

THE PROBLEM OF LAND RIGHTS ADMINISTRATION IN KENYA

**A Thesis Submitted by Kibagendi Assa M. Nyakundi in Partial Fulfilment of the
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DECLARATION

I hereby declare that this thesis constitutes my sole original work presented for examination by the University of Nairobi School of Law with the approval of my Supervisor.

SIGNED at NAIROBI this.....day of.....2012

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DEDICATION

I dedicate this thesis to my wife and best friend Lydia Kung'a Apungu Nyakundi, our dear children; Noah, Cynthia, Laureen and Joseph and to my wonderful parents the Late Michael Nyakundi and Sarah Nyakundi for their love and support.

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LIST OF STATUTES CITED

Constitution of Kenya 2010

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Registration of Titles Act, Cap. 281 (now repealed)

Government Lands Act, Cap. 280 (now repealed)

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LIST OF ACRONYMS

DfID	- Department for International Development
NLP	– National Land Policy
KNHRC	– Kenya National Human Rights Commission
GoK	- Government of Kenya
IBEAC	- Imperial British East Africa Company
NLC	- National Land Commission
MoL	- Ministry of Lands
CoL	- Commissioner of Lands
PEV	- Post-Election Violence
LSK	- Law Society of Kenya

ABSTRACT

This study conducts an academic and practical surgery of the problem of land rights administration in the pre-colonial, colonial, independent and modern Kenya. At the core of the statement of the problem of the study lie issues of land tenure and sanctity of land titles in Kenya. Amazingly, the issues that form the nuclei of the “Land Question” in Kenya are closely intertwined with the socio-economic and political climate prevailing in the country. Hence, the study confronts the problem from the policy, legal-constitutional and institutional dimensions. The study culminates into recommendations for improving the system of land rights administration in Kenya for better governance of the country.

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CHAPTER ONE: INTRODUCTION

It would appear that there is little to be gained by trying to lay down any hard and fast criteria. In the final analysis the actual form of a system and even the law which governs it, will matter less than the practical wisdom with which it has been adapted to local needs and the competence with which it is administered. A seriously defective law may be made to operate successfully by skilled administrators, while a juridically perfect law may fail in incompetent hands. Much more than legally impeccable statutes are needed to establish and maintain a land register throughout any territory and ... the efficacy of the organization and the machinery of the humdrum record from day to day is even more vital. ...the cooperation and satisfaction of the great mass of land holders and peasantry, without which registration of rights to land is neither workable nor worth working, can only be won by its realized effects on their fields and in their lives, which critically depend on the details of the record that directly touch, and the qualities of the officers who personally deal, with them.¹

At the time of the Commission's appointment, the country was already experiencing a major crisis in its Public land tenure. Land meant for public purposes had over the years been wantonly and illegally allocated to private individuals and corporations in total disregard of the public interest. The privatization of public land in this manner is commonly referred to as "Land Grabbing". So pervasive was this practice that by the turn of the Century, there was real danger that Kenya could be without a public land tenure system. There is no legal or political system in the world which condones the extinction of its public land tenure. A country's physical development planning depends largely on the manner in which it balances private and public land rights. The reasons for the emergence and intensification of illegal and irregular allocations of public land are to be found in the country's historical, legal and political dispensation (In part, unbridled greed and complicity of Government officials thus fuelling illicit land markets throughout the Country.)²

1.1. The Meaning of Land Rights Administration and Problems Associated with it in Kenya

The above two quotations depict a deep mess and disarray into which Kenya's land tenure has gravely fallen. The situation is so grave that public land tenure is nearing extinction in the face of gross diminution while private tenure faces serious threats. The solution in reversing this worrying trend, in the vein of this thesis, lies in reforming land rights administration in Kenya.

¹ Per S.R Simpson; quoted from Smokin C. Wanjala, *Essays on Land Law: The Reform Debate in Kenya* (Nairobi: UoN Faculty of Law, 2000), p. 100. This quote underscores the fact of good and effective implementation of laws as the real panacea to the problem of land rights administration.

² Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land, 2004 (popularly known as the *Ndung'u Report*) at p. 1. These views are corroborated elsewhere, thus: "The loss of public land occurred through connivance and active participation of successive Commissioners of Lands, Ministry of Lands officials and other government officers. The management of state corporations either abdicated or abused their responsibilities as custodians and trustees of public land. They should be identified and appropriately charged." (See "Unjust Enrichment: The Making of Land-Grabbing Millionaires", Vol. 2, a joint Report of KNHRC & the Kenya Land Alliance; available at www.oxfam.org.uk/resources/learning/landrights/east.html; accessed on November 6, 2011).

The phrase ‘land rights administration’ is conceptually, doctrinally and definitionally synonymous with ‘land administration’. The UN Land Administration Guidelines (1996) define ‘land administration’ to mean the processes of recording and disseminating information about the ownership, value and use of land and its associated resources. Dale and McLaughlin (1999) expand this definition to depict land administration as the management of land. In their view:

the processes of regulating land and property development and the use and conservation of the land, the gathering of revenues from the land through sales, leasing and taxation, and the resolving of conflicts concerning the ownership and use of land.

These definitions depict ‘land rights administration’ as a process concerned with mainly three aspects within the overall context of land management. These aspects are the ownership, the value and the use of land.³ Ownership – in a broad sense – can be seen as equivalent to land tenure as the mode in which rights to land are held; value is about all kinds of values which land might have, depending on the purpose of the valuation, the use of the land and the method of valuation; and the use of land is about all the kinds of use that can be made of the land, depending on the purpose of the use and type of classification and methodology used. As such,

³ Chapter 3 of the NLP generically covers land rights administration in Kenya. In particular, paragraph 144 of the Policy, which falls under Section 3.5., defines ‘land administration’ as the process of determining, recording and disseminating information about ownership, value and use of land. An efficient land administration system guarantees the recording of land rights, promotes tenure security, and guides land transactions. Further, it provides land users with appropriate forms of documentation to guarantee land rights, and supports the processes of land allocation, land dispute resolution and fiscal management of land. According to paragraph 145, the principal functions of land administration are: (a) Ascertainment and registration of land rights; (b) Allocation and management of land; (c) Facilitation of efficient transactions in land; (d) Development and maintenance of an efficient and accurate land information system; (e) Establishment of mechanisms for the assessment of land resources for fiscal management and revenue collection; and (f) Establishment of efficient and accessible mechanisms for resolving land disputes. Notably, paragraph 146 of the Policy recognizes the major defect in Kenya’s land administration pattern in the following bold admission: *“However, the existing land administration system has not performed these functions adequately. It is bureaucratic, expensive, undemocratic and prone to abuse, resulting in inordinate delays and injustice in the administration of land.”* For the juridical, fiscal, land management information and adjudicative components of land rights administration, see HWO Okoth-Ogendo, “Reforming Land Rights Administration Systems in Africa: A Preliminary Presentation of Issues”, World Bank... Regional Training Course, Nairobi, May 22-25, 2006 (on file with writer).

processes in land rights administration include the determination or adjudication of rights and other attributes of the land, the survey and description of the land, their detailed documentation and the provision of relevant information in support of land markets.⁴

The goal of the land rights administration process is to support the implementation of a land policy using the aspects of land management. The implementation of the land policy is a joint responsibility of private and public parties, but usually governments set an institutional framework that meets the principles of the ‘rule of law’, including a binding legal framework as a context for implementing the land management aspects of land tenure, land value and land use. The purposes of good land rights administration are to improve and guarantee security of land tenure, support the implementation of urban and rural land use planning, provide a base for land taxation, provide security for credit, guarantee the result of judicial procedures relating to land rights, reduce land disputes, develop and monitor land markets, protect state lands, facilitate land reform and produce statistical data as a basis of social and economic development (UN, 1998).⁵

In addition, rights to land may be held under statutory law, common law and customary traditions. Under statutory and common law (or the ‘formal’ system), rights to land or real property rights to land are usually defined in the relevant legislation dealing with land. Property rights to land originating from the formal system – for example ownership, freehold, leasehold, easements, encumbrances and servitudes as recognized and defined in the law – are usually protected by provisions in national Constitutions.⁶ In this formal system, people gain access to

⁴ Excerpted from Monica Lengoiboni, “*Pastoral Seasonal Land Rights in Land Administration: A Study of Northern Kenya*”, Wageningen University, ISBN 978-90-8585-866-9.

⁵ *Ibid.*

⁶ Enemark and Molen, 2008.

real property rights initially through the cadastral processes of adjudication, survey and registration. Cadastral surveys aim to determine the legal situation of land by documenting the land objects and their right holders while registration confirms the legal security of the real property rights to land.⁷

Because real property rights to land obtain a legal status through legal instruments, holders of formal rights to land can *assume* that their rights to land are protected or secured. On the other hand, customary law is a body of unwritten rules that finds its legitimacy in tradition, which may have been applied from time immemorial.⁸ The content of customary laws is diverse, can vary from community to community according to cultural, ecological, social, economic and political factors.⁹ In many customary tenure systems, people gain access to property rights to land through membership of social communities, which validate and facilitate the acquisition and safeguarding of property rights.¹⁰ This thesis focuses on land tenure as it relates to the adjudication of real rights to the land in the formal system of property rights and land rights administration.¹¹

⁷ *Ibid.*

⁸ Cotula and Chauveau, 2007.

⁹ Migot-Adholla *et al.*, 1991; Cotula and Chauveau, 2007.

¹⁰ The *Ndung'u Report (Supra n. 2, pp. 1-2)* typifies customary land holding as the predominant form of land tenure in Kenya's pre-colonial period. The report proceeds to make the following salient points about this type of tenure: (a) under African Customary land law, there was a distinction between rights of access to land and control of those rights; (b) the power of control was vested in a recognized political authority or entity within a specific community; (c) the political entity exercised these powers to allocate rights of access to individuals depending on the needs and status of the individual in question; (d) rights of access were guaranteed by the political authority on the basis of reciprocal duties performed by the rights-holder to the community; (e) rights to land were determined on a continuum of flexibility; always adjusting and changing as circumstances demanded; and (f) there was no element of exclusivity to land as found within English Property Jurisprudence.

¹¹ *Ibid.*

In Kenya, no consolidated body of land law was enacted until 1963 when a Registered Land Act¹² (the now repealed Cap. 300) came into effect. Up to that point and for a vast number of ex-settler properties the applicable regime remains the common law of England as modified by the doctrines of equity and statutes of general application. The Transfer of Property Act of India 1882 (now also repealed) was thus necessary only as part of the administrative infrastructure of land relations and plenitude of substantive land laws within the settler community.¹³

These commonalities have, in the course of time, created serious problems for the evolution of land rights, and land relations in Kenya. As regards the role of the State, and its administrative bureaucracy, serious doubts have emerged as to the competence of that organ in matters of land management and stewardship. In Kenya, the State has appropriated to itself a vast array of land rights including those in respect of which the law designated it a trustee. In Kenya, for example, trust land was often administered as a specie of government land even though relevant legislation required that the interests of customary land occupiers should override all decisions to alienate or otherwise deal with such land.¹⁴

Further, the administrative infrastructure that accompanied State presence in land matters in time became a serious impediment to land development throughout the region. For while it tended to

¹² Chapter 300 of the Laws of Kenya.

¹³ H. W. O. Okoth-Ogendo, "*Land Policy Developments in East Africa: A Survey of Recent Trends*", A Regional Overview Paper for the DFID Workshop on 'Land Rights and Sustainable Development in Sub-Saharan Africa' held at Sunningdale Park Conference Centre, Berkshire, England on 16-19 February 1999. Similarly in Uganda and Tanzania land administration institutions (including land, survey and registry offices) grew at the expense of clarity in the substantive content of land law. Consequently the content of 'mailo' freeholds or of the 'right of occupancy' remained undefined well after independence.

¹⁴ *Ibid.* In Tanzania the state system granted 'rights of occupancy' over vast tracts of land to private investors without due regard to the 'deemed rights of occupancy' of customary land holders. And in Uganda while the declaration of all land as 'public land' under the Land Reform Decree 1975 should have conferred a duty of trusteeship on the state, leases were often issued to private individuals in utter disregard of the occupancy rights of customary land users.

strengthen the already enormous powers of the State, it passed on all the costs of the inefficiencies of that organ to ordinary land-users. First, ordinary land-users found themselves subjected to administrative decisions emanating from a whole host of offices and political functionaries all of which had some sort of jurisdiction over land matters. As a result conflicts and contradictions were often endemic in land-use decision-making. Second, inefficient management by that bureaucracy tended to further frustrate proprietary decision-making. And as that bureaucracy grew abuses became routine and entrenched.¹⁵ The cost of these abuses, which were often considerable, were again invariably passed on to the land-using citizenry. Third, because most conflicts and disputes over land use including those involving substantive rights tended to be processed through that bureaucracy rather than the courts, no organised body of land law ever really emerged. The dearth of a body of case law in this area is a clear pointer to this.¹⁶ Instead legislative policy appears to support the institutionalisation of administrative and quasi-administrative mechanisms of conflict resolution in the form of tribunals, mediators and elders in matters both of substantive law and land administration.¹⁷

1.2. Background to the Study

Notwithstanding the foregoing, there has been phenomenal litigation about land in Kenya. The issues in contention stretch from communal claims of ownership of land against the individual to historical claims against attempts by the government to redress perceived or real disparities arising from claims of rights over land. The list of contentious land issues is endless. In the High Court of Kenya, in the case of *Renton Company Limited –versus- George Gachihi & Anor*¹⁸, the

¹⁵ Indeed, throughout Eastern and Southern Africa land bureaucracy became corrupt, inefficient and largely insensitive to the ordinary land using public which they were designed to serve.

¹⁶ *Supra* n. 13.

¹⁷ *Ibid.*

¹⁸ Petition No. 215 of 2010

government yet again came face to face with some of the issues concerning the enforcement of land rights that have for years been at the centre of controversy.

In this case, the Kenya Government was hard pressed to recover public land that had been allocated to private individuals otherwise known as “*private developers*”. It illustrates the difficulty not just in terms of legal challenges but methods hitherto employed by the Ministry of Lands in recovery attempts. In another earlier case, a company called Kuria Greens Limited owned by one Mr. Kuria Kanyingi, a former Member of Parliament, well-connected to powerful personalities in the government had been issued with a title to land belonging to the Kenya Agricultural Research Institute (KARI). The Registrar of Titles had attempted to revoke this title but the High Court (presided over by Mr. Justice Daniel Musinga) could hear none of it. He ruled that the Registrar had no power under any law to revoke a registered title. The *Renton case*¹⁹ only emphasized the stand taken by the courts so consistently over the years where sanctity of title formed the basis of decisions reached in litigation pertaining to land.

Renton bought a parcel of land in Nairobi for *Kshs. 18.2 Million* on April 10, 1996 from the City Council of Nairobi and almost promptly sold part of the land to other parties among them the Settlement Fund Trustees (SFT) which is a body corporate under the Ministry of Lands. The deal however aborted but not before a sum of *Kshs. 80 Million* in deposit had been paid out to Renton. According to a report by the City Planning Director the government had acquired *1,716 acres* of land and reserved the same to the Council for public utilities as part of the Nairobi Metropolitan Growth Strategy for 1973.

¹⁹ *Ibid.*

The land was later subdivided and sold to private parties among them Renton Company Limited who acquired 600 acres of the same. In the face of the growing city population, the sale of these particular parcels was clearly not in the public interest. It was therefore proposed in the report to the Registrar of Titles to revoke the titles issued thereby. The Registrar very promptly obliged and published a Gazzete notice accordingly and the affected company, feeling aggrieved, sued the Attorney General and the Registrar. The main argument by the Plaintiff was the attempted revocation was unconstitutional. The plaintiff's case was that it had obtained the land for value and would lose enormously and that the attempted revocation contravened the then section 75 of the Constitution²⁰ which generally provided for the protection of private property. It had bought the property from the council rather than the Government and the Registrar had no powers to revoke the title. The completing argument was that indeed the Registrar could revoke the title under the law and that the title had been irregularly acquired. The City Council of Nairobi held the land in trust for the public and therefore had no interest to divest it to Renton Company Limited. The land was reserved for public use and alienation to the company was against the public interest.

In the end, the court was unimpressed with the arguments by the State and ruled that there had been a violation of the rules of natural justice since the right to private property was vigilantly protected by the Constitution and the Registrar had acted *ultra vires* in purporting to revoke the title. The decision was declared null and void and the gazette notice quashed.

²⁰ The Constitution then in force has since been repealed.

In flashback, on February 2, 1963, during the Lancaster Conference²¹, as the debate for Kenya's new Independence Constitution got underway, there was a curious member of the Kenyan delegation, one Thurgood Marshall, an American civil rights activist and constitutional lawyer. He is reputed to have cunningly sneaked the Bill of Rights into the Constitution and with a stroke of the pen significantly eroded the sting in the clamour for land reform that had otherwise been at the core of the pitch for independence. Tucked in this bill of rights was a land tenure clause that allowed the white settlers to enjoy gross land ownership rights including land leases up to 999 years. This clause has haunted the land rights administration regime in Kenya. The most valuable arable land belonging to local communities had been appropriated by white settlers who now believed that their property rights therein required to be protected through entrenched provisions in the Constitution and other legislation. The nationalists, on the other hand, clamoured for land ownership patterns and technical components in favour of the local populace.

Marshall sought to adopt the Nigerian model in which the Constitution allowed the State to compulsorily acquire private property only for public use provided the state extended to the person affected just, prompt and full compensation. The underlying intention was to protect minorities from governmental action.

The practical effect over the years has been that land grievances which in the first place informed the drive to independence remained unaddressed fully or at all and the law tended to protect titles regardless of how they were acquired in the myriad of legislation some of which contain contradictory provisions.

²¹ In a new book, *Working Towards Democracy, Thurgood Marshall and the Constitution of Kenya*, Mary I Dudziak discusses the role of Thurgood Marshall in pushing for the land clause without consulting the other members of the Kenyan delegation who included Tom Mboya, R.G. Ngala, Peter Koinange, Julius Gikonyo Kiano.

Most statutes which deal with these issues were enacted within the early and mid 21st century.²² They protect titles to grabbed public land, allow acquisition of land by others in impeachment of the owner's title through adverse possession, outlaw cancellation of first registration titles even when fraudulently obtained²³ while the President until recently appeared to enjoy overriding legal mandate to allocate public/government land. Issues relating to land resource utilization and administration, minority rights, environmental conservation, individual interests, human rights and traditional cultures have since engendered serious debate and conflict.

Land is a commodity in the world of commerce. It reflects the strife that besets other commodities where scarcity and competition unleash varied challenges²⁴:

The rational exploitation of a nation's natural resources is of critical importance to national development and welfare of the people... (T)he process of development while leading to high growth of GDP and improvement of the welfare of Kenyans has had deleterious effects on the natural environment in terms of deforestation, overstocking and soil erosion, air and water pollution as well as urban blight.

The fast population growth has resulted in increasing pressure on land resources...The government is desirous to ensure that this development does not take place at the expense of the natural environment.²⁵

Consequently, therefore, efficient land rights administration will impact favourably on environmental management. The flipside is that inadequate and inefficient land rights administration would precipitate environmental degradation.

²² For instance the Registered Land Act was enacted in 1963, the Registration of Titles Act in 1920, and the Government Lands Act in 1915.

²³ See Section 143 of the Registered Land Act.

²⁴ Smokin C. Wanjala, "Problems of Land Registration and Titling in Kenya: Administrative and Political Pitfalls and their Possible Solutions", in *Essays on Land Law: The Reform Debate in Kenya*, Faculty of Law, University of Nairobi.

²⁵ See Republic of Kenya, Development Plan, 1989 – 1993, Nairobi Government Printer at p. 174.

That land rights administration in Kenya is problematic is not in dispute. This finds expression in various in various forms such as corrupt state officials, inadequate record keeping and competing claims between players in the land sector. This can be traced to the advent of colonialism and its aftermath. Imperial jurisprudence was deliberately couched to provide legal cushion for the conquest and acquisition of land through a systematic displacement of the native people. Three clear phrases stand out, that is, acquisition of land, imposition of an alien property regime and the transformation of the native land tenure. In this regard, varied but interrelated legal, political and economic instruments were employed resulting in the behemoth that has bedeviled land rights administration in Kenya.

The independence government inherited a land legacy that has continued to befuddle it in the amalgam of interests represented in the struggle for dominance over the resource. In the absence of a sound land rights administration function, chaos is inevitable. As the late Prof. Okoth Ogendo observed:

The land administration as an integral part of an organized land system is founded on a number of principle of sovereignty expressed in terms of the doctrines of territoriality and the police power of the State. The fact that political society will soon or later seek to define and defend its territorial boundaries is as elementary as it is fundamental to the constitution of the statehood. The maintenance of the state depends to no small extent, therefore, on the administration of its boundaries. At this level, therefore, the land administration function is an important factor in the maintenance of community identity.²⁶

The police power of the State draws sanctity from the assumption that the State must retain some overall control over strategic resources. The power, though, is residual to ensure that land resources are used in a manner that does not prejudice public welfare. Otherwise, without state intervention, the public good and will would surely suffer. This doctrine is an extension of the

²⁶ H.W.O.O., Okoth Ogendo, "The Legal Basis for Land Administration in an African Context" (on file with writer).

doctrine of nuisance which, while recognizing private rights does not reign to injure others and in the event of such injury there is recourse for those afflicted at their instance or that of the State. This power of the State resonates through a large mass of law that deals with land administration and processes.

The issue of sanctity of title will claim significant space in this discourse. There ought to be interdependence between the domain of private property and regulation to check excesses that flow from unadulterated application of strict sanctity to title. Prof. Okoth Ogendo observes that:-

The quality of land rights are often enhanced, not eroded, when account is taken of the overall goals and aspirations of the judicial principles which create and protect them. Land rights from whatever tenure derived are therefore only as secure and sacrosanct as the political and social context in which they are acquired, enjoyed and transacted.²⁷

With the myriad of instances where the title holder has been called upon to defend his title against competing claims from the State, community and even kinship, the concept of sanctity of title is severely compromised. And yet in sanctity of title lies the wherewithal for commerce which is crucial for economic/commercial, social and political stability. In the light of near-overwhelming enthusiasm about the doctrine of sanctity of title, there is need to examine whether the doctrine would necessarily defeat claims from the community and the State.

The answer may lie partly in the fact that land retains a unique position in Kenya's history. Wars have been fought over it. The struggle for independence was largely due to land-related grievances. This "property" conflict runs deeply in the country's social, economic, political and legal relations thereby hitherto inviting a plethora of State policy and legal interventions. Not

²⁷ *Ibid.*

surprisingly, many state initiatives touching on land have failed to conclusively resolve outstanding issues as a result of land-related grievances.

In the aftermath, successive governments have sought adjustments to policy and legal arrangements in the country's land relations.²⁸ The public retains great interest in this resource more so as nations continue to be engulfed in debate particularly in the controversial arena of public land tenure. Claims that land hitherto set aside for public purposes has been wantonly and illegally appropriated into individual hands often as a result of political manipulation have reached a crescendo. "*Land grabbing*", as the phenomenon has been ubiquitously known, has acquired a specific meaning in this scheme of things that would effectively phase out public land tenure which, in the long run and continuum, would be perilous. The State must retain some public land tenure as its "*physical development planning depends largely on the manner in which it balances private and public land rights*".²⁹ As will be seen later, the new Constitution does capture this aspect.

In view of the fact that land has been appropriated into private hands in flagrant breach of the doctrine of public trust, it is necessary to consider whether the titles conferred thereby enjoy unmitigated legal sanctity or whether there will be need for redress in terms of against whom the action lies, at what cost, if any, and in whose favour. Although the doctrine of public trust was until recently not constitutionally referred to, there is legal ambience from which this doctrine ought to assail the undesired application of the doctrine of sanctity of title.³⁰

²⁸ See the *Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land, 2004* (*Supra* n. 2).

²⁹ *Ibid.*

³⁰ For instance, Section 75 of the repealed Constitution afforded a broad basis for this inference without defining "public interest".

Where public officers are accorded discretion by laws in exercise of a mandate, the law imposes a duty that the exercise of attendant power must be “reasonable”.³¹ By dint of their job description, public officers are enjoined to take into account public interest in the exercise of power including the power to allocate land. Thus, the power the President has enjoyed to allocate unalienated government land under Section 3 the Government Lands Act³² was intended to deal with any cases arising where such allocation was necessary only in the public interest.

The reality of things is that there is colossal evidence of misuse of this power through arbitrariness by the President and the Commissioner of lands. Pursuant to the said section 3, the President could delegate his powers to the Commissioner of Lands under certain designated circumstances in the public interest. Although the new Constitution has removed this power from the President, titles issued in violation thereto will continue to pose a major problem especially in view of the emphatic normative provisions of the new Constitution and the slow/piecemeal and, at times, stalled implementation of the *Njonjo* and *Ndung’u Commission* Reports. .

A number of statutes provide that upon registration, a title is indefeasible.³³ A registered title is accorded legal invincibility. Although there is great premium for the individual in a capitalist society to feel secure in his possessions and exchange them for commensurate return³⁴, a blanket insulation of all titles against legal challenge has often led to undesired and adverse

³¹ See *Associated Provincial Picture House Ltd v. Wednesbury’s Corporation* [1947] 2 All ER 680, *R v. Secretary of State for Home Department and Anor Ex parte Hargreaves and Others* [1977] 1 All ER 397, etc.

³² Chapter 280 of the Laws of Kenya.

³³ For instance, under Sections 27, 28 and 30 of the Registered Land Act, the registration of a person as a proprietor of land or lease confers upon that person a title not capable of being defeated by any other claim unless it’s a claim founded on fraud or unless in the case of an overriding interest.

³⁴ In addition, the free transfer of property such as land encourages or leads to efficient land use for the larger good of the society.

consequences. It is an extreme notion that makes the title an end in itself and bars enquiry as to how such title arose in the first place. Under common law, the concept of indefeasibility of title would be difficult to entertain or sustain.³⁵

In the light of the foregoing, the need for reform in land rights administration is even greater.

Prof. Ogendo pertinently observes:-

Indeed any hope of economic recovery, poverty reduction and restoration of political stability in the region hangs largely on how the problem will be resolved ... Reform must be directed at the land sector as a whole.³⁶

1.3. The constitutional dimension of the problem

Land holding, access and use as well as the need to sustain the environment influenced the Constitution-making process in Kenya. Previously, Government control of land ownership as sanctioned by the repealed Constitution and related land laws was a recipe for not only inequitable land ownership, but also illegal distribution of public land. Land in cities, municipalities, townships and government lands were indiscriminately apportioned by successive Commissioners of Lands who would abuse the presidential discretion to apportion such lands. Land acquired for public use was illegally allocated through forged letters and documents.³⁷

In light of these problems created by a narrow constitutional focus on land in the old Constitution, the new Constitution has attempted to reorient/reclassify land tenure, enacted overall land policy principles and generally established a constitutional pedestal for land reform

³⁵ See discussion on the indefeasibility of title in Megarry and Wade, *The Law of Real Property* (London: Sweet and Maxwell, 6th Edition), pp. 278-290.

³⁶ Okoth-Ogendo, *op. cit.*, n. 26.

³⁷ Quoted from Ojienda & Okoth, *infra* n. 65.

in the country. The policy, constitutional and statutory facets of the reform are the subject of elaborate discussion in Chapter Four of this thesis.

1.4. Statement of the problem

This study critically deals with the question of land rights administration in Kenya in the context of apparent problems that have beset it. This is in view of the fact that there have arisen issues in this sector leading to an upsurge in litigation, the illegal and irregular exercise of power to alienate public land by those who have the authority to do so and limitations that check upon the concept of absolute proprietorship. The public interest in land has also projected itself in land rights administration thereby formenting inevitable conflict with private interests. Most of these issues remain largely unresolved. Therefore, the problem that has been investigated by the study may be summarized thus:

“How can the problems surrounding land rights administration in Kenya be resolved so as to ensure better land tenure in Kenya and sanctity of title?”

1.5. Objectives of the study

This study attempts to debate in a scholarly manner the questions that beset land rights administration in Kenya with a view to searching for solutions in a sector that is so strategic in national development. Since the advent of colonialism, foreign norms were introduced into this sector in aid of colonial objectives. Large swathes of land were alienated and an alien land regime imposed onto the indigenous legal system to protect the interests of the European settlers. At the advent of independence, a conflict was inevitable to deal with the emergent changes in land ownership in the form of a new State and a new class of landowners. The result has been tremendous confusion in land rights administration in Kenya, leaving in its wake unresolved issues. This study therefore seeks to expose those issues and suggest remedies.

1.6. Research questions

The study deals with the following germane questions:

- (a) What types of land tenure obtain under the Kenya's land law regime and how did they come to be?
- (b) What are the problems bedeviling land rights administration in Kenya both historically and contemporarily?
- (c) How can these problems be redressed?

1.7. Justification for the study

As the background to the problem of this study (Part 1.2.) reveals, there is phenomenal litigation pertaining to land encompassing a variety of issues, mainly, whether the absolute proprietorship any longer holds against other interests; to what extent should the public interest be taken into account when dealing with issues pertaining to land and what reforms are necessary to address the disarray that there is in record-keeping and the mischief hitherto evident in the actions of those whose authority it is to exercise power with regard to land. These incessant problems of Kenya's land tenure need an academic assessment which should form a basis for policy and legal intervention. Here is where the study comes in.

1.8. Hypotheses

This research has proved the following hypotheses:

- (a) That the system of administration of land rights in Kenya has been in serious disarray since the colonial times.
- (b) That unless the problems bedeviling land rights administration in Kenya are urgently resolved, Kenya's land tenure regimes will still pose major problem to the nation and her citizenry.
- (c) That the current ongoing land reforms are a major milestone in redressing the vexed "Land Question" in Kenya.

1.9. Theoretical framework

Van der Molen³⁸ has come up with a ‘**land administration theory**’ in which he argues that the introduction of land administration systems requires substantial investments. Decisions on the institutional context (embracing the legal framework and public administration) influence the costs of adjudication and boundary survey substantially. As in many government decision-making processes normally much attention is paid to policy-making and not to policy implementation and insufficient thoughts are given to the operational consequences. Aiming for state-guaranteed titles and accurate boundary survey might hamper and delay the establishment of land administration systems, as unfortunately is shown in many countries. Therefore, the politicians responsible for the land issue in government policy should have a better understanding of the possibilities of starting simple systems, then migrate to complex ones. Surveying professionals should develop the capacity to better understand the relation between societal development and the appropriateness of technology. Molen argues that it is better to start ‘quick and dirty’ and develop successfully to ‘sophisticated’ over the years, than start ‘sophisticated’ and fail.

No doubt, the present research was also informed by prevalent doctrines and theories in land rights discourse. These include the **public trust**, **eminent domain** and **police power** doctrines. Under the public trust doctrine³⁹, the government holds the radical title to all land within the territory of the State in trust for the people while eminent domain and police powers are legal antecedents of the radical title. The latter two doctrines enjoy constitutional basis in Kenya.⁴⁰

³⁸ “*Land Administration Theory: Thinking in Terms of Migration of Systems*” available at http://www.fig.net/pub/fig_2002/Ts7-5/TS7_5_vandermolen.pdf (accessed on November 13, 2011)

³⁹ See *Ndung’u Report* (*Supra.*, n. 2) p. 8 *et seq.*

⁴⁰ See Articles 40 and 66 of the new Constitution (2010)

1.10. Conceptual framework

Land aptly captures a nation's sovereignty in more ways than one. It is critical to the economic, social, and cultural development of any nation including Kenya which is the subject of enquiry in this study. Land was also a key reason for the struggle for independence in Kenya and land issues remain politically sensitive and culturally complex.⁴¹

Land administration in Africa is very much related to dual systems of land tenure, that is, the existence of various types of land tenure concepts in the same country. The basic idea is that western-style ownership consists of an individual relationship between proprietors and their land (although in many times coming from feudal relationships), while customary concepts are based on ownership by a village, family, tribe or clan to which an individual has a certain relationship.⁴² Although the majority of countries have adopted western-style statutory laws, experience shows that people's behavior does not change with respect to their own existing normative system. This is called "legal pluralism" which characterizes Kenya's land law system as seen in the multiple simultaneous operation of customary, statutory and constitutional laws in land matters.⁴³

Land administration systems are not a purpose in themselves. They are part of a broader land policy. Land policy reflects the way governments want to deal with the land issue in terms of sustainable development. This depends on the culture, history and attitude of a people. It is, therefore, worthwhile to draw up an analytical picture of the support the land administration system gives to the implementation of the land policy instruments, as follows: improving land

⁴¹ *National Land Policy (of Kenya)*, Clause 1.

⁴² See *Supra.*, n. 5.

⁴³ Molen, *op. cit.*, n. 36.

tenure security; regulating the land markets, implementing urban and rural land use planning, development and maintenance; providing a base for land taxation; and management of environmental resources.⁴⁴

The design and implementation of land administration systems depends heavily on their intended use. As governments should principally aim at working as efficient and as effective as possible, and should keep the tax burden as low as possible, it is up to the government to reflect on the true minimum requirements to land administration systems given the intended use. Part of that process is the identification of existing and intended users of the system, and asking their opinion on what they experience as sufficient for their purpose. In a nut-shell, the steps a government could take include the following: identify the true purpose of the land administration system; identify the intended users of the system and other stakeholders; identify a minimum set of requirements that the system should meet; reflect on future developments; refine the minimum set to guarantee scalability; avoid duplication of data acquisition and aim at data-sharing (infrastructure). Somehow, this way of working corresponds with the history of many land administration systems: starting as simple registers and cadastres for land taxation purposes in the 19th century, growing into more sophisticated forms serving legal security, land markets and land management.⁴⁵

⁴⁴ Kirk & Löffler & Zimmermann, 1998.

⁴⁵ *Ibid.* See also Ting & Williamson, 1999, and Van der Molen, 2002.

1.11. Literature review

The *National Land Policy*⁴⁶ (of Kenya) whose vision is to “*guide the country towards efficient, sustainable and equitable use of land for prosperity and posterity*”⁴⁷ provides an overall framework and defines the key measures required to address the critical issues of land administration, access to land, land use planning, restitution of historical injustices, environmental degradation, conflicts, unplanned proliferation of informal urban settlements, outdated legal framework, institutional framework and information management. It also addresses constitutional issues such as compulsory acquisition and development control as well as tenure. It recognizes the need for security of tenure for all Kenyans (all socio-economic groups, women, pastoral communities, informal settlement residents and other marginalized groups). As far as the policy is concerned, land administration and management problems will be addressed through streamlining and strengthening surveying and mapping systems, adjudication procedures and processes, land registration and allocation systems and land markets. To ensure access to justice in land related matters, land dispute institutions and mechanisms will be streamlined through the establishment of independent, accountable and democratic systems and mechanisms including Alternative Dispute Management regimes. Inefficient and time consuming land information systems have complicated planning, zoning and overall management of land. The Government proposes to prepare and implement national guidelines to improve the quality and quantity of land information through computerization at both national and local levels. Land issues requiring special intervention, such as historical injustices, land rights of minority communities (such as hunter-gatherers, forest-dwellers and pastoralists) and vulnerable groups will be addressed. The rights of these groups will be

⁴⁶ Disseminated by GoK through the Ministry of Lands as Sessional Paper No. 3 of 2009. Available at <http://www.lands.go.ke>.

⁴⁷ See Clause 3.

recognized and protected. Measures will be initiated to identify such groups and ensure their access to land and participation in decision making over land and land based resources. With all these issues addressed in the Policy, the document forms one of the most crucial background literature for the proposed thesis.

Lengoiboni's⁴⁸ concern is pastoral land rights in Northern Kenya. She argues that incorporating these rights in the formal system requires identifying and securing pastoralists' rights on migration corridors and dry season pastures in a manner that, first, reflects their customary practices about 'where' and 'when' they require access to the land, and second, aligning both the 'when' and the 'where' within the legal framework for both property rights and land administration. This approach may facilitate the legal recognition of pastoralists' seasonal mobility and access to required resources in the formal system. Legal empowerment also gives pastoralists the ability to use the formal law to enforce their land rights, thereby securing their access to the required seasonal resources. The nexus between this study and Lengoiboni's work is the concern for the mainstreaming of pastoralist land rights into the Kenyan formal land law regime to minimize the problems of land rights administration in Kenya as far as pastoralists are concerned. However, the departure point is that Lengoiboni's work concentrates on pastoralists' tenurial concerns while the present thesis looks at the problem(s) of land rights administration in Kenya in broader terms.

The Land and Equity Movement in Uganda (LEMU)'s Policy Discussion Paper 2 entitled "*Titling Customary Land*"⁴⁹ is useful for a comparative study of land rights administration

⁴⁸ *Supra* n. 5, p. 145. See also Lenaola *et al*, "*Land Tenure in Pastoral Lands*", in Juma and Ojwang' (eds.), *Infra.*, n. 56, at p. 231.

⁴⁹ Available at www.landinuganda.org (accessed on November 13, 2011).

between Kenya and Uganda. This paper argues that most land in Uganda is currently held under unregistered ‘customary tenure’. This means that it is privately owned, either by individuals, families or by clans. People’s rights to this land are recognized by law, although they have no documents to prove ownership, and there is no register where their land ownership is recorded. Their land has never been formally surveyed: boundaries are locally established, usually by trees or other natural markers. Local land judges or clan elders know who owns which land and they will arbitrate in cases of dispute. The ‘traditional’ rules of the people relating to land have legal force – this would include matters concerning the rights of the elderly or children, rights of passage through land, rules about borrowing and lending land, and about selling land. (However, local rules are not allowed to discriminate against women or the disabled.) However, these authorities have no power to enforce their decisions except through social pressure. The current policy of the Ugandan Government on land is to move rapidly from this system to one of freehold title. In this system, each parcel of land is mapped (and usually marked with recognized marker stones). Land ownership of each surveyed parcel is recorded in a formal land registry, and a title deed is issued, which serves as proof of ownership. The paper, however, argues that the time is not right for an accelerated process of systematic demarcation for titling, nor is this an optimal use of Government resources. Attention should rather be paid to creating a situation of land administration where people’s rights are clear, understood by all, disputes are minimalised and there are transparent processes which have widespread consent.

Okoth-Ogendo’s paper entitled “*Land Policy Developments in East Africa: A Survey of Recent Trends*”⁵⁰ adopts a regional approach to the question of land rights administration and concludes

⁵⁰ *Supra.*, n. 12.

that the last two decades have seen an unprecedented preoccupation with land policy development in sub-Saharan Africa. In Eastern and Southern Africa, for example, all countries except Angola and the Democratic Republic of the Congo (former Zaire) are currently engaged, at various levels of detail, in the evaluation and re-evaluation of their land policies, laws, agrarian structures, and support services infrastructure. While emerging paradigms do not suggest spectacular breakthroughs in the design of new land rights systems, considerable gains in land policy process formulation and the clarification of legislative goals have been made. Land rights systems are being more consolidated and rational, and the corpus of land law being made less complex and pluralistic. The paper traces the genesis and genealogy of the problem of land rights administration in Kenya to imperialism (read, colonialism) by the then British power. It contends that in Kenya, a broad and somewhat ambiguous proclamation, not unlike that issued by German authorities in Tanzania, was made in 1897 declaring all 'waste and unoccupied land' Crown Land hence vested in the imperial power. That ambiguity was, however, removed in 1899 on the advice of the Law Officers of the Crown who argued that in Kenya all land had in fact accrued to the imperial power simply by reason of assumption of jurisdiction.⁵¹ Thereafter, Kenya slipped very quickly into a territory of individual private estate owners the legitimacy of whose titles were derived from the imperial power.

Okoth-Ogendo continues to observe that by 1920, when Kenya was formally declared a colony, all land in the country, irrespective of whether it was occupied or unoccupied, was regarded by the British authorities as 'Crown Land' hence available for alienation to white settlers for use as private estates. Even when attempts were made in 1922 and thereafter to address the issue of

⁵¹ Okoth-Ogendo, *Tenants of the Crown: Evolution of Agrarian Law and Institutions in Kenya* (Nairobi: ACTS Press, 1991).

land rights security for African cultivators, the device then used, that is, to create ‘reservations’ for each ethnic group, offered no protection in the face of settler advance. And as the Maasai were to discover to their detriment, not even ‘treaties’ similar to those concluded elsewhere in Central and Southern Africa, were capable of offering protection. Land reserved for Africans for their use remained ‘Crown Land’ hence available for alienation at any time.⁵² It was only after several inquiries and commissions that a clear separation in colonial law (rather than fact) was made in 1938 between ‘Crown Land’ out of which private titles could be granted, and ‘native lands’ which were to be held in trust for those in actual occupation. In Kenya’s post-colonial phase, despite her long experience with comprehensive land tenure reforms, little effort has been made to design innovative land rights systems and complimentary infrastructure for the country. Private ownership rights derived from the sovereign (now the President) remain as legitimate as they ever were in colonial times, ‘native lands’ (now called ‘trustlands’) are still held by statutory trustees rather than directly by indigenous occupants and unalienated land remains the private property of the government, hence subject to no public trust. Attempts to convert trust land into individually held ‘absolute proprietorship’ have simply thrown the country’s tenure system into confusion.⁵³ For little clarity has as yet emerged on whether this new ‘estate’ (the ‘absolute proprietorship’) is an allodium, an estate *sui generis*, or merely a disguised fee simple! In general terms, therefore, not much has changed since 1938 even though a great deal of policy development has in fact occurred.

⁵² *Ibid.* See *Isaka Wainaina v. Murito wa Indagara*.

⁵³ Hence the problem of land rights administration in Kenya intended to be discussed by this study.

An Oxfam Report on a Regional Land Grabbing Workshop⁵⁴ attempts to conceptualize the phenomenon of “land grabbing” as involving the deliberate taking of land or rights to land from the people enabled by power imbalances as a result of the unequal distribution of resources and skewed access to information and knowledge. The report argues that land grabbing involves a great inequality in the access to land that investors get compared to local people and leads to dispossession, displacement and destitution of people and their land and it can occur within both legal and illegal frameworks. It notes that not all investment in land is bad, but that the focus should be on the common problematic investments that result in the negative outcomes of land grabbing. Due to lack of information and knowledge, many communities have lost their land resulting in disempowerment and increased marginalization of the poorest. Customary land ownership procedures are being sidelined to give way to state centered laws which also contribute to land grabbing in the region. Foreign companies mostly from Europe, USA, Canada and some Asian countries have grabbed land for investment in bio-fuel production, carbon trading and production of food for export. Speculation is another strong motivation for land grabbing for both local and foreign companies. Local and foreign governments are identified as the main facilitators of land grabbing due to their role in attracting the foreign investments and helping the investors obtain the land they want. Communities have taken actions ranging from signing petitions to court cases to resist land grabbing with success in a few cases, but big challenges still persist in many other cases. The report concludes that it requires collective and consistent efforts from all stakeholders at national, regional and international levels to successfully combat land grabbing both in Kenya and the region.

⁵⁴ Held at Lukenya Getaway, Nairobi, Kenya on 10th – 11th June 2010.

Smokin Wanjala's (ed.)⁵⁵ *Essays on Land Law* opines from the outset that to assert that the most pertinent and debatable issue in Kenya today is the 'Land Question' is not an exercise in hyperbole. From whichever vantage point, the land question has exercised the minds of scholars and policy makers alike in Kenya with ever increasing degrees of intensity. Debate on diverse land related matters, ranging from tenure to environmental conservation, continues to rage unabated. The collection of essays is a reflection of this state of affairs as it brings back into focus the various legal, political, economic and social perspectives that have influenced the land reform discourse. The five parts of the book, divided into thirteen chapters, form a thematic thread. Part one deals with the historical perspectives of the land question in Kenya. The factors that shaped the content of Kenya's land law and attendant institutional and constitutional regimes are addressed. The operationalization of the legal regimes and policy frameworks emergent from the colonial legacy is extensively dealt with in part two which explores how the State has sought to balance private and public interests in land through the instrumentality of law. Part three contains detailed analyses of the interface between tenure, land use and environmental conservation. Of great interest is chapter 9 which reviews the various theories and paradigms of land related development. Part four recasts the discussions in the preceding chapters in a manner that identifies some of the pertinent issues that should not escape the attention of the reformer. Part five is a useful comparative perspective on the entire question of land reform. The conceptual underpinnings that have influenced legal and policy approaches to land ownership and use in a number of countries in Africa are discussed in this part. The international human rights aspect to the land question which the writer explores adds the often missing link in the current discourse.

⁵⁵ *Supra.*, n. 24.

Juma and Ojwang's book⁵⁶ examines the relationship between land ownership and the sustainable use of natural resources in the context of constitutional change in Africa. It contends that access to and ownership of land is a central aspect of African development in general and political change in particular. Most of the development strategies adopted by African countries are related to the use of land. But, these strategies and the legal arrangements that come with them have not taken into account ecological principles and the importance of long-term natural resource conservation. While traditional development plans have placed emphasis on maximizing economic returns from the available land, new approaches to development are calling for the use of a conservation ethic to guide growth strategies. The way land use is governed is not simply an economic question, but also a critical aspect of the management of political affairs. It may be argued that the governance of land use is the most important political issue in most African countries. Land issues, therefore, should be a central aspect of the Constitution as the overall scheme of national governance. The main argument of the book is that current constitutional arrangements in many countries, especially in Africa, put excessive emphasis on the protection of private property rights without requiring the corresponding duty of ecological stewardship. Until recently, it had been taken for granted that private ownership and the related legal as well as administrative instruments such as land titling, were a prerequisite for increasing agricultural productivity in the developing world. The book cites a study of a number of African countries which has concluded that *"title does not equal security of tenure; the extent to which it does depends on the quality of the title surveyed and the broader context of respect*

⁵⁶ Calestous Juma and J.B. Ojwang' (eds.), *In Land We Trust: Environment, Private Property and Constitutional Change* (Nairobi: Initiatives Publishers, 1996), p. 1.

for law. Unsuccessful attempts to substitute State titles for customary entitlements may reduce security by creating normative confusion, of which the powerful may take advantage."⁵⁷

The above literature review serves to illustrate the disarrayed state into which land rights administration in Kenya has deplorably fallen. Thus, the galaxy of issues that the present study will bring to the fore cannot be under-estimated.

1.12. Research methodology

This research used both primary and secondary resources. The former included relevant legislation, ordinances and Orders-in-Council, etc while the latter encompassed books, articles and information generated from the Internet. Furthermore, the research was prescriptive and involved literature review as it progressed.

1.13. Limitations and delimitations of the study

First, the province of this study is epistemologically delimited to the topical issue of the land rights administration in Kenya. Thus, the conceptual analyses and arguments of the study were specifically delimited to this theme throughout the entire discussion. This was to ensure internal coherence and relevance of the study.

Second, time is a rather obvious limitation to any human initiative. The present study complied with the specific period of time allocated for postgraduate research by the host institution being the University of Nairobi. The researcher proved the hypotheses outlined in part 1.7. herein and collated the research findings of the study within the timeframe allocated by the host University.

⁵⁷ Bruce and Migot-Adhola, 1994, p. 260.

Another mundane limitation to the study was funding in terms of the financial resources necessary to substantively and efficaciously undertake the technical and resource-demanding aspects of this research such as data collection and collation, library visits, etc. However, serious effort was made to overcome this and related challenges.

Finally, the dynamic/fluid nature of the land reform process in Kenya means that some aspects of this study may be further research from time to time. The new statutes are still in their initial implementation stages and further developments thereon may affect the discussion and research findings of this study.

1.14. Chapter breakdown

Chapter One – Introduction

This chapter discusses various introductory issues to usher in the entire discussion of the thesis. It highlights the background to the problem of the study, the statement of the problem, objectives of the study, research questions, justification for the study, hypotheses, theoretical framework, conceptual framework, literature review, methodology, limitations and delimitations of the study and the chapter breakdown of the entire thesis.

Chapter Two – The History of Land Rights Administration in Kenya

This chapter is borne out of the truism that the best way of understanding a phenomenon is to trace and investigate its historical origin, development and undercurrents and thereafter analyze its modern manifestations. Hence, this chapter grapples with the historical problems that have

formed the nuclei of the “Land Question” in Kenya which have been aptly captured in the National Land Policy⁵⁸, thus:

Kenya has not had a single and clearly defined National Land Policy since independence. This, together with the existence of many land laws, some of which are incompatible, has resulted in a complex land management and administration system. The land question has manifested itself in many ways such as fragmentation, breakdown in land administration, disparities in land ownership and poverty. This has resulted in environmental, social, economic and political problems including deterioration in land quality, squatting and landlessness, disinheritance of some groups and individuals, urban squalor, under-utilization and abandonment of agricultural land, tenure insecurity and conflict.⁵⁹

The proposed thesis is in tandem with the foregoing official position of the Kenyan Government.

Chapter Three - Contemporary Manifestations of the Problem of Land Rights Administration in Kenya

Taking cue from Chapter Two as summarized above, Chapter Three contextualizes the problem of land rights administration in modern Kenya. The pertinent questions addressed include the following: why has there been phenomenal litigation on land in Kenya in recent times? All of a sudden, why has there been a momentous upsurge of interest in land reforms in Kenya? Which recent geo-political factors are responsible for this sweeping wave of reform? Have the pre-colonial and pre-independence land problems extended to the post-colonial Kenya? And, what are the contemporary manifestations of the problem of land rights administration in Kenya?

Chapter Four – Attempts to Resolve the Problem of Land Rights Administration in Kenya: Policy, Legal and Constitutional Dimensions

This chapter is based on a substantive analysis of the antecedents of the National Land Policy and the proprietary provisions of Kenya’s (new) Constitution being Article 40 and Chapter Five thereof. The chapter attempts to give a candid assessment of the policy and constitutional pedestal of the regime of land rights administration in Kenya and what the current wave of

⁵⁸ *Supra.*, n. 46.

⁵⁹ Excerpted from the Executive Summary to the Policy.

reforms means for the entire corpus of land law in Kenya. The new land statutes currently in vogue are analyzed.

Chapter 5 – Conclusions and Recommendations

In an attempt to make overall concluding arguments of the thesis, this chapter proffers recommendations meant to accelerate the current wave of reforms in the sphere of land rights administration (LRA) in Kenya. These horizons for reform are benchmarked against comparative reforms undertaken by progressive land rights administration regimes such as Australia, etc.

2.0. CHAPTER TWO: THE HISTORY OF LAND RIGHTS ADMINISTRATION IN KENYA

The most reliable thing in a question of social science and one that is most necessary in order really to acquire the habit of approaching this question correctly and not allowing oneself to get lost in the mass of detail or in the immense variety of conflicting opinion is to approach this question scientifically and not to forget the underlying historical connection; to examine every question from the standpoint of how the given phenomenon arose in history and what were the principal stages in its development and from this standpoint, to examine what it has become today.⁶⁰ Emphasis added.

“Let it be known to all whom it may concern that [His Majesty] has placed himself and all his territories, countries, people and subjects under the protection, rule and government of the Imperial British East Africa Company [hereinafter, ‘IBEAC’ or ‘the Company’], and has ceded to the said Company all his sovereign rights and rights of government over all his territories, countries, people and subjects and that the said Company have assumed the rights ceded to them as aforesaid, and that the said Company hereby grant their protection and the benefit of their rule and government to him, his territories, countries, people and subjects, and hereby authorize him to use the flag of the said Company as a sign of their protection. Dated at _____ this _____ day of _____ 18 ____.”⁶¹

2.1. Introduction

This chapter is borne out of the logic that the best way of understanding a phenomenon is to trace and investigate its historical origin, development and undercurrents and thereafter analyze its modern manifestations. Hence, this chapter will grapple with the historical problems that have formed the nuclei of the “Land Question” in Kenya which have been aptly captured in the National Land Policy⁶², thus:

Kenya has not had a single and clearly defined National Land Policy since independence. This, together with the existence of many land laws, some of which are incompatible, has resulted in a complex land management and administration system. The land question has manifested itself in many ways such as fragmentation, breakdown in land administration, disparities in land ownership and poverty. This has resulted in environmental, social, economic and political problems including deterioration in land quality, squatting and landlessness, disinheritance of

⁶⁰ Vladimir Lenin, *Selected Works*, Vol. 3, p. 202. These words of Lenin have stood the test of time and have helped researchers come out of the morass or detail of conflicting opinion. As far as the present chapter is concerned, it is the historical context of a phenomenon which gives it analytical frame/perspective. Hence, this chapter focuses on the historical evolution of land rights administration in Kenya.

⁶¹ This was/is the wording of the texts of the 97 treaties concluded by IBEAC with functionaries in the interior as borrowed from H.W.O. Okoth-Ogendo, *Tenants of the Crown: Evolution of Agrarian Law and Institutions in Kenya* (Nairobi: ACTS Press, 1991), pp. 20-21. It shows the overweening and dictatorial manner in which the British government colonized the Kenyan territory, ceding her “governance rights” to the Company (IBEAC).

⁶² Sessional Paper No. 3 of 2009.

some groups and individuals, urban squalor, under-utilization and abandonment of agricultural land, tenure insecurity and conflict.⁶³ *Underlining supplied.*

Against the background of the foregoing official government position, this chapter discusses the three (3) distinct phases of the history of land rights administration in Kenya.

2.2. The acquisition/alienation phase⁶⁴

The history of Kenya's land law and land rights administration is rooted in the origins of colonialism. The colonial conquest of the East African Protectorate as Kenya was then known was inspired by strategic and economic reasons specifically the European need for raw materials, and the rich agricultural potential of the region. These interests could only be realized through the assumption of effective control over the region. This 'effective control' meant the power to acquire title to and deal with land resources in the region.

The first strategy was realized on 15 June 1895 through the declaration of a Protectorate status over the region. But the declaration did not solve the problem entirely because it only vested political jurisdiction over the region in the Crown. As Okoth-Ogendo notes, "the sort of control needed was not one that merely shielded British traders from competition by nationals of other European powers, but one that gave both the traders and the imperial government the power to acquire title to and deal with the land resources of the region."⁶⁵

⁶³ Excerpted from the Executive Summary to the National Land Policy (*ibid.*). The proposed thesis is in tandem with the foregoing official position of the Kenyan Government.

⁶⁴ It runs loosely between 1897 upto 1915 and is very critical in Kenya's history. It determined the social, political and economic complexities of Kenya. A lot of the future hinges on how historical anomalies will be rectified through the new constitutional order and regime of land law/administration. This falls under the mandate of the yet-to-be formed *National Land Commission* (NLC), see Article 67(2) (e) of the Constitution.

⁶⁵ Okoth-Ogendo, *supra.*, n. 61, p. 9. See also Ojienda & Okoth, "Land and the Environment", in PLO Lumumba *et al* (eds.), *The Constitution of Kenya: Contemporary Readings* (Nrb.: LawAfrica, 2011), pp. 158-9. The latter note that "[w]hen the British declared a protectorate status over East Africa on 15th June 1895, the power to acquire title to and deal with resources in the East African region remained unresolved; the British had to conquer, enter into agreements, treaty or purchase land from the natives for it to have control over land in the East African protectorate."

Land rights could only be acquired through conquest, agreement, treaty or sale. Some of these mechanisms were only possible within the 10-mile coastal strip which had been under the jurisdiction of the Sultan of Zanzibar and which had been ceded to IBEAC through a *Concession Agreement*. The Protectorate authorities, following upon this agreement, extended the *Indian Land Acquisition Act* in 1896 to the 10-mile Coastal strip to enable the authorities to acquire land for public purposes.

Later, this Act was extended beyond the 10-mile Coastal Strip into the interior to facilitate the acquisition of land but only for purposes of the construction of the Uganda Railway (for movement between the Kenyan Coast and Uganda). In 1899, the Law Offices of the Crown revised their opinion to the effect that the earlier opinion only applied to Protectorates with a settled form of Government. Where a Protectorate did not have a settled form of government the Crown would have the power to acquire all waste and unoccupied land, make grants of unoccupied land and also make grants of freehold or leasehold of such acquired lands to the subjects of the Crown. This could be done through the instrumentality of the English *Foreign Jurisdiction Act 1890*. This revision of opinion was incorporated in the *E.A. (Lands) Order –In-Council 1901* and later in the *Crown Lands Ordinance 1902*. Through the *Crown Lands Ordinance 1902*, the Protectorate authority could acquire all waste and unoccupied land which was in fact designated as “Crown Land”.

Having resolved the legal hurdle the next task for the Protectorate authority was to identify agents of economic development. There were a number of options open to the Protectorate Government. The first option was to create a homeland in the E.A. Protectorate for the Jews who

had been displaced through various historical and religious movements. But, soon that option was discouraged and instead white settlers from Britain and South Africa were to be encouraged to move into the East African region and be given grants of free hold and loan leases. The natives had been discounted from the very beginning because they did not show any abilities for hard work.⁶⁶

From 1902 onwards, settlers were given grants of freehold and leasehold upon very flexible terms. There were 3 categories of settlers:- The first comprised of British Corporate syndicates; The second comprised of British members of the British nobility or “men of means” and eccentric aristocrats such as Lord Delamere, Hindlip, Cranworth, etc; and white farmers from South Africa.⁶⁷

But, soon, the settlers became dissatisfied with certain aspects of the *Crown Lands Ordinance 1902*. First, they argued that their titles to land were repugnant to the sanctity of title on the ground that the Ordinance contained a provision which had made it impossible for a grantee to complete acquisition of title until full payment of the purchase price. This provision had prevented the free transfer of such title to other persons. They reasoned that the Ordinance was ambivalent with regard to the person of Africans because it had declared that where title to land was acquired in circumstances where Africans were still in possession of parts of that land, their rights were to be respected until they had moved out of that land. This raised an unnecessary

⁶⁶ Even the legal/proprietary capacity of Africans to own land was contemptuously doubted. Hardinge, a colonial scholar, argued that since Africans owned land only in terms of occupational rights, it followed that unoccupied land reverted to the territorial sovereign (per Okoth-Ogendo, *supra.*, n. 61, p. 11).

⁶⁷ Okoth-Ogendo, *ibid.*, p. 15.

encumbrance or title. They argued that the best option was to reserve land for Africans far away from areas suitable for European settlement. This is the origin of the *Reserve System*.

The idea of reserves in fact was to be actualized soon in the so-called *Maasai Agreements*, first of 1904 and later 1911. Through these agreements the Maasais were said to have agreed to move out of Nairobi and its environs through their tribal leaders into Laikipia so as to make way for European Settlement. It is on record that about 12,000 Maasais and two million cattle gave way to 40 Europeans. When Laikipia was found suitable for European settlement, the Maasai's were again moved (vide the 1911 agreement) to lower parts of Laikipia. Later, these agreements were challenged in court through the celebrated case of *Ole Njogo & Others v. AG of the EA Protectorate*⁶⁸ where the Petitioner questioned the validity of those agreements on grounds that the Maasai people had not been consulted. The colonial court, citing principles of international law, technically declared that these agreement were an "act of state" between two sovereigns and could not be challengeable in a domestic court.

The settlers also complained about the position of the Indian land rights. Indians who had settled for long in the Protectorate and, unlike Africans, enjoyed the political backing of the Government of India. They had a lot of money. The settlers argued that the Ordinance should make it clear that Indians should not get title to settler's agricultural land. Instead, Indians would settle in designated parts of urban areas far away from European occupied lands.⁶⁹

⁶⁸ (1914) 5 EALR 70.

⁶⁹ This historical British disdain for Indians is well captured in Part I of the Report of the Economic Commission 1919. As Okoth-Ogendo (*supra.*, n. 61, p. 40 footnote 27) notes, the Commission which consisted of such hardliners as Lord Delamere, *et al*, went completely out of its frame of reference to pour vitriolics on the Indian community. Said the Commission, "*The Indian is an unwholesome influence ... because of his incurable repugnance to sanitation and hygiene ... the moral depravity of the Indian is equally damaging ...*". They went on to claim that Indians not only introduced and carried plague and other diseases but were inciters to crime. See also the abortive

In response to these complaints, the *Crown Lands Bill* was drafted in 1908 and which was finally promulgated into the *Crown Lands Ordinance 1915* which marked the complete disinheritation of the African people of their land by the colonial authorities. The alienation phase was thus complete. Therein lies the seeds of the Mau Mau war of Liberation (to recapture land).

The salient features of the Crown Lands Ordinance 1915 were that it declared all land in the Protectorate to be Crown land, subject to the Governor's power of alienation⁷⁰ and Africans became 'tenants at will' of the Crown. This position was made very clear in the case of *Isaka Wainaina & Anor. v. Murito wa Indagara & 2 Others*. These two parties had a dispute over land wherein the Plaintiff claimed to be the owner of such land and where he sought the ejectment of the Defendant from the said land on grounds that he was a trespasser. The AG applied to be enjoined as a party to the proceedings where he argued that the two parties did not have *locus standi*. The Chief Justice (Barth J.) declared as follows:-

In my view the effect of the Crown Lands Ordinance is clearly, *inter alia*, to vest land reserved for the use of the native tribe in the Crown. If that be so natives in occupation of such land became tenants at will of the Crown.

By 1920, when Kenya was formally declared a colony, all land in the country, irrespective of whether it was occupied or unoccupied was regarded by the British authorities as 'Crown Land' hence available for alienation to white settlers for use as private estates. Even when attempts were made in 1922 and thereafter to address the issue of land rights security for African

Public Health Bill of November 1918 whose sole object was to empower the Governor to give effect to the segregation of the races in municipalities and townships.

⁷⁰ 'Crown Land' was defined to mean all public lands in the Protectorate which are for the time being subject to the 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 the members of any native tribe.

cultivators, the device then used, i.e. to create ‘reservations’ for each ethnic group offered no protection in the face of settler advance. And as the Maasai were to discover to their detriment, not even ‘treaties’ similar to those concluded elsewhere in Central and Southern Africa, were capable of offering protection. Land reserved Africans for use remained ‘Crown Land’ hence available for alienation at any time.⁷¹

2.3. The imposition phase⁷²

To facilitate the use and transfer of property between the European settlers, *The Indian Transfer of Property Act 1882* (ITPA) was extended to the Protectorate and later the colony. This Act had been effectively and successfully used in India. Its main purpose was to define and prescribe the nature of property rights which would be vested in a holder of a freehold estate or a long-term lease. Secondly, it would regulate the manner in which these rights would be transferred between the settlers. But this Act was not a complete piece of legislation in that it did not provide a mechanism for the registration of property rights. The mechanism for registration was realized through the promulgation of the *Registration of Titles Ordinance of 1919*.

Having imposed an English property regime into the Protectorate, the only question that remained to be dealt with by the authorities was the nature of land ownership by the Africans. This question was handled through three main phases: The formal gazettement of native reserves in 1926, the conferment of a juridical status upon the reserves and the formal removal of the

⁷¹ H. W. O. Okoth-Ogendo, “*Land Policy Developments in East Africa: A Survey of Recent Trends*”, A Regional Overview Paper for the DFID Workshop on ‘Land Rights and Sustainable Development in Sub-Saharan Africa’ held at Sunningdale Park Conference Centre, Berkshire, England on 16-19 February 1999.

⁷² During this phase, alien laws and notions of property were extended to the colony for purposes of regulating land relations. It runs from 1915-1963 (pre-independence period). See also Ojienda & Okoth, *supra*. n. 63.

native reserves from the purview of the Crown Lands Ordinance. In other words, there was an introduction of dual systems of landholding and administration.

The year 1926 marked the formal gazettement of all areas which would be occupied and used by native tribes. Formal gazettement meant the spatial definition of such areas. This, however, did not define the juridical status of such native reserves. Juridical status enshrined administration and regulation of the nature of subsisting land rights. These questions were dealt by the promulgation of the *Native Lands Trust Ordinance* of 1930. This Ordinance declared that natives would have rights over their land other than rights amounting to ownership but which are recognized by native law and custom.

In terms of administration and regulation the *Native Lands Trust Ordinance* 1930 established a *Native Lands Trust Board* to administrate land relations within the native reserve. The composition of the Board was predominantly European meaning that the main intention of this scheme was to administer and conjure native land relations for the benefit of the security of tenure by the European settlers. The mind game played by the Europeans to confer a false of security upon the Africans by giving an impression that whatever land which had been set aside for the native use and occupation would be so maintained.

The falsity of this scheme became evident with the discovery of gold in Kakamega in 1932, an event which led to the amendment of the 1930 Ordinance to effect the expropriatory provision that whenever and wherever minerals would be found, such areas would remain to the Crown for

purposes of mineral extraction. The colonial authorities were, however, forced to revise the system following recommendations by the *Carter Land Commission of 1934*.

This Commission basically recommended that African land rights should be more definitively addressed through legislation and a more sense of security conferred upon the natives. These recommendations by the Commission were implemented through the promulgation of the *Native Lands Trust Ordinance of 1938*. The 1938 Ordinance removed native reserves from the purview of the *Crown Lands Ordinance* altogether and vested them exclusively in the *Native Lands Trust Board* which was constituted to comprise (of) a native Commissioner as Chairman, a European and three Africans.

An amendment was made to the *Crown Lands Ordinance* providing a definition of the White Highlands and established a *Highlands Board* for purposes of administration of the agriculturally-fertile highlands. The 1938 Ordinance, therefore, introduced the formal segregation of land ownership and administration in the colony. The main aim of this formal segregation was to resolve the ambiguity in the juridical status of land ownership and promised the Africans that for as long as it was possible, all land which had been reserved for them would no longer be encroached upon.

The 1938 Ordinance was thus a replica of the *Crown Land Ordinances*. It retained the concept of 'Crown Land' which characterized land relations in the colony right upto the independent Kenya.

All lands which were formerly crown lands are now designated as trust lands under the *Trust Lands Act* by the county councils on behalf of locals.⁷³

2.4. The transformation phase⁷⁴

It marked the changing of African land tenure relations and bringing them into line with the English notions. The transformation of African land relations was necessitated by the problems which were endemic and inherent within the reserves. The reserve system led to a breakdown of social institutions within African communities, landlessness, famine and disease in those areas, partly due to over-crowding. It also introduced a system of fixity in African land relations that the reserve system was internally and externally exclusive. The most significant development occasioned by the problems within the reserves was the emergence and spread of political agitation within African Communities based on their grievances about stolen lands.

This political agitation started to threaten the security of tenure so far enjoyed by the European settlers leading to a search for a solution by the colonial administration. The need to address these problems led to the 'transformation phase'. The colonial authorities through the *East Africa Royal Commission* and the famously called the *Swynnerton Plan of 1954 and 1955* argued that the problems then being experienced in the African reserves were not so, much a consequence of land scarcity but a consequence of defective land tenure arrangements arising out of the annexation of the Kenyan land territory by the British.

⁷³ See Section 115 of the old/repealed Constitution and compare it with Article 63(2) (d) (iii) of the present Constitution.

⁷⁴ This is a period during which African/Kenyan land tenure relations were transformed from being indigenous into English/Western. It is the tenure reform phase.

It was agreed that the system of tenure within the reserves be transformed so as to give the African people a sense of security which would make them start relating to their lands through more efficient productive mechanisms. These recommendations were implemented through the promulgation, in 1956, of the *Land Tenure Rules* and later in 1960, the *Native Lands Registration Ordinance*. The Rules and the latter ordinance provided for a system where tenure would be individualized through three processes, viz, land adjudication, land consolidation and land registration. Land adjudication entailed the ascertainment of right amounting to ownership and the annotation on the adjudication register. Land consolidation, on the other hand, entailed the merging of small units of land into larger economic units where necessary while land registration entailed the entry of the adjudicated rights onto a land register which culminated in the conferment of an absolute title upon the registered proprietor.⁷⁵

Land consolidation also solved various territorial tensions. The legislative basis of the land tenure reform began with the promulgation of the *Land Tenure Rules 1956*. What the *Native Lands Registration Ordinance* did was to provide for the quantum of rights which an individual would hold in land by virtue of that registration, the substantive law that would apply to such registered land, and to clarify what would befall African customary rights to land which had not been entered onto the register and had been noted on the register (but not amounting to ownership). Both the *Land Tenure Rules* and the *Native Lands Registration Ordinance* were forerunners to the *Registered Land Act*, Cap. 300, enacted in 1963.

⁷⁵ This was/is the genesis of the Absolute Proprietorship (AP) estate enshrined under Sections 27, 28 and 30 of the repealed *Registered Land Act*.

The impact of land tenure reform in African land relations after Independence was that it firmly grounded African land relations on notions of English property law, set the stage whereupon conflict between registered proprietors and dispossessed land-owners would be played and affected the juridical status of African customary land law within the emergent legal system. This stage/arena of conflict has presented itself to date and current land reform initiatives are meant to cushion/jettison it in more than one way.

2.5. Analytical trends

The above divergencies continue to dominate land policy, law and administration of land rights to this day. Rather than restructure land relations in accordance with new development imperatives, Kenya, instead, simply re-entrenched and sometimes expanded, the scope of colonial land policy and law. Despite her long experience with comprehensive land tenure reforms, little effort has been made to design innovative land rights systems and complementary infrastructure for the country. Private ownership rights derived from the sovereign (now the President) remain as legitimate as they ever were in colonial times, ‘native lands’ (now called ‘trustlands’) are still held by statutory trustees rather than directly by indigenous occupants and unalienated land remains the private property of the government, hence subject to no public trust.⁷⁶ Attempts to convert trust land into individually held ‘Absolute Proprietorship’ (AP) have simply thrown the country’s tenure system into confusion. Little clarity has as yet emerged on whether this new ‘estate’ is an allodium, an estate *sui generis*, or merely a disguised fee simple! In general terms, therefore, not much has changed since 1938 even though a great deal of policy development has in fact occurred.⁷⁷

⁷⁶ See Ojienda & Okoth, *supra*. n. 65, p. 164.

⁷⁷ Okoth-Ogendo, *supra*. n. 13.

Although the juridical landscape drawn by colonial and post-colonial land policies and laws appear, at first, divergent and irreconcilable, buried underneath them are a number of common issues which have influenced contemporary land policy development in East Africa. Three of these are of special significance.

The first is the role of the state in the regime of property law introduced by colonialism and perpetuated by the post-colonial state. The state became, in law, the ultimate authority in matters of control and management of land.⁷⁸ This is enshrined in the notion of ‘radical title’ which gives rise to the powers of eminent domain, compulsory acquisition and escheat/*bona vacantia*. Eminent domain remains a powerful instrument of public policy. The important of the availability and exercise of this power is that in all three countries, the state has always had an overriding interest over matters of access, control and management of land irrespective of the tenure category under which it is held or owned.⁷⁹

The second is the general contempt of customary land tenure which has been widely documented. Even before the *Swynnerton Plan of 1954* defined systematic procedures for the conversion of customary tenure into individual freeholds, official policy always contemplated the ultimate disappearance of that system. As was the case then, so it is now, the official policy of the Kenya Government is the extinguishment of customary tenure through systematic adjudication of rights and registration of title, and its replacement with a system akin to the English freehold.

⁷⁸ *Ibid.*

⁷⁹ The position is similar in Uganda and Tanzania.

The second basis of that contempt lies in the assumption that customary land tenure is merely a stage in the historical evolution of societies from 'status to contract' (Maine, 1861). Fuelled by conclusions of legal anthropologists, colonial administrators did, indeed, believe that customary land relations would wither away as Western civilization became progressively dominant in African social relations. There was, therefore, no need to acknowledge, leave alone develop customary land law, as a viable legal system. Indeed, it was even thought that by simply enacting a new system of land law - usually based on Western property notions - customary land law would simply atrophy and die!⁸⁰ Consequently, customary land tenure and land law has been systematically misinterpreted even undermined by the judiciary⁸¹, ignored by legislatures and constantly manipulated by administrators to support ideological experiment as and when this became necessary.

The third common issue is the essentially administrative character of land law in these jurisdictions. Not only has customary land law been neglected and undeveloped, the substantive content of imported English property law has not been fully developed either. The reason, of course, has been that the corpus of English common law was presumed to be so well-developed that proprietors would have no problem understanding the nature and content of rights conferred by that regime. Instead of enacting substantive property law statutes, therefore, the colonial government concentrated rather on the development of an administrative infrastructure around the prevailing land relations. The result is that much of what counted as land law was in effect

⁸⁰ Okoth-Ogendo, *supra.*, n. 13.

⁸¹ See the tragic positivist conclusions in the cases of *Obiero v. Opiyo* [1972] E.A. 227, *Esiroyo v. Esiroyo* [1973] E.A. 388, *Belinda Murai v. Amos Wainaina Civ. Appeal No. 45/1977 - C/A*.

the law of land administration, hence land tenure became part and parcel of administrative law. The ITPA was part of this administrative scheme.⁸²

These commonalities have, in the course of time, created serious problems for the evolution of land rights, and land relations in Kenya. As regards the role of the state, and its administrative bureaucracy, serious doubts have emerged as to its competence in matters of land management and stewardship. The state has simply appropriated to itself a vast array of land rights including those in respect of which the law expressly designated it a trustee. In Kenya, trust land was often administered as a specie of government land even though relevant legislation required that the interests of customary land occupiers should override all decisions to alienate or otherwise deal with such land.⁸³

Further, the administrative infrastructure that accompanied state presence in land matters in time became a serious impediment to land development throughout the region. For while it tended to strengthen the already enormous powers of the state, it passed on all the costs of the inefficiencies of that organ to ordinary land users. First, ordinary land users found themselves subjected to administrative decisions emanating from a whole host of offices and political functionaries all of which had some sort of jurisdiction over land matters. As a result conflicts and contradictions were often endemic in land use decision-making. Second, inefficient

⁸² There are definitely legally-undesirable consequences of locating land rights administration within the rubric of administrative law rather than land law. The most visible result has been decay, corruption and transactional inefficiency of the Ministry of Lands coupled with faulty human attitudes.

⁸³ Comparatively, in Tanzania the state system granted 'rights of occupancy' over vast tracts of land to private investors without due regard to the 'deemed rights of occupancy' of customary land holders. And in Uganda while the declaration of all land as 'public land' under the Land Reform Decree 1975 should have conferred a duty of trusteeship on the state, leases were often issued to private individuals in utter disregard of the occupancy rights of customary land users.

management by that bureaucracy tended to further frustrate proprietary decision-making. And, as that bureaucracy grew, abuses became routine and entrenched.⁸⁴ The cost of these abuses, which were often considerable, were again invariably passed on to the land-using public. Second, because most conflicts and disputes over land use including those involving substantive rights tended to be processed through that bureaucracy rather than the courts, no organised body of land law ever really emerged. The dearth of a body of case law in this area is a clear pointer to this.

Instead, legislative policy appears to support the institutionalisation of administrative and quasi-administrative mechanisms of conflict resolution in the form of tribunals, mediators and elders in matters both of substantive law and land administration. As regards the status of customary land tenure, all available assessments indicate that despite its resilience in the face of constant attempts to legislate it out of existence, its juridical content remains obscure, control mechanisms ineffective and transactional procedures generally inconclusive.⁸⁵ What exists in effect is simply a body of social practices regarding land which are not likely to die quickly but which are ill-adapted to the challenges of contemporary land development.

⁸⁴ Indeed throughout Eastern and Southern Africa, land bureaucracy became corrupt, inefficient and largely insensitive to the ordinary land-using public which they were designed to serve.

⁸⁵ See cases on the impact of RLA registration on prior-existing customary rights such as *Obiero v. Opiyo* [1972] E.A. 227, *Esiroyo v. Esiroyo* [1973] E.A. 388, *Belinda Murai v. Amos Wainaina Civ. Appeal No. 45/1977 - C/A*, *Mishek & Others v. Priscilla Wambui Civ. Case No. 1400/1973 and Mwangi & Another v. Mwangi* [1986] KLR 328, *Muguthu v. Muguthu HCCC No. 377/1968*, *Gathiba v. Gathiba* [2001] 2 E.A. 342, *Mumo v. Makau* [2004] 1 KLR 13, *Edward Samuel Limuli v. Marko Sabayi HCCC No. 222/1978*, *Alan Kiama v. Ndia Civ. Appeal No. 42/1978*, *Mukangu v. Mbui* [2004] 2 KLR 256, *Kanyi v. Muthiora* [1984] KLR 712, *Muthuita v. Wanoe* [1982] KLR 166 and *George Kamau Njunge v. Raphael Irungu Njunge HCCA No. 578 of 2007*. Moreover, it is not certain whether customary landholding can sustain commercial/economic uses of land such as the creation of encumbrances (mortgages and charges) and servitudes (easements, profits *a prendre* and restrictive covenants).

The fact that statutory attempts to eradicate customary land tenure practices have always focused on issues of title rather than on the dynamics of tenure relations as a whole has created further confusion in the property systems of these countries. For that focus misses the fact that the uninterrupted transmissibility of land rights between one generation and the next is a fundamental tenet of customary land tenure. To assume that the vesting of the full plenitude of land rights in individuals or groups accompanied with authority to extinguish the rights of future generations will eradicate customary tenure in the absence of any changes, express or implied, in the rules of customary land inheritance, is clearly an exercise in futility. The survival of customary land tenure practices in Kenya despite half a century of attempts at statutory conversion and the collapse of the family freehold or 'Ndunda' system in Malawi are clear proof of that futility. Experience from Kenya suggests that as long as succession to land is governed by customary law, it matters not what other law governs the determination of land rights in general.

Because these problems have evolved over a considerable period of time and in the light of rapidly changing economic, social and political conditions in the region, reform of land rights and complementary infrastructure have become inevitable and urgent. The focus of reform has been at two inter-connected levels; namely policy and substantive law. In either case the basic issues appear to be the same over the years.

The first is a governance issue and relates essentially to the role of the state and its agents in land matters. Given the fact that under the existing legal regimes the state is both an inefficient administrator and predator on land that really belongs to ordinary land users, what changes in policy and law should be effected to institutionalise an effective framework for proprietary

freedom? This issue has become especially important in the light of pressures for economic liberalisation which are currently sweeping throughout the whole of Africa.⁸⁶

The second is an old issue and concerns the search for a secure system of land tenure. The simple assumption that customary land tenure is inherently insecure and that salvation lies in its replacement with a regime of individual property modelled after English tenure systems is clearly no longer tenable. What policy and legal changes are required to ensure that tenure regimes confer social security and equity, permit economic efficiency, and facilitate the sustainable management of land? The resolution of this issue has by no means been easy especially since each of those values: security, equity, efficiency and sustainability are not always naturally reinforcing.

The third is basically normative and political and is about how best to maintain social stability and integrity in the light of revolutionary and sometimes unfamiliar changes in land relations. The issue here is how and when changes in land rights, whatever their propriety, should be introduced. Should they be incremental or comprehensive, radical or revolutionary? How are established social systems to be protected against adverse consequences of change, or compensated for loss of accrued rights and interests? As a policy matter, this issue has been handled in terms of the search for a comprehensive corpus of law that would establish a complete land rights system.⁸⁷

⁸⁶ The way in which Uganda and Tanzania have approached this issue is to revisit the doctrines of 'radical title' and 'eminent domain' so as to protect the public from any possible abuses of public trust.

⁸⁷ This is what Kenya thought it was doing in 1963, Uganda appears to have done in 1998, and Tanzania hopes to accomplish in an attempt to enact a basic land law.

The fourth relates to the nature, objective and limitation of the police power of the state i.e. the residual power of the state to ensure that proprietary land use does not injure the public good. In recent times, this issue has become central to the discourse on the sustainable management of land resources at the national and international spheres. The concern therefore is to design policies and laws that would ensure proper oversight in the exploitation of resources without erecting an impediment, thereby, to proprietary freedom.

The fifth is about the support services infrastructure necessary for a land rights system to operate effectively. This is not an issue which designers of land policies and laws often advert to. The general perspective has always been that changes in the technical description of title *per se* is all that is required for a new land rights system to function. Experience from Kenya and those countries where experimentation with new tenure regimes have been conducted, indicate clearly that reform of complementary institutions relating to physical infrastructure, supply of agrarian inputs and services are important levers in the operation of land rights systems. Although such infrastructure exist in various degrees in each country, they have not always been effectively coordinated or fully activated.

In recent times, Kenya has dealt with these issues in ways reflecting the pre-eminence of social, economic or political pressures in her land reform agenda. In general, however, two main processes have been adopted in the formulation of appropriate policies and design of laws around these and other issues. The first of these is essentially bureaucratic in nature and assumes that policy and legal development can be undertaken in the usual course of administration. This means in practice that state organs are quickly mobilised to produce policy and legal instruments

which may or may not be radical in content and consequence.⁸⁸ The second has been to rely on expert panels, task forces or investigating teams, or on comprehensive commissions of inquiry whose mandate is to generate and derive policy principles and programmes through extensive discourse and negotiation (Okoth-Ogendo, 1998a). Kenya has, at one stage or another adopted one or a combination of these processes.

Bureaucratic processes of land policy and legal development has a respectable history in Kenya. There is a long list of policy papers going back to the Swynnerton Plan of 1954 that attests to the use of this modality. At the same time commissions, task forces and investigations have been used in land policy development on many occasions. Examples of these include the Kenya Land Commission of 1934, the East Africa Royal Commission of 1953-5 and the Lawrence Commission of 1965-6. Most recently, we have had the *Commission of Inquiry into the Land Law System of Kenya on Principles of a National Land Policy Framework, Constitutional Position of Land and New Framework for Land Administration*⁸⁹ and the *Commission of Inquiry into the Illegal/Irregular Allocation of Public Land, 2004*⁹⁰.

The range of issues covered by many of these policy and legal instruments often goes beyond the five issues identified above. The manner in which these are treated, however, is not always satisfactory or rigorous. A number of land policy challenges, therefore, still remain and are likely to dominate public discourse in the twenty-first century. Four of these are readily apparent.

⁸⁸ The example of the current *National Land Policy* (*supra.*, n. 3) suffices.

⁸⁹ Popularly known as the *Njonjo Commission*.

⁹⁰ Popularly known as the *Ndung'u Commission*. See, generally, Ojienda, T., *Conveyancing Principles and Practice* (LawAfrica: Nairobi, 2008) p. 265 *et seq.*

The first is to design truly innovative tenure regimes to suit the variety of complex land use systems that characterise the Kenyan landscape. The assumption by policy makers in Kenya that a tenure system suited to agricultural communities can also serve pastoral and nomadic economies is simply not tenable. Attempts to provide for the management of pastoral areas through the establishment of group ranches in Kenya [akin to communal land associative in Uganda, and village sovereignty over land in Tanzania] do not appear to have resolved that issue either. Much more thought and design will be needed in this area of policy.

The second is to provide a framework for the orderly evolution and development of customary land tenure and law. There are three dimensions to this challenge. Firstly replacement strategies of customary tenure change must give way to evolutionary and essentially adaptive models (Bruce and Migot-Adholla, 1994). The nature and the manner of secretion into existing tenure structures of these adaptive models will require more systematic investigation. Secondly, the relative position of individuals in communities in which they live will need clarification in the design of new land rights systems. For even though it is relatively obvious that individual rights to land exist alongside community rights in all customary tenure regimes, no serious attempts have been made to address this issue in land tenure legislations in Kenya. Thirdly, the various regimes of customary tenure in existence in each country will require harmonisation into a common regime for all land held under customary law. This would make land administration and development more integrative and universal. The tendency to emphasise the unique features rather than commonalities in customary land tenure analysis must therefore be abandoned.

The third is to democratise land administration systems and structures. Note has been taken of the fact that existing land rights systems are characterised by a heavy administrative overload and that this is, by and large, inefficient and extractive. The land rights administration machinery in Kenya has become monolithic. Therefore, land policy development must seek to install a simple, accessible and broadly participatory framework for land administration irrespective of tenure category.

The fourth is to design a framework for the codification of customary land tenure rules and their integration into statutory law. Most intractable will be the codification of rules relating to the transmission of land rights in *mortis causa* and their modification to suit a statutory system of administration. This challenge must, however, be approached with caution. First, customary land tenure rules form part of community norms which govern behaviour in spheres other than land matters *per se*. Codification and integration must tread softly among those spheres. Second, although customary rules are largely unwritten, there is no reason why this should always remain so.⁹¹ Third, customary land tenure is an organic system which responds, *inter alia*, to changes in external stimuli such as technology and population growth just like any other. The process of codification and integration must not assume that customary land tenure is static or immune to change,

No satisfactory attempts have been made thus far to confront these challenges in Kenya. One hopes, however, that as more and wider (regional) experiences become available, appropriate lessons can be drawn and used in the design of appropriate land rights regimes in the country. Kenya is especially poised to confront these challenges as the new constitutional reform regime,

⁹¹The operation of the Laws of Lerotholi as part of Basotho customary land law is instructive here.

which includes the mandate of the review of the system of land rights administration, gets underway.

2.6. Current trends of classification of land

In response to the above analysis, Article 61(2) of the 2010 Constitution of Kenya now classifies and typologizes Kenya's land tenure into three: public, community or private.⁹² According to Article 62, public land is (a) land which at the effective date was unalienated government land as defined by an Act of Parliament in force at the effective date; (b) land lawfully held, used or occupied by any State organ, except any such land that is occupied by the State organ as lessee under a private lease; (c) land transferred to the State by way of sale, reversion or surrender; (d) land in respect of which no individual or community ownership can be established by any legal process; (e) land in respect of which no heir can be identified by any legal process; (f) all minerals and mineral oils as defined by law; (g) government forests other than forests to which Article 63 (2) (d) (i) applies, government game reserves, water catchment areas, national parks, government animal sanctuaries, and specially protected areas; (h) all roads and thoroughfares provided for by an Act of Parliament; (i) all rivers, lakes and other water bodies as defined by an Act of Parliament; (j) the territorial sea, the exclusive economic zone and the sea bed; (k) the continental shelf; (l) all land between the high and low water marks; (m) any land not classified as private or community land under this Constitution; and (n) any other land declared to be public land by an Act of Parliament— (i) in force at the effective date; or (ii) enacted after the effective date.

On the other hand, under Article 63(2), community land consists of— (a) land lawfully registered in the name of group representatives under the provisions of any law; (b) land

⁹² These categories have been derived from Section 3.3.1 of the NLP.

lawfully transferred to a specific community by any process of law; (c) any other land declared to be community land by an Act of Parliament; and (d) land that is— (i) lawfully held, managed or used by specific communities as community forests, grazing areas or shrines; (ii) ancestral lands and lands traditionally occupied by hunter-gatherer communities; or (iii) lawfully held as trust land by the county governments, but not including any public land held in trust by the county government under Article 62 (2). However, the *Community Land Bill* is yet to be enacted to implement this section.

Finally, in accordance with Article 64, private land consists of — (a) registered land held by any person under any freehold tenure; (b) land held by any person under leasehold tenure; and (c) any other land declared private land under an Act of Parliament.

2.7. Conclusion

The last two decades have seen an unprecedented preoccupation with land policy development in Kenya (Okoth-Ogendo, 1998a). Kenya is currently engaged, at various levels of detail, in the evaluation and re-evaluation of their land policies, laws, agrarian structures, and support services infrastructure. While emerging paradigms do not suggest spectacular breakthroughs in the design of new land rights systems, considerable gains in land policy process formulation and the clarification of legislative goals have been made. Land rights systems are being consolidated and rationalized and, thus, the corpus of land law becomes less complex and pluralistic.⁹³

Further, clear recognition has been given of the centrality of land policies in the management of sustainable development paradigms in Kenya. For this reason, one must not expect pressures for

⁹³ See the current *National Land Policy* (*supra.*, n. 3) and implementation statutes.

reform to subside. Experience suggests that policy responses to these pressures must not be regarded as a one-shot or dispositive affair. For even in conditions of relative stability in land relations, pressure for reform which lie buried within their structure will eventually explode into demands for fundamental change. How Kenya responds to that explosion is entirely a matter of context, commitment and resource availability.

3.0. CHAPTER THREE: CONTEMPORARY MANIFESTATIONS OF THE PROBLEM OF LAND RIGHTS ADMINISTRATION IN KENYA

The experience of most service users [of the Ministry of Lands (MoL) business processes] is that upon presenting applications for the processing of land transactions, once the documents are received, they go into something of a 'black hole', of curious and hard to understand processes, which make tracking of progress on documents extremely frustrating. The lack of understanding of service users of the business processes applied by the MoL in handling transactions, translates to creating a mysterious aura over the process of handling land transactions. For example, an Advocate handling a transaction uses a clerk to follow up the processes at the MoL. When asked for a progress report, the clerk advises the Advocate of the room or unit processing the documents. The Advocate, having no clue what stage that office or unit represents, can barely advise a client of the actual status of the transaction. This lack of understanding leads to frustration – as none can estimate efficiently what timelines to expect for completion of the transaction – and increases the temptation to 'jump over the seemingly tedious process', by offering some incentive to expedite the process.⁹⁴

Land administration and management problems will be addressed through streamlining and strengthening surveying and mapping systems, adjudication procedures and processes, land registration and allocation systems and land markets. To ensure access to justice in land related matters, land dispute institutions and mechanisms will be streamlined through the establishment of independent, accountable and democratic systems and mechanisms including Alternative Dispute Management regime.⁹⁵

3.1. Introduction

Taking cue from Chapter Two, this chapter contextualizes the problem of land rights administration in modern Kenya. The pertinent questions to be addressed here include the following: why has there been phenomenal litigation on land in Kenya in recent times? All of a sudden, why has there been a momentous upsurge of interest in land reforms in Kenya? What

⁹⁴ Part of the Executive Summary to the Law Society of Kenya, *Land Reform Project 2011: Report of the Audit of the Business Process in the Land Registries of Nairobi, Mombasa, Thika and Nakuru*, Feb 2012, p. 11 (copy with writer). This Report, shortly predating the new land statutes, is a graphic catalogue of the real-life problems experienced by service users of the Ministry of Lands, a prime component of whom are lawyers. The report is a major indictment on the Ministry and one can only hope that the National Land Commission being currently set up will do better.

⁹⁵ This paragraph is part of the Executive Summary to the NLP, p. x. It shows that, at least at the policy level, the Ministry of Lands has acknowledged the need for reform in the area of land rights administration in Kenya which is the key concern of this thesis. Similar reform ideas have been expressed by the civil society and members of the academy. For example, Adam Leach has wisely noted that “[t]o say reform is the way of the future, to persuade and convince others, demands vision.... The scope for reform also depends upon understanding the stake held in the land, in the nation itself”; quoted from Leach, “Land Reform and Socio-Economic Change in Kenya”, in Smokin C. Wanjala, *Essays on Land Law: The Reform Debate in Kenya* (Nairobi: UoN Faculty of Law, 2000), p. 192.

recent geo-political factors are responsible for this sweeping wave of reform? Have the pre-colonial and pre-independence land problems extended to the post-colonial Kenya? And, what are the contemporary manifestations of the problem of land rights administration in Kenya?

This chapter therefore proceeds on the basis of the entire analytical framework of the thesis whose core objective is to conduct an academic and practical diagnosis of the problems of land rights administration bedeviling Kenya both in historical and modern times. As such, this chapter presents a depiction of the extent of the problem under investigation and is informed by secondary data and the writer's professional experience.

3.2. Some notable recent land litigation in Kenya⁹⁶

3.2.1. Gitwany Investment Limited v Tajma Limited HCCC 1114/02 Nairobi

This case dealt with conflicting title deeds between the two parties and the dispute fell to Justice Lenaola to resolve. With regard to the issue of ownership and possession of the subject matter of the case, the learned judge held that Gitwany Investment Limited was the *bonafide* owner of the land while the defendant's title was invalid. The Commissioner of Lands was thereby ordered by the court to pay Tajma Limited damages of Ksh. 151.5 million together with interests and costs for the losses incurred as a result of the second invalid title which included the structures they had erected on the land. The learned judge stated that "Gitwany's lack of physical possession (of the property) did not adversely affect their right of ownership".

This case proves that even the government (read: the office of the Commissioner of Lands⁹⁷) can be ordered by the court to pay the cost of any consequential problems that may emerge from poor land rights administration in particular the double/multiple issuance of title deeds or

⁹⁶ In addition to the cases discussed hereunder, see also *Renton Company Limited v George Gachihi & Anor* Petition No. 215 of 2010 discussed in Chapter One under Background to the Study (p. 8 *et seq*).

⁹⁷ In the new land laws and statutory dispensation, this office has not been provided for meaning that it is almost defunct.

double/multiple allocation of the same property to different ‘proprietors’. Whenever there is a case of two or more title deeds over the same property or a double allocation, there must be an element of fraud, illegality and/or irregularity involved in the production of the second fraudulent title.⁹⁸ Such corruption must of necessity involve key people in the Ministry of Lands such as the office of the Commissioner of Lands because it is the government, by virtue of its radical title to all land within the territory, which is the sole repository of the power and authority to register land.

3.2.2. Major General (rtd) Dedan Njuguna Gichuru v Registrar of Titles & Others, Nairobi⁹⁹

The applicant successfully sued the 1st respondent who is an important officer in land rights administration in Nairobi area seeking the Judicial Review order of *certiorari* to quash a Gazette Notice published on 26 November 2010 by the 1st respondent revoking titles and grant to his 14 parcels of land at Tigoni area in Kiambu. In doing so, the 1st respondent, acting on grounds of ‘public interest’ reasoned that the land belonged to the Kenya Agricultural Research Institute (KARI) despite the fact that there were pending cases filed by the defunct Kenya Anti-Corruption Commission (KACC¹⁰⁰) seeking the cancellation of the titles. Justice Weldon Korir ruled thus:

As has been demonstrated, the registrar of titles does not have any power under the Constitution to make a declaration that a particular parcel of land was irregularly and unlawfully acquired.

⁹⁸ Section 143 of the repealed RLA protected first registrations of land. The section read thus: “(1) *Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake. (2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.*” Underlining supplied.

⁹⁹ Extracted from The Nairobi Law Monthly, May 2012, p. 8.

¹⁰⁰ Now, the Ethics and Anti-Corruption Commission (EACC).

Likening the present case to that of a thief caught in the act who must be taken through the due process of law rather than be sent straight to jail by the police, the learned judge concluded:

I have, however, demonstrated that even where there is clear evidence of fraud and the unregistered proprietor does not voluntarily surrender the title, the only avenue open to the 1st respondent (registrar of titles) is to go to court.

3.2.3. Commissioner of Lands & Anor v Coastal Aquaculture Ltd¹⁰¹

The Commissioner of Lands, on 5 November 1993, published Gazette Notices nos. 5689 and 5690 both dated 4 November 1993. The first Gazette Notice headed “intention to acquire land” stated that the Commissioner in pursuance of section 6(2) of the Land Acquisition Act¹⁰² was giving notice that the Government intended to acquire the respondent’s land for Tana River Wetlands. The second Gazette Notice notified that an inquiry as to the compensation would be held for persons interested in the said land. The respondent applied for an order of prohibition to restrain the Commissioner of Lands from continuing with an inquiry into claims of compensation. In granting the order the High Court stated that the Commissioner of Lands lacked jurisdiction to commence or continue with the inquiry and that the impugned Notices were defective and invalid as they did not identify the public body for whom the land was being acquired and the public purpose to be served by such acquisition. On appeal by the Commissioner of Lands, the Court of Appeal through Pall JA propounded the correct position on compulsory acquisition law as follows:

... the Gazette Notice must disclose the name of the public body for whom the land is being acquired and the public purpose for which it is being acquired. If it fails to do so, it is *ultra vires* the provisions of the Constitution and the Act. Consequently the Commissioner or other person(s) appointed by the Minister to conduct the inquiry under section 9(3) of the Act shall not have jurisdiction to inquire. I am of the view that *Re Kisima Farm Ltd (1978) KLR 36* is good law.

¹⁰¹ [2006] I KLR (E & L) 264

¹⁰² This statute has been repealed by the Land Act.

3.3. The current momentum for land reforms in Kenya

That there has been an unprecedented and momentous upsurge in land reforms in Kenya in the recent past (during the last 8 years)¹⁰³ cannot be gainsaid. Let's take a sneak preview of the process in the last 3 years: the National Land Policy (NLP) was passed by Cabinet, Parliament and finally disseminated as Sessional Paper No. 3 in August 2009. About a year later, precisely on 27 August 2010, the new Constitution was promulgated with a constitutionally-comprehensive Chapter Five on Land and Environment. Thereafter, in compliance with the implementing legislation deadline imposed by the Sixth Schedule of the Constitution, the Kenyan Parliament has already passed the Land Act¹⁰⁴, Land Registration Act¹⁰⁵ and National Land Commission Act¹⁰⁶ which are meant to implement the NLP and Chapter Five of the Constitution by changing the practice of land rights administration in Kenya. Suffice it to state that the operation of the three new land statutes commenced on 2 May 2012.

The speed with which the land reforms have been undertaken leaves even the keen analyst baffled and confirms the late Okoth-Ogendo's prediction about thirteen years ago that:

... real and urgent problems exist which the government and the people of Kenya must attend to fairly early in the next century otherwise these will become unmanageable. We believe that opportunity and momentum already exist despite some lingering prevarication in the lead Ministry... Caution is, however, necessary. Land reform is an exercise which requires a great deal of courage and ingenuity since solutions will not lie in the development of policy instruments or the enactment of laws alone however well crafted. These outcomes are usually the beginning of much more sustained processes of ... change management and internationalisation (*sic*) of values, and institutional practices. This is the complex reality which policy-makers must confront in the next Century.¹⁰⁷

¹⁰³ The month of February 2004 marked the commencement of the process of formulation of the comprehensive National Land Policy.

¹⁰⁴ Act No. 6 of 2012.

¹⁰⁵ Act No. 3 of 2012.

¹⁰⁶ Act No. 5 of 2012.

¹⁰⁷ Okoth-Ogendo, "Land Issues in Kenya: Agenda Items from the 20th Century", 30 September 1999, p. 22 (A confidential brief for the Department for International Development-DfID, Eastern Africa; on file with writer).

As if thinking in the same vein, Smokin Wanjala also opined and predicted about twenty-two years back that:

The challenges of the future are many and difficult. Nonetheless, the society must always have the foresight and courage to face them. Knowledge of the law and the ability to change the law in conformity with the demands of the times are necessary tools with which to confront the future.¹⁰⁸

Donors and development partners, too, have noted with deep interest the momentum for land reform in Kenya. Let us hear from the UK Department for International Development (DfID):

Recent government actions and policy pronouncements since the new government took charge have inspired confidence and renewed enthusiasm on land reform and the strengthening of ministry of lands and settlement as the basis for improving livelihoods for the majority of people and for sustainable development in Kenya. Enthusiasm for land reform and decentralisation of land administration is based on the government's stated intention to involve stakeholders in order to increase effectiveness and efficiency of land matters by reflecting local conditions, needs and priorities. The ministry of lands & settlement has already initiated stakeholders' meetings to help the ministry capture views for their strategic plan and reform agenda.¹⁰⁹

3.4. Contemporary manifestations of land administration (LA) problems in Kenya

The Report of the Presidential Commission of Inquiry into Illegal and Irregular Allocation of Public Land ('Ndung'u Commission') highlights how, in the previous regime, corrupt officials had massively abused the inherited colonial land administration system by illegally assigning land titles. The report recommended that the government initiates action to recover these properties.

The NLP, a brainchild of the Ndung'u and Njonjo Commission Reports, notes that inefficient and time consuming land information systems have complicated planning, zoning and overall management of land. In the policy document, the Government undertakes to prepare and implement national guidelines to improve the quality and quantity of land information through computerization at both national and local levels. This should cover all relevant aspects such as standards, geo-

¹⁰⁸ Wanjala, *infra*, n. 114 at p. 79.

¹⁰⁹ DfID, Project Completion Report & DFID Support to the Kenya Land Reform Process 11 August 2003, p. 23, available at www.mokoro.co.uk/.../dfid_support_to_kenya_land_reform_process.pdf accessed on 28 June 2012.

referencing, pre-requisites for LIMS¹¹⁰, security, intellectual property rights (IPRs) and land information dissemination and pricing.¹¹¹

Indeed, paragraph 24 of the NLP concedes that several land administration-related problems in the country have brought the land question into sharp focus. These include: (a) rapid population growth in the small farm sector, a systematic breakdown in land administration and land delivery procedures, inadequate participation by communities in the governance and management of land and natural resources; (b) rapid urbanization, general disregard for land use planning regulations, and a multiplicity of legal regimes related to land; (c) gross disparities in land ownership, gender and trans-generational discrimination in succession, transfer of land and the exclusion of women in land decision-making processes; (d) lack of capacity to gain access to clearly defined, enforceable and transferable property rights; (e) a general deterioration in land productivity in the large farm sector; and (f) inadequate environmental management and conflicts over land and land based resources.

According to paragraph 25 of the Policy, the above negative developments have had many impacts and led to low productivity and poverty. These impacts include: (a) severe land pressure and fragmentation of land holdings into uneconomic units; (b) deterioration in land quality due to poor land use practices; (c) unproductive and speculative land hoarding; (d) under-utilization and abandonment of agricultural land; (e) severe tenure insecurity due to overlapping rights; (f) disinheritance of women and vulnerable members of society, and biased decisions by land management and dispute resolution institutions; (g) landlessness and the squatter phenomenon;

¹¹⁰ In full, 'Land Information Management Systems'.

¹¹¹ Part of the Executive Summary to the NLP, p. x.

(h) uncontrolled development, urban squalor and environmental pollution; (i) wanton destruction of forests, catchment areas and areas of unique biodiversity; (j) desertification in the arid and semi-arid lands (ASAL areas); and (k) growth of extra-legal land administration processes.¹¹²

Another problematic area which has led to an upsurge of land litigation in Kenya has been compulsory acquisition of land¹¹³. The established procedures for compulsory acquisition were either abused or not adhered to leading to irregular acquisitions. In addition, the powers of the President and local authorities to set apart Trust Land were overlapping. The State's right to acquire private land for public purposes falls under the Government's power of eminent domain¹¹⁴ over all land within its territory. Closely related to compulsory acquisition is the police power which expresses the Government's right of developmental control of land use. The latter power, too, has not been spared by the problems under discussion.¹¹⁵

The process of individualization of tenure, that is, land adjudication and/or consolidation, the eventual registration of interests in land under the repealed RLA and declaration of whole

¹¹² It is the concatenation and amalgamation of these issues, *inter alia*, that fuelled the 2007/08 post-election violence (PEV) in Kenya.

¹¹³ This is the power of the State to extinguish or acquire any title or other interest in land for a public purpose, subject to prompt payment of compensation, and is provided for in the current Constitution. This power has hitherto been exercised by the Commissioner of Lands on behalf of the State. The former Constitution also permitted a modified form of acquisition in the case of Trust Land which was activated by the President or local authorities. This was/is referred to as "setting apart". Compulsory acquisition is now provided for under Part VIII of the Land Act and will be undertaken by the National Land Commission (NLC) on behalf of the national or county governments as per Section 107 *et seq* of the Act.

¹¹⁴ This power, arising out of the Government's radical title to all land within territory, can be historically traced back to the Norman Conquest of England of 1066 AD in which the victorious king declared all land in England to be falling under his jurisdiction and thereby granted his subjects only 'estates' i.e. interests in land. The relationship between an estate-holder and the Crown/Government is called 'tenure'. These historical antecedents are admirably discussed in Smokin Wanjala, *You and the Law: Land Law & Disputes in Kenya* (Nairobi: O.U.P 1990), p. 13. See also para. 52 of the NLP.

¹¹⁵ As paragraphs 49 and 50 of the NLP respectively note, development control has not been extensively used to regulate the use of land and to ensure sustainability but has been exercised by various Government agencies whose activities are uncoordinated with the result that the attendant regulatory framework has been largely ineffective. One can only hope that things will change in light of Article 66 of the new Constitution.

districts in the pre-independence period as Government land has affected customary tenure in two material respects: (a) undermining traditional resource management institutions; and (b) ignoring customary land rights not deemed to amount to ownership, such as family interests in land, the rights of “strangers” (for example *jodak* among the Luo and the *ahoi* among the Kikuyu), and communal rights to clan land (such as rights to *inkutot* land among the Maasai and rights to *kaya* forests among the Mijikenda).¹¹⁶ The NLP further notes that historically, the processes and procedures of land adjudication and consolidation were intended to extinguish customary tenure and replace it with statutory tenure. The implementation of the processes of adjudication and consolidation has been slow due to legislative and institutional constraints.¹¹⁷

At the Government-level, the Minister for Lands has been, albeit on paper, keen on addressing concerns related to customary land tenure. This is what he had to say late last year:

Over the years, the Ministry of Lands has been working towards the protection of citizens’ rights to land and providing security of tenure to individuals and groups. These rights were formerly derived from Government lands and trust lands, which have since been reclassified as Public Land and Community Land respectively by the Constitution of Kenya 2010. As a system of land tenure in Kenya, “Community Land” is a new category introduced by Article 63 of the Constitution. This Article strengthens the various provisions in the National Land Policy regarding the recognition of all modes of tenure, including customary and community land ownership. Almost all previous statutes on land were geared towards individualization of land with few or no provisions for recognizing communal rights and interests to land. To secure community lands, it is necessary to document and map existing forms of communal tenure, whether customary or contemporary, rural or urban, in consultation with the affected groups and incorporate them into broad principles that will facilitate the orderly evolution of community land law. For this reason, there is need to lay a clear framework and procedures for recognition, protection and registration of community rights to land and land-based resources taking into account [the] multiple interests of all land users.¹¹⁸

¹¹⁶ Para. 64 of the NLP. A huge bulk of land litigation in Kenya has revolved around the uncertainty of customary land tenure occasioned by registration of land. The main issue has been whether the pre-registration customary rights of use and occupation can hold against the Absolute Proprietorship estate created by registration especially in light of Section 143 of the repealed RLA and Sections 24-26 of the Land Registration Act (LRA). These contestations are still likely to beset the interpretation of Sections 24-26 of the Land Registration Act.

¹¹⁷ NLP, para. 85.

¹¹⁸ MoL, “Remarks of the Honorable James Orengo, Minister for Lands”, as delivered by his Assistant Minister, the Honorable Sylvester Bifwoli Wakholi, on the occasion of the closing ceremonies for the SECURE Project

In addition, there have been no clearly defined procedures for the allocation of land in settlement schemes under the Agriculture Act¹¹⁹ leading to manipulation of the lists of allottees and exclusion of the poor and the landless. These problems have been compounded by the lack of clearly defined procedures for identifying and keeping records of genuine squatters and landless people.¹²⁰ In addition, there are numerous cases of underutilized land by allottees.¹²¹ Furthermore, survey and mapping processes have been hampered by slow, cumbersome and outdated modes of operation, and failure to regulate non-title surveys leading to the development of incompatible maps.¹²²

Another vexing area has been the fiscal aspect of land administration in Kenya. Land taxation assessment and collection procedures under the repealed laws and existing practice do not provide effective fiscal management frameworks that encourage generating public revenue, discourage land speculation, support efficient utilization of land and provide incentives for appropriate land uses.¹²³ With specific regard to rental income taxes, the Minister for Finance in the 2012/13 Budget Statement had the following to say:

Mr. Speaker, over the recent past, many patriotic Kenyans have invested heavily in real estate thereby promoting access to housing for our people. To ensure fairness and also allow this class of citizen to

Workshop on the Community Land Rights Recognition (CLRR) Model at Kaskazi Beach Hotel, 16th September, 2011 (copy with writer).

¹¹⁹ Chapter 318 of the Laws of Kenya.

¹²⁰ The Coast region has the largest single concentration of landless indigenous people living as squatters. It has also given rise to the problem of absentee landlords/owners. The combined effect of such geo-specific problems presents a need to regulate the rights of landowners and tenants in the context of the prevalent practice of “tenancies-at-will” and good planning practice (NLP, para. 184). For example, the protracted battle between former MP Hon Basil Criticos and squatters in his vast land in Taita Taveta County of the Coast region has been much publicized by both the print and electronic media. The matter is currently locked up in court in a heated and convoluted litigation through HCCC Nos. 1019/04, 159/05 – Msa & 446/09 and has enjoined even the Taita Taveta Town Council as an Interested Party/Trustee and the Agricultural Finance Corporation (AFC) as chargee.

¹²¹ NLP, para. 151.

¹²² NLP, para. 154.

¹²³ NLP, para. 167.

contribute toward our nation building, the Kenya Revenue Authority [KRA] will shortly embark on mapping out all residential and commercial areas and implement a comprehensive strategy to ensure that all landlords are effectively brought into the tax net and all rental income taxes due are paid.¹²⁴

From the fiscal perspective, the collection of land taxes has been less than optimal with high default rates which have been fuelled by a poor fiscal culture on the part of landowners, corruption by the concerned officers, inadequate official record keeping and bureaucratic red tape. All these problems compound to make land rights administration in Kenya a nightmare.

3.5. Conclusion

This chapter has revealed that the efficiency and effectiveness of land rights administration is constrained by the political and social environment within a regime and largely determined by the ability of the civil service/local authorities to implement policy. Key elements in assessing the environment for land administration are: (a) clarity and social congruence in formally recognised rights and the ability of the regime to implement systems which recognise these rights as indicated by the proportion of the population and jurisdictional area that benefits from formal land administration services; (b) recognition afforded by the regime to informal land rights covering, where appropriate, both informal settlers and populations living under customary arrangements; and the level of disputes over land rights, the formal and alternative dispute resolution (ADR) mechanisms available to resolve these disputes and their efficiency and effectiveness. The land administration system with its information and records can be critical in dispute resolution.¹²⁵

¹²⁴ Para. 91. The 2012 Budget documents are available at www.treasury.go.ke. However, there is no indication as to when the mapping exercise will start and indeed how it will be carried out.

¹²⁵ Land Equity International, *Land Administration: Indicators of Success, Future Challenges*, Oct 2006, p. 123, available at www.landequity.com.au/publications.htm accessed on 28 June 2012.

This chapter has highlighted three major issues: (a) the meteoric rise in land litigation in Kenya in recent times, (b) the spontaneous upsurge in the momentum for land reforms in Kenya in the recent past and (c) the still prevailing manifestations of problems of land rights administration in contemporary Kenya. Thus, the focus of the next chapter shall be the capacity and potentiality of the new statutory regime to solve these problems.

4.0. CHAPTER FOUR: ATTEMPTS TO RESOLVE THE PROBLEM OF LAND RIGHTS ADMINISTRATION IN KENYA: POLICY, LEGAL AND CONSTITUTIONAL DIMENSIONS

The constitutional provisions on environmental and land use, management and access are an improvement over the repealed Constitution. The Constitution has safeguards that protect against abuse of presidential discretion in land allocations; conservation of environmental resources, addressing historical injustices, protecting group lands including ancestral lands, solving squatter problems and achieving gender parity in landholding. The constitutional provisions will however bring with it institutional reforms in terms of management and use of land and the environment.¹²⁶

4.1. Introduction

This chapter gauges the capability of the recent land reforms in Kenya to solve the land administration (LA) dilemma. The chapter is based on a substantive analysis of the antecedents of the National Land Policy, the proprietary provisions of Kenya's (new) Constitution being Article 40 and Chapter Five thereof and the new land statutes. The chapter attempts a candid assessment of the policy, constitutional and legislative pedestal of the regime of land rights administration in Kenya and what the fresh reforms mean for the entire corpus of Kenya's land law.

4.2. The policy basis for reform

In or about May 2010, the Government of Kenya (GoK) through the Ministry of Lands disseminated in the daily print media the *National Land Policy* (hereinafter, "NLP") as Sessional Paper No. 3 of 2009. This document was a product of wide stakeholder consultations in a long-drawn out process. The policy has five broad thematic areas divided into the following chapters: background information; the land question; the land policy framework; institutional framework; and policy implementation framework.

¹²⁶ Ojienda & Okoth, 'Land and the Environment', in PLO Lumumba *et al* (eds.), *The Constitution of Kenya: Contemporary Readings* (Nairobi LawAfrica 2011), 179-180. This view hints that the new Constitution has signaled a positive step in Kenya's land tenure patterns. However, the writer's focus is land administration in Kenya under the prevailing constitutional, policy and statutory regimes.

Chapter One of the Policy which contains background information has procedural and standard-setting issues such as the vision, mission, objectives, principles and guiding values of the policy. It also highlights the methodology adopted in formulating the policy.

Chapter Two of the Policy tackles the land question and appreciates the fact that land issues in Kenya are not a recent phenomenon and they traverse all categories of land tenure in Kenya, whether public, private, communitarian, corporeal or incorporeal, etc. A basic problem in Kenya is the importation and transplantation of English notions of property law such as the Fee Simple freehold into essentially agrarian communities without adequate domestication.¹²⁷

Chapter Three constitutes the bulk of the policy document. According to *Clause 28*, the NLP sets out goals and direction for the present and future management of land in Kenya. The major problem with this chapter is that it amalgamates many diverse issues into one chapter of one policy. The writer sees a problem with amalgamating both land and environment issues in one policy document and one chapter of the (new) Constitution. Land requires separate treatment due to its complex nature from a proprietary perspective. The environment does not create proprietary rights similar to land rights and interests.

¹²⁷ Again, the tragic disinheritance of Africans/Kenyans by the British colonialists posed a major problem – see Barth J. decision in *Isaka Wainaina v. Murito wa Indagara* – Africans were declared to be tenants at will of the British crown. Post-independence governments have largely been lacking political will to undertake land reforms due to, presumably, selfish interests. However, the NLP and New Constitution (2010) have made major strides in land tenure reform in Kenya. For origins of the land question, see *clause 19* of the NLP.

The attempt by this chapter of the policy to include issues of benefit-sharing from land-based resources (clause 3.3.4.1), environmental management principles (clause 3.4.3), eco-system protection principles (clause 3.4.3.2), refugees and IDPs (clause 3.6.8), HIV & AIDS (clause 3.6.10.1), etc within a “National Land Policy” is unfortunate and regrettable. The unhealthy and haphazard admixture of issues in the NLP, particularly Chapter 3 thereof, has resulted in over-fragmentation of sections within the policy which leaves the analytical reader a bit confused. It smacks of less-convincing draftsmanship. Besides, the document is a “National Land Policy” and not a “National Land and Environment Policy”. In addition, how can environment issues be handled by the Ministry of Lands? The aforesaid untidy admixture of issues poses serious implementation problems and may result in a delay in enacting the land Bills under the (new) Constitution.¹²⁸

As far as the institutional framework, discussed by Chapter Four of the Policy, is concerned, Clause 225 of the Policy appreciates the fact that the existing institutional framework for land administration and management is highly centralized, complex and exceedingly bureaucratic. LSK is on record as having publicly protested against the bureaucracy and corruption at the Lands Office(s).¹²⁹

The challenge for the institutional process of land tenure in Kenya is the proper and harmonious coordination of the administrative and dispute-settlement organs proposed by the Policy and the (new) Constitution, being the NLC and its decentralized agencies i.e. the District Land Boards and Community Land Boards, together with other relevant governmental bodies such as local

¹²⁸ Even land and environment, for instance, are taught as separate course units at law school.

¹²⁹ See, generally, LSK Land Reform Project Report 2011.

authorities. There is also bound to arise administrative controversies between the Ministry of Lands and NLC.

In line with Chapter 5 of the Policy, a *Land Reform Transformation Unit (LRTU)* was set up and is housed at the Ministry of Lands (MoL) to drive forward the agenda of implementing the Policy and attendant land reforms. Already, this unit is working hard to ensure the implementation of the policy provisions through generation of relevant bills and background research.

4.3. The constitutional basis for reform¹³⁰

The general right to property including land is enacted by Article 40 of the 2010 Constitution.

This section reads verbatim that:

- (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—
 - (a) of any description; and
 - (b) in any part of Kenya.
- (2) Parliament shall not enact a law that permits the State or any person—
 - (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
 - (b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).
- (3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—
 - (a) 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 Chapter Five; or
 - (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—
 - (i) requires prompt payment in full, of just compensation to the person; and
 - (ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.
- 4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.
- (5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.
- (6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.

¹³⁰ For a more comprehensive analysis see Ojienda & Okoth, *supra.*, n. 126.

The legal antecedents of Article 40 are amplified by the first half of Chapter Five of the Constitution which runs from Articles 60-68 (all-inclusive). Article 60 sets out the principles of land policy while Articles 61-64¹³¹ classify land tenure in Kenya into public, community and private. Article 65 pegs landholding by foreigners to leasehold tenure of a maximum of 99 years only.¹³² Article 66 embraces the land law doctrine of police powers. Article 67 establishes the NLC which is statutorily underpinned in the NLC Act¹³³. Article 68 is the specific constitutional anchor for the new statutes.

4.4. The statutory reforms

4.4.1 The Land Act¹³⁴

The Land Act opens a new chapter in the administration of land in Kenya. Prior to this statute, land administration was regulated by more than ten statutes, some with contradictory or redundant provisions. The statute was legislated to give effect to Article 68 of the Constitution, and it aims to revise, consolidate and rationalize land laws; and to provide for the sustainable administration and management of land and land based resources

This sub-section focuses on the themes of tenure system, ownership and proprietary rights over land. Land tenure refers to the terms and conditions under which access to land rights are acquired, retained, used, disposed of or transmitted. Tenure systems may be categorized as: public, individual, or customary.

¹³¹ According to Article 61(1), (1), “*All land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals.*” This presupposes a radical paradigm shift from the classical common law notion of eminent domain where this power resided in the State through its primordial entity, the Government. Thus, in Kenya’s new constitutional dispensation, the power of eminent domain has acquired a new unique utilitarian dimension, radically departing from its historical residence and vesting in the Government. The first line of application of this new thinking in land administration matters should be public land tenure.

¹³² It is submitted by the writer that this negative appropriation of land rights by way of conversion from freeholds or beyond-99 year leases into lesser leaseholds amounts to compulsory acquisition for which compensation has not been promised nor guaranteed. This provision, though appearing to be buttressed by Article 40(3) (a), offends the basic right to property/land.

¹³³ *Infra*, 4.4.3.

¹³⁴ Act No. 6 of 2012 (LA)

Section 3 (1) of LA provides that the ‘Act shall apply to all land declared as:

- (a) public land under Article 62 of the Constitution;
- (b) private land under Article 64 of the Constitution; and
- (c) community land under Article 63 of the Constitution and any other written law relating to community land.

Ownership embodies the bundle of rights that a person has over land. According to the Roman law, ownership entails the right to use, misuse, abuse, enjoy fruits from and destroy property.

Rights over land can be categorized into:

- (a) Primary rights or estates such as (i) Freehold (e.g. fee simple, fee tail, absolute proprietorship) and (ii) Leasehold
- (b) Secondary rights such as (i) servitudes, and (ii) encumbrances.

Freehold interest is recognized in the LA s 5; and is defined in s 2 as:

the unlimited right to use and dispose of land in perpetuity subject to the rights of others and the regulatory powers of the national government, county government and other relevant state organs.

Servitudes are rights that facilitate the enjoyment of a person’s property by another. They can be: easements, profits and restrictive covenants. Section 2 of Act defines an ‘easement’ to mean a non-possessory interest in another’s land that allows the holder to use the land to a particular extent, to require the proprietor to undertake an act relating to the land, or to restrict the proprietor’s use to a particular extent, and shall not include a profit.

Encumbrances include mortgages¹³⁵ and charges¹³⁶. The new statutes concentrate on charges rather than mortgages. Section 2 of the Land Act defines a “charge” as ‘an interest in land securing the payment of money or money’s worth or the fulfillment of any condition, and includes a subcharge and the instrument creating a charge, including –

(a) an informal charge, which is a written and witnessed undertaking, the clear intention of which is to charge the chargor’s land with the repayment of money or money’s worth obtained from the chargee; and

(b) a customary charge which is a type of informal charge whose undertaking has been observed by a group of people over an indefinite period of time and considered as legal and binding to such people.’

According to the Act, a charge of land will take effect as security only. Thus section 80 (1) of LA provides thus:

Upon the commencement of this Act, a charge shall have effect as a security only and shall not operate as a transfer of any interests or rights in the land from the chargor to the chargee but the chargee shall have, subject to the provisions of this Part, all the powers and remedies in case of default by the chargor and be subject to all the obligations that would be conferred or implied in a transfer of an interest in land subject to redemption.

Apart from providing for administration of land, the LA has provisions for guiding values and norms in the management of land. The National Land Commission and public officers are expected to abide by and be guided by principles such as: equity, security of land rights, sustainability, transparency, cost effective administration, conservation ecologically sensitive areas, elimination of gender discrimination, accountability and democratic decision making, technical and financial sustainability, non-discrimination and protection of the marginalized.

¹³⁵ A mortgage may be considered as ‘a disposition of some interest in land or other property as a security for the payment of a debt or the discharge of some other obligation for which it is given’. See *Santley v Wilde* (1899) 2 Ch 474.

¹³⁶ A charge has many similarities to a mortgage except that, the land in question is not conveyed to the chargee, but merely confers the chargee with certain rights, such as possession and sale, of the property charged as security for loan/credit.

In addition, the Act establishes a Land Compensation Fund to provide compensation to any person who, as a result of the implementation of any of the provisions of the Act suffers loss of rights in land. The Act also repeals the Wayleaves Act, Cap. 292 and the Land Acquisition Act, Cap. 295.

In conclusion, the Land Act provides a legal framework designed to deal with the contemporary problems facing land administration in Kenya. Compared to the previous statutes it provides for a more transparent, fair and democratized land administration system. It is to be hoped that land transactions will henceforth acquire more legality and legitimacy especially in regard to public land tenure.

4.4.2 The Land Registration Act¹³⁷

Land registration describes the systems by which matters concerning ownership, possession or other rights in land can be recorded, usually with a government agency or department, to provide evidence of title, facilitate transactions and to prevent unlawful disposal of land. A land registration system should provide order and stability in society by creating security not only for landowners and their partners but also for national and international investors and moneylenders, for traders and dealers, and for governments. Land registration entails adjudication and demarcation.

Land adjudication may be broadly considered as entailing the processes of determination of rights and other attributes of the land, the survey and description of these, their detailed documentation and the provision of relevant information in support of land markets. Different land adjudication approaches may be distinguished by whether they: are office or field based, are

¹³⁷ Act No. 3 of 2012 (LRA).

systematic area-by-area adjudication, resolve disputes speedily, use of large scale maps, mark boundary limits, or whether fees are charged to landowners.

The LRA does not alter the substantive laws relating to land adjudication, and the provisions of the Land Adjudication Act or the Land Consolidation Act shall continue to apply. Section 88 (2) of the LRA underscores the fee paying system by stating thus:

The Registrar shall not register a disposition of any land, lease or charge against which unpaid fees are recorded until such fees are paid and shall refuse to register a disposition or to issue a certificate of title or a certificate of lease if the fees payable to the Registrar under the Land Adjudication Act or the Land Consolidation Act are not recorded in the register as having been paid in full.

On the other hand, demarcation refers to the means by which boundaries are defined. According to section 20 (1) of the LRA, ‘every proprietor of land shall maintain in good order the fences, hedges, stones, pillars, beacons, walls and other features that demarcate the boundaries, pursuant to the requirements of any written law.’ The boundary points defined as per provisions of the previous statutes will therefore continue to be recognized. Additionally, the LRA has introduced geo-referencing as a mode of identifying properties leased under the Sectional Properties Act¹³⁸.

Section 54 (5) provides that:

The Registrar shall register long-term leases and issue certificates of lease over apartments, flats, maisonettes, townhouses or offices having the effect of conferring ownership, if the property comprised is properly geo-referenced and approved by the statutory body responsible for the survey of land.¹³⁹

¹³⁸ No. 21 of 1987.

¹³⁹ LSK have voiced its concern regarding this requirement of geo-referencing thus: “It is common knowledge that the limited capacity of the survey department has been a major constraint in processing deed plans in respect of sub-division of land parcels. The added responsibility for the survey department to approve geo-referenced plans for apartments, townhouses etc will require increased resources and manpower to be deployed to the survey department. Members of the Society would wish the Ministry to address this issue urgently. In the repealed Acts there was some discretion accorded to the Registrar as to whether to accept plans attached to long term leases so long as he was of the view that the plans adequately identified the parcel of Land or part of the land. The members

The LRA, like the repealed RLA and RTA, provides for titles registration. While the sub-section title to Section 26 states that the Certificate of Title will be held as conclusive evidence of proprietorship, the section itself provides that:

the certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as *prima facie* evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge...

LRA s 24 (a), (b) and the repealed RLA ss 27 and 28 have identical provisions:

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

The LRA therefore confers absolute proprietorship rights over the parcels of land upon the owner. This can be distinguished from the interests conferred by older statutes such as the GLA and ITPA which conferred common law interests such as the fee simple estate. Under the LRA, the Registrar shall issue a Certificate of Title or Certificate of Lease.

The LRA s 7 (1) establishes a land registry in each registration unit where a land register will be kept, under the administration of a land registrar. This is similar to the RLA which provided for a land register in each registration district. A Chief Land Registrar, was responsible for administering the land registries. Under the LRA, in addition to the Chief Land Registrar, County Land Registrars may be appointed and Community Land Registers established.¹⁴⁰

of the Society would wish the Ministry to consider giving back to the Registrar this discretion to ease the burden on the survey department.” Quoted from LSK Memorandum on new Land Laws dated 6 June 2012.

¹⁴⁰ Comparatively, the repealed GLA only provided for one registry in Nairobi, under the control of the Registrar of Government Lands. The repealed LTA provided for a registrar known as the Recorder of Titles, with one registry in Mombasa. The registrar under the repealed RTA was known as the Registrar of Titles with two registries, one in Nairobi and the other Mombasa.

The provisions of the LRA are somewhat similar to those of the RLA. For example, LRA s 6 (2) provides that:

every registration unit shall be divided into registration sections, which shall be identified by distinctive names, and may be further divided into blocks, which shall be given distinctive numbers or letters or combinations of numbers and letters.

Like the RLA, the LRA provides for transfers. A transfer is defined in the LRA s 2 as ‘(a) the passing of land, a lease or a charge from one party to another by an act of the parties and not by operation of the law; or (b) the instrument by which any such passing is effected.’¹⁴¹

LRA s 3, further provides that parcels in each registration section or block shall be numbered consecutively, and the name of the registration section and the number and letter of the block, if any, and the number of the parcel shall together be a sufficient reference to any parcel. LRA s 7 (1) provides that there shall be maintained, in each registration unit, a land registry in which there shall be kept the cadastral map, in addition to the land register.¹⁴²

4.4.3 The National Land Commission Act¹⁴³

The preamble to the Act announces its purpose as “*to make further provision as to the functions and powers of the National Land Commission, qualifications and procedures for appointments to the Commission; to give effect to the objects and principles of devolved government in land management and administration, and for connected purposes.*”

¹⁴¹ The repealed statutes such as the GLA, LTA and RDA did not have substantive provisions for conveyancing.

¹⁴² A ‘cadastre’ is an information system consisting of two parts: a series of maps or plans showing the size and location of all land parcels together with text records that describe the attributes of the land. It is distinguished from a land registration system in that the latter is exclusively concerned with ownership. Both a cadastre and a land register must operate within a strict legal framework, but a land register may not in practice record all land over a whole country since not all citizens may choose to register their lands. Cadastres may support either records of property rights, or the taxation of land, or the recording of land use. See Steudler D and Kaufmann J (eds) (2002). *Benchmarking Cadastral Systems*. International Federation of Surveyors (FIG).

¹⁴³ Act No. 5 of 2012 (NLCA).

The object and purpose of the Act is specified by section 3 as providing for:

- a) 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;
- (b) for the operations, powers, responsibilities and additional functions of the Commission pursuant to Article 67 (3) of the Constitution;
- (c) 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
- (d) for a linkage between the Commission, county governments and other institutions dealing with land and land related resources.

Under s 5, the functions of the NLC shall include public land management, policy-formulation, title registration, research, investigations, dispute-settlement, tax assessment and land-use planning oversight. The powers of the commission under section 6 include information-gathering, inquiries and default powers. As far as devolved land administration is concerned, the establishment of county land management boards (CLMBs) is covered by section 18.

4.5. The effect of non-repeal of certain land statutes and transitional issues

The advent of the new land laws in this country has only had a “repealing effect” on some and NOT ALL land laws. The following statutes have “survived” the radical surgery: the Land Control Act¹⁴⁴, the Landlord and Tenants (Shops, Hotels and Catering Establishments) Act¹⁴⁵

¹⁴⁴ Cap. 302. The omission of this statute in the Schedule of repealed statutes under the LRA has caused a lot of controversy resulting in litigation. In actual fact, in Petition No. 258/2011 (High Court Nrb), Justice Lenaola ordered the Attorney General to forthwith address the non-repeal of the said Act in spite of Parliament’s decision to that effect. Furthermore, the requirement of presidential consent for transfer of beach plots has been invalidated vide Constitutional Petition No. 41/2011 (High Court at Mombasa).

¹⁴⁵ Cap. 301

dealing with business premises, the Rent Restriction Act¹⁴⁶ dealing with residential premises, the Distress for Rent Act¹⁴⁷, the Sectional Properties Act¹⁴⁸ and the Equitable Mortgages Act¹⁴⁹.

It is submitted that the non-repeal of these statutes goes against the recent trend of reforms in land administration in the country. This is clearly a case of preserving old wine in the edifice of new wineskins. For example, while the Sectional Properties Act is intended to deal exclusively with sectional properties, Section 54(5) of the LRA prescribes the requirement of geo-referencing of such properties which ought to be undertaken by the often disorganized Department of Survey.

In a nutshell, in view of the transitional clauses of the LRA, i.e. Sections 104-108, there are bound to be difficulties in transiting to the new regime. Such problems especially experienced by lawyers, landowners, banks, conveyancers and land officers are what prompted the Commissioner of Lands to issue a Practice Instruction on 18 June 2012 as reproduced in the Appendix to this thesis. In light of the intended devolution of land administration in Kenya especially as envisaged by the National Land Commission Act, more difficulties are bound to arise.

4.6. Conclusion

The recent policy and legislation on land introduce profound land reforms in Kenya. The statutes if well implemented will make land tenure more secure in terms of private and communal property. They will give juridical stability to land tenure, regularize agrarian rights, and grant individual certificates of title. The Constitution, policy and statutes focus on strengthening the

¹⁴⁶ Cap. 296

¹⁴⁷ Cap. 293

¹⁴⁸ Act No. 21 of 1987

¹⁴⁹ Cap. 291

legal and institutional framework for land in Kenya, in a way that endeavors to respond to the aspiration of Kenyans. Nonetheless, critical voices are already being heard, particularly in the manner of their implementation.

CHAPTER FIVE: CONCLUSIONS AND RECOMMENDATIONS

5.1. Recap/summary of main issues

Chapter One of this thesis discussed the introductory issues meant to usher in the entire discussion of the thesis. It highlighted the meaning of ‘land rights administration’, the background to the problem, the statement of the problem, objectives of the study, research questions, justification for the study, hypotheses, theoretical framework, conceptual framework, literature review, methodology, limitations and delimitations of the study and the chapter breakdown of the entire thesis.

Subsequently, Chapter Two appreciated the truism that the best way of understanding a phenomenon is to trace and investigate its historical origin, development and undercurrents and thereafter analyze its modern manifestations. Hence, the studied the historical background of land rights administration in Kenya and looked at the same within the epochal phases of the “Land Question” in Kenya.

Taking cue from the previous chapter, Chapter Three examined the problems of land rights administration in modern Kenya through the prism of the recent upsurge of land litigation in Kenya. The analysis in this chapter appreciated the fact that increased litigation on land rights in Kenya shows deep-seated land rights administration problems which are traceable and attributable to the State and its officers.

Chapter Four focused on the policy, legal and constitutional attempts to resolve the problem of land rights administration in Kenya. It was noted that the combined hortatory and practical effects of the National Land Policy and the new land statutes portends well for the future of land

rights administration. However, as with all laws, policies and regulations, however all crafted, existing on paper is just a phenomenon. Implementation is the most difficult task because it must be contextualized within the socio-economic, cultural and political order of the society. The possible challenges/problems of implementation include the following:

- (a) Fake/fraudulent titles.
- (b) Corruption and negative human attitude.
- (c) Political interference especially in light of the *Ndung'u & Njonjo* Land Reports.
- (d) Public land grabbing.
- (e) Determination of cases pending before courts under the old/repealed laws (i.e. the previous legal regime).
- (f) Lack of public awareness.
- (g) Devolution.
- (h) Lack of appropriate technology.
- (i) Funding constraints for the budget of Ksh. 9.6 billion as per clause 271 NLP.
- (j) The unclear fate of the Fee Simple (FS) estate e.g. GLA/RTA/LTA titles¹⁵⁰.
- (k) The repealed RLA was/is yet to bear optimal results.
- (l) The requirement for geo-referencing under s 54(5) LRA.
- (m) Format for presenting conveyancing instruments pending regulations under s 110 LRA.
- (n) Coordination between NLC/MoL.
- (o) Record-keeping challenges.
- (p) The fate of mortgages since the new land statutes focus on charges.
- (q) Issues of redistributive justice.

¹⁵⁰ See Commissioner of Lands (CoL) Practice Instruction of 18 June 2012.

- (r) Landlessness.
- (s) Population explosion and rural-urban migration.
- (t) The unique Coast province land issues e.g. absentee landlords.

Thus, the recommendations suggested below are meant to overcome, *inter alia*, the above challenges of implementing the new land laws and policy.

5.2. Recommendations

Land administration requires a clear hierarchy and procedure, otherwise formal and informal authorities will compete to fill the power gaps, the result will be administrative anarchy, whose consequences are disastrous for the economic and political stability of the country. Research affirms that when a formal/legal land administration system fails, an informal system will replace it.¹⁵¹

The first problem that should be overcome is record-keeping since it forms the basis for further action. Considering the challenges Kenya faces to speed up the process of recording information on land ownership, land tenure (etc.), it seems recommendable to create simple systems that can improve over years. The steps GoK can take include¹⁵²:

- (a) Developing a long term scenario concerning which land policy instruments should be supported by land administration.
- (b) Deciding on priorities: which instruments need support first.
- (c) Deciding on the minimum content of registers and maps.
- (d) Designing simple processes and accepting imperfections.

¹⁵¹ Herbert, K., Margaret Rugadya, Esther Obaikol, (2005) "Systematic Demarcation of Customary Tenure in Uganda", Land Research Series No: 6, Associates for Development, Kampala, p. 50.

¹⁵² See Van Der Molen, *supra* n. 36.

- (e) Designing systems that are scalable.
- (f) Developing a migration path towards the intended use on the long run.
- (g) Anticipating on ICT possibilities, to be applied over years.
- (h) Avoiding accurate boundary survey as much as possible in the initial phase.
- (i) Avoiding intensive investigations to guarantee titles, accept the imperfections of recording transfer-documents ('deeds').

Following these steps as mentioned might provide a good framework for successful introduction and growth of land administration systems accompanied by the below procedural reforms:

- (a) Aggressive awareness-creation on the new land laws and policy.
- (b) Expert or specialized training of all lands officers of the MoL and NLC especially registrars and clerks who deal with land issues on a day-to-day basis.
- (c) Massive penal crackdown on illegal land markets and printers of fake and fraudulent land titles.
- (d) Attitude change (mental disarmament) of relevant officers starting with the members of the NLC and top officers of MoL.
- (e) Fast-tracking of the Community Land Bill 2011 or its incorporation into the Land Act alongside public and private land tenures.

5.3. Conclusion

The above-suggested reforms are by no means exhaustive. But, they ought not to remain in the realm of hollow proposals. The implementation journey should walk with these suggestions in mind because implementation may be a dead end if not realistically undertaken. In the long run, the new system of land administration in Kenya portends well for the future of the country.

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Ref: GEN/F/1/VOL. IV

Date: 18th June 2012

All Land Registrars
Registrars of Title and
Registrars of Government Land

PRACTICE INSTRUCTION

**RE: NATIONAL LAND COMMISSION ACT (ACT NO.5 OF 2012) THE
LAND ACT (ACT NO. 6 OF 2012) AND THE LAND REGISTRATION
ACT (ACT NO.3 OF 2012)**

The above statutes were passed by Parliament and gazetted on 2nd May 2012 which is also the commencement date.

The Land Registration Act repealed the Indian Transfer of Property Act, 1882; the Government Lands Act, (Cap 280); the Registration of Titles Act, (Cap 281); the Land Titles Act (Cap 282) and the Registered Land Act (Cap. 300). These have been the statutes governing the registration of transactions in land and other documents in our Land Registries.

Pursuant to the passing of the new Land Acts, questions have been raised by various stakeholders including Advocates, Banks and other conveyancing practitioners on the implementation. Specifically, the issue of format of the documents/instruments to be presented for registration within the transition period

before the Cabinet Secretary makes the regulations contemplated under Section 110 is apparently not clear to many of our Officers.

In this respect, your attention is drawn to the Part XII of the Land Registration Act (hereinafter referred to as LRA) on Savings and Transition.

Section 105 of the LRA deals with transiting of the Title documents

This section has clearly recognized the existing titles, which shall be deemed to be the titles under the Act until the new form is put in place to transit the titles to the Certificate of Title or Certificate of Lease contemplated by the Act.

The Registers kept by the registries shall be deemed to be the Registers under the Act until the corresponding Land Register is put in place.

Concerns have been raised with regard to the application of Section 105 (1) (c) of the LRA in relation to the repealed Government Lands Act and the Land Titles Act.

The attention of the Registrars and the parties concerned is drawn to the provisions of Section 107 (2) which upon proper interpretation is understood to mean that before the steps outlined in section 105 (1) (c) are taken, the instruments previously used for dispositions of interests in land under these two Acts shall continue to be used and the law applicable shall continue to be applied.

There are also concerns that the requirement for geo-referencing will cause practical difficulties to the ongoing developments some of whose units are already registered or are about to be submitted for valuation and registration. Kindly note that section 107 of the Land Registration Act allows lease instruments of the ongoing projects to proceed to registration without the requirement for geo-referencing.

Section 108 LRA deals with the provisions in respect of rules, orders, forms etc

This section clearly stipulates that the form of the documents or instruments presented for registration shall not change until rules, orders, regulations, directives, notices forms and notifications are put in place by the Cabinet Secretary.

The section has further made it necessary for practitioners to make relevant alterations, adaptations, qualifications and exceptions to bring their documents in conformity with the Act. The legal practitioners are therefore expected to draw their documents in conformity with the Land Act and the Land Registration Act having regard to this section.

It is expected that a registrable instrument shall have the following parts;

The heading (Title), parties, the description of property, the consideration, execution and attestation

i) The Heading:

The heading may be as follows:

- a) Documents under Registration of Land Act Cap. 300 (Repealed)

REPUBLIC OF KENYA

Date Received
For Registration

Presentation Book
No.

Registration Fees
Kshs. Paid
Receipt No.

**IN THE MATTER OF THE LAND ACT NO. 6 OF 2012,
IN THE MATTER OF THE LAND REGISTRATION ACT NO. 5 OF 2012
AND IN THE MATTER OF THE REGISTERED LAND ACT CAP 300
(REPEALED)**

CHARGE/TRANSFER/DISCHARGE/LEASE etc

TITLE NUMBER

MEMORANDUM

(Form of Charge Approved Under Section
108 of the Registered Land Act (Now Repealed)
Under Reference [.....] and
Adopted for use pursuant to Section 108 of the
Land Registration Act 2012 to conform with
The Land Registration Act 2012 and the Land Act 2012)

b) Documents under Registration of Titles Act Cap. 281 (repealed)

**REPUBLIC OF KENYA
IN THE MATTER OF THE LAND ACT NO. 6 OF 2012
IN THE MATTER OF THE LAND REGISTRATION NO. 3 OF 2012 AND
IN THE MATTER OF THE REGISTRATION OF TITLES ACT CAP 281
(REPEALED)**

CHARGE/TRANSFER/DISCHARGE/LEASE etc

TITLE NUMBER

MEMORANDUM

(Form of Charge adopted from Form J (1) of the
Registration of Titles Act (Chapter 281) (Now Repealed)
Pursuant to Section 108 of the Land Registration Act 2012)

ii) The Parties

iii) The Description of Property

The property shall be described as per the title currently subsisting pending their conversion to the Land Registration Act.

iv) The Consideration

v) Execution and Attestation.

It shall be in accordance with Sec.44 of the Land Registration Act. However, Section 44 and 45 of the Land Registration Act has not recognized execution of documents before an Advocate in respect to individuals' transactions. Take note that there is a need to ensure that all documents presented for registration are attested to by an advocate of the High Court of Kenya, Magistrate, Judge or Notary Public.

Section 54 (5) of LRA on Long Term Leases

Numerous questions have been raised on the position of long-term leases during the transition period.

Kindly be advised that until such a time that the Director of Surveys shall have put in place the process of geo – referencing and approvals contemplated under section 54 (5) of LRA, the registration of long term leases shall continue as under the previous procedures and registration regime obtaining immediately prior to the commencement of the Land Registration Act (See Section 108 of LRA).

Therefore note that the registration of documents/instruments in all our registries shall continue pending the gazettment of the new procedures, regulations, forms and provisions which are currently underway. Any matter that is not clear may be referred to the Chief Land Registrar for clarification but you are advised to desist from rejecting documents in pretext of the new land laws.

It is of outmost importance that every Registrar takes the initiative to read and understand The National Land Commission Act No. 5 of 2012, The Land Act No. 6 of 2012 and The Land Registration Act No. 3 of 2012


Z. A. MABEA
COMMISSIONER OF LANDS

CC: The Hon. Minister for Lands

The Permanent Secretary - Lands

The Chairman Law Society of Kenya

The Chief Land Registrar