stakeholders and interest groups staked interest in the process. In 1997 after consistent and persistent agitation, debates and negotiations, the parliament passed the Constitution of Kenya Review Act which was intended to guide the review process. The Act was amended in 2000 which basically expanded the institution entrusted with the mandate of guiding the process. Notable position here is that the control and final say on the new Constitution was the parliament. However this was challenged in court by activist Timothy Njoya and others. The outcome of the case gave legitimacy of a referendum when the court held that a constitutional review could only be made by holding a referendum and not by parliament or any other institution.¹⁸² After the cases, parliament passed Constitution of Kenya Review (Amendment) Act¹⁸³ and entrenched referendum process in the review process.

Two opposing side emerged during the campaign for the referendum which was eventually held in November 2005. Kenyans returned a verdict of ‘No’ meaning that they had rejected the proposed constitution. Whether or not such rejection was on issues or political interests is another question altogether. Onyancha observes that referendums may be held as a growing willingness by the ruling elite to let the people decide issues concerning their governance or the elites using them to strengthen their governing grip.¹⁸⁴ He argues that the 2005 referendum was politicized and was more about political interest rather than genuine desire to make a constitution. He may be right going by the turn of events after the referendum where political parties were borne out of the exercise. The aftermath of the 2005 referendum saw renewed efforts to making a new constitution

¹⁸²Njoya & 6 Others –versus- the Attorney General & 3 Others (2004) 1KLR 161 and Onyango & Others -versus- the Attorney General Nairobi Miscellaneous civil Application number 677 of 2003 (unreported).

¹⁸³Act number 9 of 2004.

¹⁸⁴ Onyancha (n 21).

with appointment of a committee of experts which harmonized several drafts and eventually the people of Kenya voted for a new Constitution on 4th August 2010.

The new Constitution establishes several independent bodies among them the NLC. This process having been people driven, the product of the same can be said to have been people's choice. What is clear from the process as far as land injustices are concerned is that the people of Kenya were eager to have the injustices addressed. That is why this particular issue was entrenched in the Constitution. The people could not as a matter of fact deal with the nitty gritty of how the issue shall be carried out. Those details were left to the parliament as peoples' representatives. Parliament is expected to ensure that the law it passes resonates with the letter and spirit of the constitutional provision. The law should therefore address the issue to the satisfaction of the people of Kenya. It is against this background that this chapter analysis the applicable laws.

a. The Constitution

Article 40 of the Constitution has provisions that cement the sanctity of titles to property. It grants the right to every person either in association with others or individually, to acquire and own property of any description and in any part of Kenya.¹⁸⁵ It further prohibits parliament from enacting any law that permits the state or any person to arbitrarily deprive a person of any property of any description or of any interest in, or right over, any property of any description or limit in any way the enjoyment of any right to own property on the basis of any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.¹⁸⁶ The Constitution therefore, bars arbitrary deprivation of the right to own land, thus guaranteeing sanctity of title.

The Constitution however grants a lee-way to recovery of land which is found to have been unlawfully acquired, implying that the protection is not absolute by providing that the rights under Article 40 do not extend to any property that has been found to have been unlawfully acquired.¹⁸⁷ This implies that any property that was grabbed or taken without the owner's consent or is otherwise illegally acquired can be taken away from the holder without any compensation. The Constitution does not define whose mandate it is to 'find that the land was unlawfully acquired'. The assumption here is that the NLC will initiate investigations and find out whether the land was unlawfully acquired. The NLC must therefore come up with regulations on how the process of establishing the acquisition of the land should be done. The NLC has since published a hand book which gives guidelines on how the process of establishing illegality and recovering the unlawfully acquired land shall be carried out.

The State is prohibited from depriving a person of property of any description of any interest in, or right over, property of any description unless the deprivation results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land in accordance with

¹⁸⁵ Article 40(1).

¹⁸⁶ Article 40(2).

¹⁸⁷ Article 40(6).

Chapter Five, or is for a public purpose or in the public interest and is carried out in accordance with the Constitution and any Act of Parliament that; requires prompt payment in full of just compensation to the person and allows any person who has an interest in, right over that property a right of access to a court of law.¹⁸⁸ This provision prohibits the government from depriving persons of their land unless by compulsory acquisition, or other avenue provided for in chapter five. However, Article 40(6) expressly removes the protection and requirement for compensation from holders of titles for illegally acquired lands.

Chapter five of the Constitution, in recognition of the magnitude of illegal acquisition of public land, authorizes parliament to enact a law to enable the review of all grants or dispositions of public land to establish their propriety or legality. Though the Constitution is silent on actions subsequent to the review, it can be implied that those grants or dispositions that are illegal should be cancelled and the land repossessed by the government. The Constitution therefore guarantees sanctity of title, but provides a framework for repossession of unlawfully acquired public land, leaving Parliament to expound and enact on the specifics.

Article 67(2)(e) of the Constitution provides a framework for implementation of some of the recommendations made in the National Land Policy. Key among issues on land in the 2010 Constitution is the establishment of a NLC to manage land on behalf of central and county governments. One of the functions of the National Land Commission is to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress.¹⁸⁹

The NLC is constitutionally authorized to undertake investigations on claims of present and historical land injustices so as to recommend suitable redress. Many endeavors in the past to, for instance, repossess irregularly or unlawfully acquired public land such as the recommendations of the Commission on Illegally Acquired Land commonly known as the Ndung'u Commission as well as efforts by the EACC to reclaim such lands, have been met with legal obstacles such as sanctity of first registration of title, irrespective of how the title was obtained. It has also not escaped the attention of Kenyans that the efforts to save the Mau Forest water towers by reclaiming titles and evicting those who unevenly settled on the land was made into a political battle against the Constitution by those who resisted eviction. To date the government is still battling the Mau Forest problem due to intertwined issues of politics and land management. To succeed in this area the NLC will require political goodwill and support from the stakeholders. Unlike the past we have a law entrenching the process of addressing these injustices and it is achievable.

¹⁸⁸ Ibid.

¹⁸⁹ Article 67(2)(e) of the Constitution.

b. National Land Commission Act, No. 5 of 2012

The purpose and object of this Act is to provide: for the management and administration of land in accordance with the principles of land policy set out in Article 60 of the Constitution and the national land policy; for the operations, powers, responsibilities and additional functions of the Commission pursuant to Article 67 (3) of the Constitution; a legal framework for the identification and appointment of the chairperson, members and the secretary of the Commission pursuant to Article 250 (2) and (12) (a) of the Constitution; and for a linkage between the Commission, county governments and other institutions dealing with land and land related resources.¹⁹⁰

The Act provides that its functions shall be decentralized in order to enhance ease of access and wider public reach.¹⁹¹ The NLC is given a wide assortment of functions which include: to recommend a national land policy to the national government; to manage public land on behalf of the national and county governments; to advise the national government on a comprehensive programme for the registration of title in land throughout Kenya; to conduct research related to land and the use of natural resources, and make recommendations to appropriate authorities; to initiate investigations, on its own initiative or on a complaint into present or historical land injustices and recommend appropriate redress; to encourage the application of traditional dispute resolution mechanisms in land conflicts; to assess tax on land and premiums on immovable property in any area designated by law; and to monitor and have oversight responsibilities over land use planning throughout the country.¹⁹² It is the function of initiating investigations into present and historical land injustices which is the subject of this paper.

In order to enhance the expertise of the NLC in the performance of its functions, the Act provides that the Chairperson and the members of the NLC shall be persons who are knowledgeable and experienced in land matters.¹⁹³ Of critical importance in the recovery of illegally alienated land, the Act empowers the NLC by dint of Article 68 (c) (v) of the Constitution to, within five years of the commencement of the Act, on its own motion or upon a complaint by the national or a county government, a community or an individual, review all grants or dispositions of public land to establish their propriety or legality. On establishment that the title was acquired unlawfully, the NLC is required to direct the registrar to revoke or cancel the title.¹⁹⁴ This is departure from the past where the old land law regime did not provide for the power of the Registrar to expressly cancel a title. Instead it was left to the courts. This provision appears to usurp the role of the Environment and Land Court which has exclusive jurisdiction to deal with land disputes. Further, it goes against the principle of separation of powers which holds that the arbitration of disputes should be the role of the Courts or Tribunals and not the executive under which the NLC falls. On the other hand, it is based on an articulate Constitutional provision, which would override any

¹⁹⁰ Section 3 of the Act.

¹⁹¹ Section 4 of the Act.

¹⁹² Section 5 of the Act.

¹⁹³ Section 8 of the Act.

¹⁹⁴ Section 14 of the Act.

provisions of an Act of parliament. To guard against the interests of the innocent third purchasers for value without notice, the Act protects against defeat of their interests by providing that no revocation of title shall be effected against a bona fide purchaser for value without notice of a defect in the title.¹⁹⁵

The Act allows NLC to establish committees for the better carrying out of its functions,¹⁹⁶ and also co-opt members with additional skills to the committees.¹⁹⁷ It finally devolves management of public land by establishing County Land Management Boards.¹⁹⁸ These boards are tasked with processing applications for allocation, change and extension of user and subdivision and renewal of leases for public land within Counties.

The NLC Act was a result of Kenyans' thirst to deal with the land issues which have refused to go despite efforts by the citizens. The government's resolve to deal with issue of land reforms has been wanting although it has always remained the most debated. It will be interesting to see how this time round the government will tackle the ever increasing grumbling of the people about the land management and administration.

By giving NCL mandate to investigate present and past historical land injustices the Constitution makers were alive to this quest. The NLC was required to propose laws and regulations to be used in addressing the historical land injustices within two years of its inception. It should be borne in mind that the process of addressing these injustices should not open up another pandoras box. The moral basis of constitutionalism is that the government should not be allowed to break the law so that it can catch criminals.¹⁹⁹ In tandem with this principle and relevant to this paper authority must be made according to the set out legal procedures.

The current land laws provide and touch on mandate of the NLC but do not give mechanisms for carrying out the said mandate. They will however be relevant points or law for consideration when the NLC is discharging its mandate. The NLC though established under the NLC Act will have to combine and consider all the provisions of the law which touch on the right to land and use and where any of them are inconsistent with the provisions of another, NLC will be called upon to exercise care and seek appropriate legal opinions on possible conflict with other institutions or government organs. A case in point was a protracted dispute between the NLC and the Ministry on who is mandated to sign leases. The matter caused a lot of conflict between the two entities to the extent that they went to the Supreme Court for interpretation. The Land (Amendment) Bill 2015 has proposed change of laws to give that mandate to the ministry. Such disputes are understandable as law keeps on shaping when it comes to implementation of the same. There however been concerns that the government is bent on weakening the NLC and taking over its

¹⁹⁵ Section 14(7).

¹⁹⁶ Section 16(1).

¹⁹⁷ Section 16(2).

¹⁹⁸ Section 18(1).

¹⁹⁹ [Kibwana \(n 87\) p 3.](#)

constitutional mandate. Caution must be exercised to prevent us from going back to the previous dispensation where land use, administration and management was an exclusive mandate of the executive which led to abuse of powers due to greed. The role of NLC should remain intact as the various institutions grapple with the formalities of discharging their respective mandates.

In order to address the injustices the NLC will have to balance between the rights of the perceived perpetrators of the injustices and the victims. It must be careful in how the issue is handled lest it opens up more serious conflicts or in the process make other people victims of the same injustices. The process of addressing the injustices has not been commenced and we are yet to see how the same will be received by Kenyans. The following chapter looks at the mechanisms which are suitable for addressing this issue.

c. Land Act, No. 6 of 2012

This Act of parliament was enacted in 2012 and commenced on 2nd May 2012. It was enacted to give effect to Article 68 of the Constitution; to revise, consolidate and rationalize land laws; to provide for the sustainable administration and management of land and land based resources, and for connected purposes.²⁰⁰ The Act defines land in terms of the Constitutional definition under Article 260.²⁰¹ Under the Article land includes; the surface of the earth and subsurface rock, any body of water in the territorial sea and exclusive economic zone, natural resources completely contained on or under the surface and air space above the surface. This definition to some extent (except the airspace part) matches that contained in the maxim '*quic quid plantatur solo solo cedit*' which is interpreted to mean 'whatever is attached to the soil becomes part of it'.²⁰²

The Act provides the necessary legal apparatus to repossess illegally acquired land. On sanctity of title, the Act provides that all grants of public land, issuances of a certificate of ownership of land or dispositions obtained or induced by corruption, on the part of any government official, county government official or employee of the NLC are illegal from their inception and are void and of no legal effect.²⁰³ It requires persons occupying such lands to forfeit it back to the government without any entitlement to any compensation.²⁰⁴ Here, the Act does not differentiate first and subsequent registrations, giving right to invalidate all transactions tainted by corruption and illegality. It thus goes against indefeasibility of first registration as provided for in the previous land laws. By holding the transactions void, it allows for cancellation of the titles. It further denies any form of compensation, without protecting an innocent purchaser for value and without notice bringing the Act under the purview of article 40(6) the Constitution.

²⁰⁰ Preamble to the Act.

²⁰¹ Section 3 of the Act.

²⁰² J Bray, *Unlocking Land Law*, (2nd edn, Hodder Education 2007) p 11.

²⁰³ Sections 158(1) and (2).

²⁰⁴ Section 158(4).

It also improves on previous laws by empowering the NLC to issue a notice to person or entity it suspects to be in illegal occupation of public land to vacate. Failure to comply with the terms of the notice empowers NLC to move to court to validate the notice and thereafter obtain appropriate orders for vacation.²⁰⁵ The Act further makes the fraudulent and corrupt land transactions a criminal offence liable on conviction to a fine not exceeding ten million shillings or imprisonment for a term not exceeding ten years or both.²⁰⁶

It is important to note at this juncture that there is a possibility of the NLC's mandate under these provisions to overlap with the mandate of the EACC on repossession of public land. What may be an issue of debate on these provisions is the legal principal that law does not operate retrospectively. Although the provisions seem to be protected under Article 40(6) of the Constitution a question will arise as to whether the same Article is in contrast to the general rules of international law which by virtue of Article 2 of the Constitution are part of laws of Kenya. It's a general rule of the international law that no law should operate retrospectively. This is the same principle implied in Article 50 (2) (n) of the Constitution which provides that a person has a right not to be convicted of an act or omission that at the time of commission or omission was not an offence in Kenya or a crime under international law.

The Act further provides for compulsory acquisition. It provides that whenever the National or County government is satisfied that it may be necessary to acquire some particular land for public use, the respective Cabinet Secretary or the County Executive Committee Member shall submit a request for acquisition of public land to the Commission to acquire the land on its behalf.²⁰⁷ The Commission is empowered however, to reject a request of an acquiring authority to undertake an acquisition if it establishes that the request does not meet the requirements prescribed under Article 40(3) of the Constitution. The acquisition is subject to prompt and adequate payment of compensation.²⁰⁸ Compulsory acquisition has been identified as one of the options towards repossession of illegally acquired land. Finally the Act also empowers the Environment and Land Court established by the Environment and Land Court Act²⁰⁹ to hear and determine disputes, actions and proceedings concerning land.²¹⁰

d. The Land Registration Act, No. 3 of 2012

It also came into force on 2nd May, 2012. It sought to consolidate, revise and rationalize the registration of titles to land and to give effect to the objects and principles of devolved government in land registration and connected purposes. The Act applies to registration of interests in all public land as declared by Article 62 of the Constitution; registration of interests all private land as

²⁰⁵ Section 155.

²⁰⁶ Section 157(1).

²⁰⁷ Section 107 of the Act.

²⁰⁸ Section 108 of the Act.

²⁰⁹ Act No. 19 of 2011.

²¹⁰ Section 101 of the Land Registration Act.

declared by Article 64 of the Constitution and registration and recording of community interests in land.²¹¹

Part II of the Act deals with the administration and organization of the register and registry in a decentralized way as envisioned under the Constitution. This is vital in terms of inculcating efficiency in the management of land on the ground of resources and the land itself. The Act further provides for the protection of documents in a more accessible, secure and reliable format²¹² and particularly offers freedom of access to information.²¹³ In order to eliminate the rampant corrupt practices and eliminate or reduce corruption and incompetence that have characterized the management of land registry, the Act provides for recruitment of the Land Registrars that is competitive by an independent body which is the Public Service Commission.²¹⁴ The functions of the registrars are stipulated in the Act which in any case excludes the power to cancel a title which had been the practice previously.²¹⁵ The Act safeguards sanctity of title, but confines that to only lawfully acquired titles. It holds that the certificate of title shall be considered conclusive evidence of proprietorship except based on misrepresentation or fraud to which the person is proved to be a party; or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.²¹⁶ The words ‘fraud’, ‘corruption’, ‘illegality’ and ‘unprocedurally’ mentioned in the Act are matters of facts which necessitate proof in a court of law. This provision serves two purposes: affirming public confidence in land holding and providing the government with the roadmap to recover illegitimately alienated public land.

The roadmap to recovery of illegitimately alienated public land highlighted above is nonetheless, subject to some limitations. The Act holds that if a person receives or acquires land in respect of which the court could make an order for restoration or for the payment of reasonable compensation, the court shall not make that order against that person if that person proves that; the land was received or acquired in good faith and without knowledge of the fact that it has been the subject of a disposition to which the part applies, or received or acquired through a person who received or acquired it in the circumstances set out therein.²¹⁷ This essentially means that an innocent third party purchaser without notice of any indiscretion has a valid title and the government cannot for that reason repossess the land. This may lead to people transferring the titles to third parties who act as their proxies in an effort to defeat the efforts and intentions of the NLC or government in reclaiming illegitimately alienated public land.

²¹¹ Section 3 of the Act.

²¹² Section 9 of the Act.

²¹³ Section 10 of the Act.

²¹⁴ Section 12 of the Act.

²¹⁵ Section 14 of the Act.

²¹⁶ Section 26 of the Act.

²¹⁷ Section 53(1) of the Act.

The Act empowers the Land Registrar to place a restriction on the transfer of the land if they suspect any improper dealing or fraud or for any other sufficient cause.²¹⁸ Further, the knowledge of fraud with regard to the third party is widened to embrace actual, imputed and constructive knowledge,²¹⁹ lessening the burden of discharging the proof on this. The Act then clothes the Environmental and Land Court with authority to hear and resolve disputes, proceedings and actions pertaining to land under the Act.²²⁰

This Act makes no difference between first and subsequent registrations, allowing blanket cancellation through the courts of any land registration which may be found to have been acquired illegitimately, unprocedurally, by fraud, misrepresentation or through a corrupt scheme. It lowers the burden of proving that the person who acquired it knew of fraud while engaging in the acquisition of the land even though it protects innocent purchasers for value.

3.3 Factors to be considered

The main legal provisions which grants NLC the mandate to investigate historical land injustices and make recommendations is Article 67(2)(e) of the Constitution. Section 5(1)(e) of the NLC Act is similar word to word to the said Article. Although these are the enabling legal provisions the NLC cannot act solely and in reliance to the two provisions only. It will have to consider all other legal instruments which touches on land and rights to individuals. The laws are not only confined to those discussed above but all relevant laws including international conventions and treaties.

The question of “third party purchasers in good faith without notice” will be critical, especially due to fact that the transactions and acquisition of the land involved the Government agencies and officers. This position may pose a challenge to the NLC as it embarks in recovering land unlawfully acquired. Although Article 40(6) of the Constitution gives an exemption where land unlawfully acquired can be recovered without compensation or following the process of compulsory acquisition, a question would arise as to who committed those unlawful acts. The government is the custodian and guarantor of titles. Before any land is transferred from one individual to another, the lands office is always involved. One conducts search and once the lands office assures him that the title is good he would go ahead and buy the same. In such situation how then do we blame the persons who bought this land even if it was unlawfully acquired? Whereas protection of a third party purchaser without notice is a logical position to take, it is important to note that many lands which were unlawfully acquired have since changed hands with the blessings of the government. If the third party purchaser without notice is deprived of this land he will be justified to sue the government for damages.

What is unlawful or irregular has not been defined in the Constitution or the NLC Act and other land laws enacted after the promulgation of the Constitution in 2010.²²¹ Restitution involving land

²¹⁸ Section 76 of the Act.

²¹⁹ Section 53(2) of the Act.

²²⁰ Section 101 of the Act.

²²¹ The Land Registration Act No 3 of 2012 and the Land Act no 6 of 2012.

that has been transferred to third parties must be handled with caution. The government is not clean on such transactions since it failed to assure the correctness of title. It would appear unfair to penalize third parties for the failures of government in a situation where the government has even received stamp duty, registration fees and other taxes in respect of transfer and registration of the same land. Article 67(2) (e) of the Constitution and section 5(1)(e) of the NLA Act do not adequately address this issue despite the glaring fact that it will pose the greatest challenge in addressing the historical land injustices. It provides more challenge than solutions. The work is cut out for NLC to make recommendations on how this challenge can be overcome or addressed.

There is a risk of one assuming that land injustices were or are committed on the poor persons only. The rich and middle class has also suffered injustices and the law and NLC should not lose this fact. For instance, there have been several cases of demolitions or attempted demolitions of houses in Kenya. In May 2014, there was an attempt to demolish houses that were purportedly on a piece of land belonging to the Livestock and Fisheries Ministry in South B area of Nairobi. The demolitions led to the destruction of approximately 20 new residential houses whose construction was still underway at Executive Housing Phase 2 estate. However Senator of Nairobi City County Mr. Mike Mbuvi prompted the President to indefinitely suspend the demolition process to give time to the owners to vacate.²²² The dilemma here is that the politicians who appear to protect such land owners may not be there the next time the government comes calling. The protection here depends on the goodwill of the politicians which only last as long as the political careers of such persons are alive. The NLC should be able to trace back the dispositions of these titles and make guided recovery of compensatory processes. The example given above was not guided by the NLC but an executive decision of a Cabinet Secretary. The Constitution and NLC Act have not made a mention of forceful evictions and how they should be handled. There is a loophole here which should be sealed.

In the 2009 the government began what it sold out to public as a long term scheme to build new houses for the people living in slums. It started with Mathare and Kibera areas of Nairobi where it claimed that the land belonged to it. The scheme involved building of new houses for the people who lived in those areas. The process was ongoing until it was lawfully challenged by some residents. The High Court of Kenya went on to hold that the government could not commence demolition works until the case was heard and determined unless the demolition was voluntarily by the occupants. The case is yet to be determined. Informal settlements should be favourably considered when NLC is formulating its framework of action. There should be a law guiding the process of provision for housing instead of living it to the government to make decisions like the ones it made in this area. There have been challenges in other areas like road expansions construction leading to numerous demolitions of buildings without considering the process of acquiring the land where the buildings stand or even compensating the alleged genuine owners. These examples disclose conflicts of law and court's interpretation of laws. One would wonder

²²² <http://www.standardmedia.co.ke/thecounties/article/2000121926/president-uhuru-suspends-demolition-of-south-b-houses> accessed on 20-08-2014 at 3 pm.

why a court of law could not protect a title holder and at the same time protect the occupants of land which rightly belonged to the government.

Third parties may have made noteworthy investments in the claimed land. Whereas entitlement theory would recommend removal of such third party owners, such action would not essentially lead to resourceful outcomes. Such arbitrary acts may expose the government to expensive litigations and waste of tax payer's money which could otherwise be used to resettle the landless and address historical land injustices. The state, therefore, should pursue various strategies to determine the land restitution claims. For instance, the state could consider restoration of the land under claim where land is still in the possession of the original allottee and has not been passed on to third parties and has not undergone significant developments. The rules of dealing with such cases must be clear in regulations and law so as to ensure quick and fair resolution. For the process to succeed there must be comprehensive public participation.²²³ The NLC is allowed under section 14 of the MLC Act to after investigations make a recommendations for regularisation of any unlawfully acquire grant. This is a positive provision which may end up avoiding of causing injustices to innocent buyers without notice.

The Ndung'u Commission was of the view that, the state could enter into voluntary agreements with landowners to purchase privately owned land on behalf of the claimants, if ownership of land under claim has been passed to innocent third parties. With regard to land on which significant investments have been made, the state should grant financial compensation or provide alternative land to the claimants. This would necessitate special legal understanding that would make available alternative mechanisms for compensating those who may have been denied their rights to land. Briefly, land restitution would require a case-by-case evaluation and possibly negotiation with the landowners and parties claiming ownership.²²⁴ As the NLC embarks on addressing historical land injustice these challenges should not escape its attention. A look at the land laws discussed here are no clear provisions on how the NLC should go about this exercise. The procedures and regulations of doing so are left to the discretion of the NLC. Such position is open to abuse.

3.4 Conclusion

The historical land injustices the NLC is required to address are enormous and go back to more than a century ago. The country has come a long way since 19th century on issues of land. Every successive regime or government has come in power on promises of land reforms. Historical land injustices may touch on several categories of people including pastoralists, farmers, women, minority or marginalized people, women, youth and children and other vulnerable groups in the society.

²²³ Tiampati (n 103).

²²⁴ Government Printer (n 144).

From the analysis of the applicable laws above, there is a gaping loophole on these issues as there are no specific provisions touching on them. The law has concentrated too much on illegally acquired public land and does not say much about private or community land despite the fact that it is in these categories of land tenure where the historical land injustices have been committed much.

However since the law has granted NLC the mandate to make recommendations on how to address these issues, there is still hope that the situation can be perfected to achieve the intended purpose. The next chapter will try to identify these recommendations and suggest the way to deal with the loopholes.

CHAPTER FOUR

CONCLUSION AND RECOMMENDATIONS.

There have been genuine concerns about reform in the land sector in Kenya and how inefficient it has been in addressing the land issues. The policies behind establishment of settlement schemes to address landlessness were in essence initiatives meant to assist the landless get land but they failed to meet the objective.

Since the time Kenya gained independence there have been several efforts to solve disputes in land which have spent considerable amount of the country's resources but the answer to the problem has remained elusive. Those who have been seeking remedies on historical injustices committed against them continue pursuing them today. At issue has been question of whether one person can deny others access to a piece of land simply because he is the registered owner.²²⁵ Unfortunately the legal system and successive land policies have always bent to the affirmative which has resulted to worsening of the land injustices across the country.

The NLP which has been in place since 2009 was a result of efforts geared towards solving the emotive land issue in Kenya. Some of the principles of the National Land Policy have since been adopted in the Constitution.²²⁶ The NLP formulation process was guided by gender and rights based principles of equitable access to land, intra and inter-generational equity, gender equity, secure land rights, transparent and good democratic governance of land and land resources. In effect, the government in efforts to solve land related problems must adopt a clear framework for verifying and recording of genuine landless people, set out a clear framework for acquisition of land for establishing settlement schemes for the landless, and also for overseeing equitable and accountable allocation of land for settlement scheme. The framework has not been achieved in the current land laws and in particular the Land Act, Land Registration Act and the NL Act. The only goal the laws have achieved in this regard is to provide for consolidation and harmonization of the land registration system. However the same is in paper but the old titles and systems still exist. There is no timelines in the said laws when the harmonization should be achieved. This is worsened by ineptitude of the NLC in dealing with historical land injustices as it has concentrated in review of grants and dispositions of public land to the detriment of other roles given to it by the Constitution.

The resettlement programme of the landless is faced with two prime shortcomings. First, the market-based system requiring mobilization of financial resources which many of the landless do not have in their capacity and possession. The landless people are the poor and there is need for establishment of the subsidized loan-scheme to advance credit to enable them purchase land. The loan schemes and settlement trust established under the repealed statutes did not improve livelihoods and development of the targeted people as many were unable to repay the loans leaving them in an insecure tenure regime and totally inhibiting their economic potential. As a result, the

²²⁵ Wanjala (n 17) p 174.

²²⁶ Article 60 of the Constitution of Kenya.

middle class and other economic elites with the resources bought them out of the acquired land on foreclosure.²²⁷ Secondly, corruption in the land resettlement programmes allowed the corrupt political and economic elites within the independence government to acquire land that was meant for the landless. The result was that a large number of the genuinely landless people lost out on the opportunity and remain locked in a cycle of poverty. The Constitution and the NLA Act do not have provisions for such a scheme and it is hoped that as the NLC makes its recommendations on how to address specific historical injustices it shall consider possibility and viability of such.

In every corner of the country today, there is a significant number of squatters who trace their landlessness to historical injustices and the failure of the post-independence governments to undertake a comprehensive resettlement programme.²²⁸ Their status as squatters has also left them in grinding poverty and vulnerable to all manner of human rights violations, including incessant evictions.²²⁹ This historical failure has given rise to a deep seated sense of grievance among many of these squatters. Despite efforts to remedy the situations, there are still many landless Kenyans in the face of poverty and massive unemployment. They have been categorized by law as trespassers, squatters, adverse possessors or simply disinherited person.²³⁰ Some of these people were occupants of the land they are now accused of trespassing on before it was allocated to those holding title documents. It should be born in minds that if a man acquires possession of a thing by forcibly depriving the owner of it or by stealing it or in some other manner that the community does not approve of, he can have no reasonable expectation of non-interference or acquiescence.²³¹ We must make fundamental re-examination of our policies to enable us take steps towards a deliberate settlement of the whole population noting that adequate land for settling those who have suffered displacements on individual basis may not be available. The NLP had very good propositions on how the issue of squatters should be tackled. It should have been expected that these propositions would be imported into the current land laws which were passed some three years after the NLP was formulated. These include redistribution, restitution, resettlement and resolution of historical land injustices. Only the historical land injustices portion was been included in the Constituting and NLC Act albeit casually.

As NLC embarks on discharging this mandate, it must appreciate that the whole process should be reconciliatory and compensatory rather than punishment to the perceived or real perpetrators neither should it be retaliatory. Failure to take this line will open up old wounds and make it a vicious cycle. It should also be noted that not all victims of past injustices may appreciate this line but should be the route to go. Disappointments and difference in opinions are ways of life. We should focus on what is good to the majority of the people.

²²⁷ M Aketch, 'Balancing of Rights in Land Law: A key Challenge in Kenya; 2014'

²²⁸ Government (n 144).

²²⁹ Lucy Mirigo & 550 others –versus- Minister for lands & others, (2014) eKLR

²³⁰ Wanjala (n 17) 174.

²³¹ Kamena (n 20).

South Africa took this route by appointing a Truth and Reconciliation Commission which had powers to recommend punishments, pardon and compensation. However not all the South Africans supported the idea of pure reconciliation. While the former President F.W de Clerk appeared before the commission and reiterated his apologies for the injustices committed during the apartheid rule, many South Africans were angered by amnesty granted for human rights abuse committed by the government. For example, the family of Steve Biko was unhappy with amnesty granted to his killers to a point of filing legal suit in court arguing that the commission was unconstitutional. P.W Botha another former apartheid rule president refused to appear before the same commission terming it a 'circus'. Despite this, he was fined and given suspended sentence by the commission but the same was overturned on appeal. As at the time of the end of the apartheid, white settlers had occupied 90% of the land surface.²³² After the apartheid land reforms have been largely successful despite the above challenges. There is need to find out what made such processes to succeed. If that has succeeded, the Kenya's situation which is not worse is capable of being solved. These are realities NLC should be alive to. People, institution and even some government entities or leaders may not fully approve its recommendations. NLC must look for ways to wade through this delicate balance.

The NLC may be faced with challenges which it must be ready to address. There is possibility that NLC will face the challenge of insufficient financing by the government and other financiers. There could as well be lack of cooperation from the government or other institution or people who are core to its functions. This may include failure by the government institutions, ministries or officials to provide support including documents and records like in South Africa where the Truth and Reconciliation Commission reported that important documents were systematically destroyed in massive quantities in 1990 and 1994. It reported that National Intelligence Agency was destroying records or obliterating official documentary memories as late as 1996.²³³ There is also possibility of facing the challenge of legal obstacles. These may be in form of weak legal structures and formation. There have been reported cases of overlaps of functions and lack of clear boundary lines between the NLC and the Ministry of Lands, Urban Development and Housing. Such overlaps may result to demoralization of the NLC and interference with its work. The NLC may be live to the fact that political interference is real in this country. Such interference may affect land governance in a negative way. Poor land governance and systems that determine land rights if interfered with is likely to form the root of land injustices. Lack of cooperation by the victims and perpetrators is also another likely obstacle as well as lack of availability of data. This would involve keeping of records and administration of registries. For instance the Cabinet Secretary in the Ministry of Lands, Urban Development and Housing has on several occasions closed down some registries for purposes of rearranging and ostensibly digitalizing the systems. The closing down of the registries brought conflict between NLC and ministry. Undocumented land and informally administered land is susceptible to grabbing, expropriation without compensation and corruption. The law has not

²³² FT Hendricks , Land Inequality in Democratic South Africa (Emerald Group Publishers 2008) p 188.

²³³ www.usip.org/publications/truth-south-africa, assessed on 20-07-2015 at 4.30 pm.

given clear guidelines on how the NLC should work. Lack of clear guidelines results to confusion, convolution of issues and conflicting decisions in similar circumstances. This in turn may affect implementation of the NLC's mandate.

NLC's mandate seems to end with recommendations. It is not clear who is supposed to implement the recommendations and what sanctions are available if that person or office fails to implement the recommendations. In South Africa civil society exerted pressure on the government until it established in 2006 a body independent from the Truth and Reconciliation Commission whose task was to monitor the implementation of the Commission's recommendations. The NLC should press for this issue and a body be established to implement its recommendations. Better still the commission may be given the mandate of implementing its findings.²³⁴

For NLC to remain relevant to its mandate it must ensure that it assists people of Kenya to move forward with positive land reforms. The country must improve security over individual and communal land, increase access to land and tenure for poor and vulnerable families, resolve land dispute, manage better public land and increase efficiency and transparency in land administration.

The NLC is called upon to investigate historical and present land injustices. In discharging this responsibility it can make rules and regulations as allowed by section 5(3) of the Act. It is recommended that the NLC should form a committee for the purposes of investigating the injustices either through a complaint or on its own initiative. The committee should be a standing one. The fact that NLC has been taken to court by people who claim to have suffered historical land injustice is an attestation that the people are aware and agitated to have these issues given attention. NLC should not wait to see people crying for justice to the point of taking the government to court. This was the main reason why that particular type of grievances was given to a specific commission. There is no room for burying the head in the sand and hoping that people will sit back and not raise these historical grievances. That is one of the many reasons Kenyans passed a new Constitution.

The NLC committee should not fall into frequently heard comments that committees and commissions are appointed as an excuse for the government to put off a decision on an awkward problem.²³⁵ The committee should carry out the investigations in such a way that they will raise acutely the main theoretical and practical issues Kenyans have been crying about in relation to injustices committed against the population. The government has been known to forming committees and commissions as a reaction to an event or grievances by the citizens in order to pacify its people that it is looking into their problems. Of course people have fallen into this trick as the government is not obligated to take any action on the issues until the committee's or the commission's reports are received. Even after the reports are received, the government in most cases claims to be studying the report and with time the issue is forgotten. However this does not solve the problems as they are likely to recur. And in most cases they have recurred.

²³⁴ www.usip.org/publications/truth-south-africa, assessed on 20-07-2015 at 4.30 pm.

²³⁵ R Gerald, Committees of Inquiry (Geirgwe Allen 7 Unwin Ltd 1975) p 11.

The land problem is a complex one due to the numerous competing interests in claims over land. The previous statutes did not serve us any better and more often they created confusions which can adequately be solved by application and use of the provisions of the current Constitution together with the adoption of the National Land Policy.²³⁶ However this may not solve the land problem once and for all and therefore, there is need for an improved and people based land reforms and in particular the landlessness as steps to solving the never ending land issue in Kenya.

The NLC should undertake a comprehensive audit of the resettlement programmes and action plans that have already been implemented since independence to establish the extent to which they benefited the landless. There is need to ascertain the actual status of persons historically dispossessed of land through accurate collection of data. The goal of redressing historical injustices is to restore land and to provide other restitution remedies to those dispossessed, in such a way that it provides support to the vital process of reconciliation, reconstruction, restitution and development.

The government together with the NLC should undertake an inclusive, comprehensive, consultative and realistic process of redressing historical injustice once and for all. Participation of all stakeholders and interest groups are key to this road map. The Constitution provides a legal framework for redress of historical land claims against the state. Failure by the successive governments to address historical injustices has been addressed in the National Land Policy. Therefore, a holistic approach must pay due regard to the rights of other communities that have acquired rights over the years. It is not practical to suggest that individuals who have acquired their land legally over the years be evicted to make way for the re-settlement of the landless.²³⁷ Instead, this process must devise creative ways of balancing the rights of both the landless and those who currently hold legal titles to the land. The parameters of historical injustices redress process should be determined according to the Constitution and law on land restitution and all other legislation as suggested by the NLC in order to actualize the objects of Article 67(2) (e) of the Constitution of Kenya and section 5(1)(e) of the NLC Act.

Where it is established that individuals have illegally acquired land, this should be repossessed for the purposes of resettling the landless. There is need to establish an independent and credible mechanism for ensuring transparency in this process. Unplanned and forceful repossession can easily precipitate chaos and upheaval as has happened in Zimbabwe. For this reason, it is necessary that the process be based on a legal and policy framework, be predictable and open to public scrutiny.²³⁸ Repossession alone will not address the historical land injustices. It must be followed by a procedural and legal redistribution of the repossessed land to genuine cases.

Land being a scarce and finite resource, it is also necessary to recognize that it might not be possible to settle all those who have been dispossessed over the years. It is therefore necessary to come up

²³⁶ Sessional Paper No.3 of 2009.

²³⁷ Government (n 144).

²³⁸ Ibid.

with innovative measures to redress this dispossession even in the absence of actual land restoration. These could be in terms of affirmative development interventions by the government. In addition, there is need to explore the possibility of initiating forms of transitory tenure where land can be availed for use by the landless on a temporary rental basis. These alternative measures need to be spelt out in a policy and given the necessary legal backing.

The problem of absentee landlordism is intertwined with the landlessness of the local inhabitants. Land that is held by absentee landlords should be appropriated for the purposes of resettling the landless local inhabitants. This should be done in a systematic, orderly and open manner. A man does not possess a field because he is walking about in it, unless he has intent to exclude other persons from the use of it.²³⁹ Possession is therefore part of the relation of ownership. It is the original from which the ownership manifests itself and is ultimately the only means of proving ownership.²⁴⁰ Those in possession should be presumed to be entitled to possession until the presumption is rebutted by someone showing a better claim to possession.²⁴¹

The identity of those who have been displaced by land clashes should be established and their land claims verified through various documents of ownership. As much as is practicable, it is important that those affected by land clashes be resettled in their own land. Where this is not possible, alternative land should be provided and the state should compensate the displaced for the losses occasioned by their relocation. In addition, the state must put in place security and administrative measures to ensure a lasting solution to the problems of land clashes. The resettlement should be done in such a way that the indigenous inhabitants do not feel that their land is being given out to foreigners and those being settled should not feel or be treated as strangers. This calls for calculated integration of all the people concerned. Such an exercise would require political good will of the affected areas and it is therefore important to involve all political, social and administrative leaders.

Orderly resolution of historical injustices can only be achieved by having a well established legal framework. Legislation on resolution of land rights is a good starting point to provide for a mechanism for recognition of the rights and claims of those who have suffered historical land injustices. It is desirable that this legislation would address the land menace in a structured manner and this will only be fruitful if the NLC comes up with clear guidelines and systems of handling the redress process.

Social dynamics have changed and are different from the times when the land was taken from the fathers of those perceived to have suffered historical injustice. The approach should be calculated, peaceful and acceptable to the people on ground. Forcing resettlements whether by government or self-aided by the landless will not succeed. It can only result to bloody confrontations which will escalate the problem instead of solving it. Conflicts that would result from violent self-help must

²³⁹ Salmond on Jurisprudence, 11th edition 322.

²⁴⁰ Kamena (n 20) p 9.

²⁴¹ Ibid.

be avoided. Self-help emerges where people feel that the government or those entrusted with protecting their interest are not working in the interests of the people. It is therefore imperative for the government and NLC to be proactive and not necessarily only where complaints have been officially filed.

Successful land reforms also requires reforming the tenure system so that new landholders will be better placed to access credit that is necessary for diversification of production, the creation of new markets, growth of rural economies, narrowing of the current income gap and better environmental protection. The redress of historical injustices must be linked to comprehensive and radical rethinking of development that transcends the current predominant subsistence framework in land use in Kenya.

The National Land Policy has outlined mechanisms of resolving the squatter problem at the Coast and proposes to take 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 Counties which comprise the entire coastal region.²⁴² Even before the operationalisation of the NLC, the Government had already settled 70,790 families in settlement schemes covering 35,300 hectares in Kwale, Kilifi, Malindi and Lamu, from a region where 128,900 squatter families have been identified and registered.²⁴³ This is proof that with determination and clear and efficient policies in place, solutions to landlessness in Kenya is achievable. The NLC should tap into these provisions of the policy and ensure that they do not find their way to the archives and forgotten. As it recommends other forms for addressing historical injustices this area should not escape its attention.

The Ministry of lands has also audited absentee landlords in the coastal region and found they own an estimated 77,753.02 hectares, although comprehensive data is still being sought to establish the actual acreage controlled by this category.²⁴⁴ Most of these leases have expired or are about to expire. The NLC is on record calling upon the County Governments to collect data and inform it of such leases. It is recommended that these leases should not be renewed in favour of the landlords. They have done nothing which benefited the Government or the community on the lands for the last century. The government has no obligation to renew the leases. It is recommended that new leases be given to the deserving landless people preferably the indigenous inhabitants. There should be established a legal framework allowing the landless to move to court and challenge renewal or grant of new leases to undeserving persons. We should settle the landless on these lands before we think of extending such favours to those who already have land.

The government has started untangling the land problem at the Coast by empowering locals as evidenced by the adjudication of land in Kwale County as in many areas of the country. It is worth noting that in some areas such as Msambweni, land has been adjudicated and registered. Great

²⁴² Kenya Gazette, 16th August, 1955, Government Printer.

²⁴³ T Gachanga, "Kenya: *Land is Ours*" www.africafiles.org. Assessed on 20-07-2014.

²⁴⁴ Ministry of Lands, Report on the Current Status of Land in the Coast.

strides have since seen recommendation made towards adjudication as a total of 1,555,479 titles covering 8.01 million hectares had been issued as at 2008. Since 1963 to date, adjudication work has been completed in Central and Western Regions with exception of some section in Busia County. However, no adjudication has been done in North Eastern Region and the strife torn Tana River County. It is recommended that the government should move with speed and complete the adjudication process in the entire country. The people living in areas where adjudication has not been carried out for the last century feel discriminated. Failure by the government to adjudicate land in many areas of this country can be termed as historical land injustice. The gesture should be extended to other areas. There is no reason why after 52 years of independence there should be a single inch of unadjudicated land in Kenya. The NLC should facilitate this. Although land adjudication does not squarely fall within its mandate it can recommend the same to the government as a matter of policy pursuant to its function under Article 67(2)(c) of the Constitution and section 5(1)(c) of the NLC Act. The NLC is a government institution and cannot operate in isolation or total exclusion of other relevant institutions.

Besides survey, demarcation and settling of squatters and the landless, the Ministry of Lands has also been resolving disputes as exemplified by the Tumbe Settlement Schemes in Kwale, where the allocation process had to be carried out afresh after local residents complained. The schemes survey maps have already been completed and a list of genuine allottees approved. To enable efforts by the government to comprehensively deal with the matter of landlessness, the NLP proposes an inventory of genuine squatters. It also calls for removal of those squatting on unsuitable land and resetting them elsewhere. These are good policy statements which should not be wished away although the way they will be handled should be fair and careful especially where it involves moving of the people. The NLC should tap into these recommendations and actualize them.

The process of addressing historical land injustices will in no doubt raise legal and other challenges leading to disputes. Ability to resolve disputes is a pillar of sustainable development in any country. Dispute resolution mechanisms should be put in place. Land dispute resolution mechanisms in the past have been handled by a number of institutions, leading to emergence of challenges, such as conflicting interpretation of the law derived from multiple statutes dealing with land disputes.²⁴⁵ The country too has suffered from lack of adequate expertise in solving the conflicts by land disputes tribunal and the courts of law, leading to numerous unresolved disputes. The Constitution has now created a specialized court to deal with the environment and use and occupation of, and title to land.²⁴⁶ This has been operationalised by establishment of Environment and Land Courts through the ELC Act.²⁴⁷ These were positive steps in having long standing disputes many of which involve claims by the landless to be dealt with in an expeditious manner. However in practice the said courts have been clogged by all manner of suits which do not necessarily concern ownership of land. Some of these suits are commercial and civil matters but because they at some point mention land they

²⁴⁵ Government (n 144).

²⁴⁶ Article 162(2)(b).

²⁴⁷ Act Number 19 of 2011.

have been transferred to the ELC. This has seen the special courts experiencing a backlog and eroding the initially anticipated benefits to the landowners and the squatters. The problem has led the Chief Justice to issue practice direction giving Magistrates powers to deal with land matters which is unconstitutional. These scenarios are threatening to take land matters back to the old system and result into failure to deal with land matters as expected. It is recommended that Article 162(2)(b) of the Constitution and preamble to the ELC Act be amended to define use, occupation and title to land in such a manner as to exclude other commercial cases which mention land. It is also recommended that the Chief Justice should desist from giving directions which confer jurisdiction on issues of land to any other court apart from the ones established under Article 162(2) (b) of the Constitution. His action of delegating other judges to deal with land matters has been challenged and the challenge upheld by the Court of Appeal which has led to near grinding to halt of land matters in the affected stations. ELC should be empowered more in terms of finance and personnel to enable them deal with land disputes expeditiously.

Unplanned subdivision of land has seen an escalation of fragmentation of land to small uneconomic pieces. Such subdivisions are as a result of sale of land by the registered owners without considering resultant ramifications and effect on the larger family and community who have genuine interest in the land. Being a registered owner does not necessarily mean that one is the only person who has an interest in the land. The Land Control Act was meant to control these fragmentations but it has failed as the Boards usually give consents to sub divide and transfer without consulting all the family members or interested persons. They do not visit the land in question neither do they interrogate the seller. Some are even known to give what they call special consents and charge the owner higher fees. The said special consents are given without going through the normal procedures. Ultimately such fragmentations have resulted to disinheritance and landlessness to family members. The law should require that all subdivisions and transfers of agricultural land may be granted only where there is a written consent of the spouse and children of the registered owner. Consents should be denied where it is evident that subdivisions will result into small uneconomical portions of land. Of 582,645 square kilometers of Kenya's territorial land, only 20 per cent is arable land for settlement, housing and food production of its population of over 40 million. This situation alone should discourage fragmentation of the arable land in order to sustain food security.

The land tenure in the country has also transited from the old land registration tenure of 999 years, to a shorter one of 99 years to a non-citizen²⁴⁸ at a time when digitization of the land registries is also taking place to promote efficient management of land for sustainability, prosperity and posterity. This is a positive step to contain instances of absentee landlords and give opportunities to the local community to get leases in exclusion of foreigners who have held them for long. NLC should remain vigilant on this issue to ensure that corrupt officials do not twist the law or circumstances of each case to defeat the intentions of the legal position.

²⁴⁸ Article 65(1) and (2) of the Constitution.

The squatter problem is real, it is powerful, and to simply wish it away and to condemn it wholesome without understanding its roots only serves to widen the chasm of misunderstanding that exists between the land owners, the squatters and government. To address land problems of which the squatter problem is one, requires that the genesis be approached and discussed with enormous integrity. It should be a deliberate and conscious decision so as not to take advantage of legal loopholes that tend to justify the situation leaving many hearts bitter and a section of this nation legally marginalized through lack of land. No amount of words can explain the reason for the human resource and capital that lies wasted over the generations due to Ordinances, Acts and basic laws that were promulgated by a people that had selfish defined interests and legalized them to acquire land in Kenya. The NLC should engage citizens and other stakeholders to identify any grey areas and align them with the current realities and the Constitution.

The aspirations of Kenyans can be achieved by the government developing an administrative or a legislative system that respects the fact that land is a different form of property and appreciate the diversity of the people of Kenya. Understanding this reality requires a reminder of how as a country we arrived at this point. The history of colonial injustice in this country need not be explained. But there is need to remember that so many of the disparities that exist in the Kenyan communities today, especially on matters touching land, can be directly traced to inequities passed on from an earlier generation that suffered under brutal legacy of colonialism and unjust land laws. The legacy of squatters must be addressed by investing in schools, communities, enforcing our constitutional and statutory laws and ensuring equity in our land laws and a just system and providing the squatters with ladders of opportunity that have not been availed for previous generations. Investing in the landless and their children will ultimately contribute greatly to all.

Legalized landlessness, where squatters are prevented often through law, from owning property, access to loans and mortgages means that squatters cannot amass any meaningful wealth to bequeath to future generations.²⁴⁹ History explains the wealth and income gap between the landless and those with land and the concentrated pockets of poverty that persists in many of today's rural communities, where the squatters belong. The path to solving their problem means embracing the burdens of the past without becoming victims of the same past. Laws, policies and programmes must be put in places that continue to insist on a full measure of justice in every aspect of Kenyans' lives. It means addressing the squatters' particular grievances which includes being settled, better health care and social amenities, better education and better jobs.

The Constitution provides that land in Kenya is supposed to be held, used and managed in a manner that is equitable, efficient, productive and sustainable through equitable access to land, security of land rights, elimination of gender discrimination²⁵⁰ and encouragement of communities to settle land disputes. This would give an individual owner, title to ownership and make him economically

²⁴⁹ BO Messah and Another “*Factors Leading to squatting in Rift Valley in Kenya*”, Journal of Law and Conflict Resolution, Academic Journals, 2013.

²⁵⁰ Article 40 of the Constitution of Kenya

productive and profitable from the farming and other uses that he may engage on that piece of land. It would also restrain him from trading off that piece of land because he would be barred through communal accountability. In this regard the ministry responsible for matters of land and NLC should adopt information technology programs. Technology development and keeping data programs on land matters, for example in the area of settlement, adjudication, licensing and title holding should be introduced and backed by legislation. This would accelerate and enhance land distribution by information technology. J Bruce holds the view that programs like Transaction Processing System, Management Information System and Inter-organisation System can contribute greatly in alleviating land problems like double issuance of titles.²⁵¹ This is a good and viable argument. Settlement complexes programs should be designed to provide social amenities like good housing, proper sanitation, schools, police services, hospitals and grave yards which are major social amenities that the landless lack. Besides, the settlement complexes land should be annexed where individual families are allocated land but under licenses and not titles.²⁵²

There is need to evaluate the position of the government as regards administration and management of land resource and resolving the land menace. The Ministry of Lands Housing and Urban Development has a settlement and adjudication department that has been tasked with formulation of policy for land management and administration, ascertainment of customary rights over trust lands, acquisition of land for poor landless Kenyans and provision of basic infrastructures needed for settlement schemes. Accordingly, the role of allocation of government land and trust land for various functions, approval for extension of leases, change of user and subdivision schemes have been taken up by the NLC although there are in fights between NLC and the ministry on some of these roles. However, land registration has been left as a function of the Ministry of Lands Housing and Urban Development. With the function of registration left under the Ministry of Lands, Housing and Urban Development, it would not be easy for the Commission to accomplish the mandate of reviewing grants because it can only make recommendations to the Registrar. Thus there is need to amend the Constitution and the NLC Act to set out clear and distinct mandates of the national government and the NLC as regards the management of land. The current provisions as contained in the Constitution²⁵³ and the Act²⁵⁴ create a situation of confusion where no entity is absolutely clear on the boundaries of its mandate. In fact the Land Registration Act of 2012 provides that officers within the land registration section shall be appointed by the Public Service Commission. They are not under the employment of the NLC. This by extension entails that the officers within the land registration section are not supposed to be under the direction of the NLC. However the Act empowers the Commission to establish land registration units in consultation with the national and the county governments. In that regard, it is supposed to gazette a constituted area as a registration unit and may vary the limits of such units from time to time. The powers to establish

²⁵¹ J Bruce, Kenya Land Policy: Analysis and Recommendations, 2009

²⁵² K Kibwana, Efficacy of State Intervention in curbing the Ills of Individualization of Land Ownership in Kenya (2000)

²⁵³ Constitution of Kenya.

²⁵⁴ National Land Commission Act 2012

registration units have been given with one hand but the powers of control and appointment of staff within the section has been taken away with the other hand. In that regard therefore, the NLC would have been more effective if it was able to have control on registration of land.

In the Harmonised Draft Constitution²⁵⁵ there was also provision that legislation was supposed to be made to ensure that settlement of the landless and the squatters and ensure rehabilitation of spontaneous settlements in both urban and rural areas was done. It also made provisions for establishment of a land fund to enable Kenyans own and use land in an equitable basis. Land tenure reforms should not only focus on agricultural productivity but should go beyond and address social restructuring, polarisation and exclusion.²⁵⁶ However the Constitution does not create tenure reforms that were envisioned.²⁵⁷ It is recommended that the NLC should take up this issue and push for actualization of the proposals.

The Constitution should be amended to ensure that the NLC is given adequate powers to address the problem of injustices and have the capacity to address the squatter land problem. Article 60 of the Constitution provides that the land in Kenya shall be managed in an equitable manner within the principles of equitable access. The prevailing circumstances relating to squatters in Kenya and the escalation of the problem as advanced by this paper therefore recommends that classification of land under Articles 61 to 64 should have been silent. Since the Constitution provides for equitable access of land, that cannot be achieved considering injustices that have made many people squatters. It recognizes private land as land registered under any person under freehold tenure and leasehold tenure. Laws and policies that have been in place have catalysed landlessness. By giving classifications, the Constitution excludes the landless who are otherwise entitled to the land dispossessed from them through the laws and policies. There is currently inequality in land distribution escalating the squatter land problem and leaving a few with large tracts that almost lie idle. The Constitution should at the very least be able to resolve this.

The NLC should also be given clear guidelines as to how the redress of the squatter land problem ought to be addressed. The squatter problem is part and parcel of historical land injustices which the NLC should be dealing with. By doing this, redress of the squatter problem will not be left at the whims of the executive arm of the government of the day. Profiling and registration of genuine squatters should be undertaken in order to establish mechanisms of identifying genuine landless people. The legal and administrative framework should be put in place to document, investigate and determine all historical land dispossessions and ensure that they are resolved. Therefore the laws in place currently should be reviewed to be in tandem with the NLP that has given a clear guideline as to how the problem should be resolved. The law should also provide for mechanisms to repossess and redistribute idle land that is kept for speculative purposes and given to those who are found to have been displaced through injustices.

²⁵⁵ Draft Constitution annexed to the Report of the Committee of Experts on Constitutional Review.

²⁵⁶ K Kanyinga "Struggles to Access Land: The Squatter Question" in Coastal Kenya (DIIS, June 1998).

²⁵⁷ "Kenya's Journey to new constitution", Daily Nation, 16th September 2010.

There is also need to ensure that there is sustainability in legal and policy framework to ensure that the problem is resolved and does not keep recurring. Vesting rights through the law will not be enough and therefore there is need for proper education for the people and sensitization on the implications in order to avoid conflict in the processes and in resolution of the problem.

The importance of resolving land problems in Kenya cannot be gainsaid. Successive governments have not been able to adequately deal with it. The land reform programme should entail restitution. Restitution is the act of making good or giving monetary value to a loss incurred. It refers to restoration of the original right to property in the instance where it was wrongfully taken from a person. One of the mechanisms for resolving the land issues is restitution. The NLP provides that the purpose of land restitution is to restore land rights to those that have unjustly been deprived of such rights. It underscores the need to address circumstances which give rise to such lack of access, including historical injustices. It also provides that the Government shall develop a legal and institutional framework for handling land restitution. Despite the Policy giving the mechanism for land restitution, the law has not made this possible. This paper recommends that it would be proper to have the Constitution²⁵⁸ and the new land laws²⁵⁹ address the squatter land problem through this mechanism as had been envisioned by the policy. However since the task of addressing the issue of historical land injustice has been left to the NLC, it should consider the remedy of restitution where it is appropriate.

The NLC should also consider the possibility and viability of compensating the victims of historical land injustices. This may be in form of cash grants to enable those who do not have resources to rebuild their lives to look for alternative land where they can settle. There have been cases where the courts have given compensation to the people who were tortured or mistreated during the one party rule. The suffering of those who lost land in the hands or on the watch of the government was worse than the political activists. There is no reason why these people who lost their land should not be compensated by the same government. The programme should however be structured and monitored to avoid a situation where those who are compensated in form of cash do not relapse to their squalid lifestyle. Some have been known to sell the lands they are granted in form of compensation which takes them back to their previous position.

Another option would be for the government to buy land from identified areas and allocate the same to those who may have suffered injustices and are landless. The program should also be monitored to avoid abuse by those tasked with the process of implementation. There should be well structured programs to assist the people being resettled to integrate with their new neighbours and the indigenous population. It has succeeded elsewhere and there is no reason why it cannot succeed here. For instance the South African truth and reconciliation commission established in 1995 to investigate human rights abuses during the period 1960-1994 recommended appropriate

²⁵⁸ Constitution of Kenya.

²⁵⁹ The Land Registration Act 2012, The Land Act 2012, The National Land Commission Act 2012, The Environment and Land Court Act 2011.

compensation with the final report being presented to President Nelson Mandela in 1998. In 2003 the succeeding president Thabo Mbeki of South Africa announced 660 million rands (equivalent of 85 million US dollars) would be used to recompense 22,000 people who had been tortured, imprisoned or who had lost relatives during apartheid.²⁶⁰

There have been truth commissions in at least 25 states some of them being Argentina and Zimbabwe and although they differed from place to place and purpose to another, they tend to have a number of features in common and implementation of their results have been key to addressing historical injustices. In Kenya we have had truth and reconciliation commission which was headed by Kenneth Kiplagat. Its results were released but implementations of the recommendations have been dogged with controversies due to vested interests. It has been challenged in court and the same may never see the light of the day. Even the simple act of signing and releasing it was controversial as some commissioners were said to have refused to sign it as it was alleged that it did not reflect the outcome of their investigations. The credibility of the report has been called to question. The NLC can borrow from this report but pay attention and care to areas which made the report wanting. The biggest challenge to the implementation would be where the report mentions those who are supposed to implement it adversely. The report should be tabled in parliament for debate and a law passed requiring the NLC or the government to implement the recommendations therein.

As NLC carries out its mandate of addressing historical land injustices, it should bear in mind that the process has a far reaching ramifications on a sizeable number of the population. It should be guided by the law and the Constitution without operating within strict legal rules. Although it may operate within the country's own frameworks, it should draw heavily on global human rights norms which are characterized by real desire for change, need to resolve issues and put the past behind and desire to address issues of amnesty, forgiveness and compensation.²⁶¹

The NLC should come up with a devised system of compensation of loss of property which may have occurred during land adjudication process, or predominant tenure system which could have accommodated some group rights. Since there are still large parts of our country which are yet to be adjudicated, the NLC should devise methods of adjudication and registration of lands rights to avoid repetition of what happened before. Now that Kenyans are more alert to their rights than before, any such repetition may be a recipe for serious violent and social conflicts. Since the process of adjudication is not yet complete in the country, management of what used to be known as trust land should not undermine rights and interests of people living in or in possession of the said land to void defeat of the original intention.

NLC should not only look at the past and present historical injustice but also look at preventive measures. It is very important to assess the situation beyond policy measures alone for securing interest in land. There should be an equitable land reform which will depend upon peace and stability in Kenya. It should come up with a law or procedure which allows and facilitates the rights

²⁶⁰ Halstead (n 30) 89.

²⁶¹ Halstead (n 30) 93.

of both individuals and communities, who may not have understood the import of existing laws as regards their rights to own, work on and occupy land without regard to the legal maxim that ignorance of law is no defence. This process should meet demand for redistribution, security of tenure and legitimization of property as a whole.

The NLC should look into ownership of land in slums and informal settlements which have also been source of conflicts due to lack of ownership documents. Scaled up land registration and legal recognition of the rights of squatters in these areas would greatly improve the lives of poor families and their ability to improve urban agriculture and run profitable businesses. It has been done in Philippines, Argentina and Indonesia²⁶² and there is no reason why it cannot work here. There are successful examples of countries worldwide that have improved their land governance and there is no reason why NLC should not help this country do the same. It will not be stretching our aspirations too far if we said that wounds can be healed through just laws and our Constitution.

It is my opinion that Article 67(2) (e) of the Constitution of Kenya 2010 and section 5(1)(e) of the NLC Act provide a basic mechanism to redress the problem of historical land injustices in Kenya. If the NLC effectively carries out its mandate it can address this long time problem. However there is need to have laws building on these basic provisions. The parliament should pass a law specifically dealing with how the NLC should address the historical land injustices. The recommendations given above should be incorporated in the new law.

²⁶² Diop (n 71) 13.