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TOPIC:

REGULATION OF THE PROCEDURE FOR ACQUIRING LAND AS A TOOL FOR MONITORING LAND USE TO ATTAIN SUSTAINABLE DEVELOPMENT:

A CRITIQUE

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DECLARATION

I **Mburu Peter Ng'ang'a** do hereby declare that this project is my original work and has not been submitted to any other university or institution for any award. I HEREBY now submit the same for the award of Master of Laws Degree of the University of Nairobi.

Mburu Peter Ng'ang'a

16/11/11

This paper has been submitted for examination for the award of Master of Laws Degree for which the candidate was registered with approval of the University Supervisor.

Joy Asiema

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17/11/2011

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Finally I recognize the true support of the School of Law, University of Nairobi.

DEDICATION

This project paper is dedicated to the love of my life, my precious wife and friend Ann Ng'ang'a.

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CHAPTER ONE - PROJECT PROPOSAL

LIST OF ACRONYMS

ACC	African Conservation Centre
CBO	Community Based Organizations
COP	Conference of Parties
CWA	Community Wildlife Associations
EIA	Environmental Impact Assessment
EMCA	Environmental Management and Coordination Act
EPZ	Export Processing Zones
GLA	Government Lands Act
IDPs	Internally Displaced Persons
ILRI	International Livestock Research Institute
ITPA	Indian Transfer of Property Act
KENSUP	Kenya National Slum Upgrading Program
KWS	Kenya Wildlife Service
LTA	Land Titles Act
NBI	Nile Basin Initiative
NEMA	National Environment Management Authority
NET	National Environment Tribunal
NGO	Non-Governmental Organizations
RDA	Registration of Documents Act
RLA	Registered Land Act
RTA	Registration of Titles Act
SEC	Settlement Executive Committee

UNCCD	United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa
UNCED	United Nations Conference on Environment and Development
UNFCCC	United Nations Framework Convention on Climate Change
WCL	Wildlife Conservation Lease
WSSD	World Summit on sustainable development

LIST OF STATUTES

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LIST OF CONVENTIONS AND INTERNATIONAL INSTRUMENTS

Convention on Wetlands of International Importance Especially as Waterfowl Habitat1 (The Ramsar Convention) United Nations Documents 996 UNTS 2ys (1976) reprinted in II International Legal Materials 97 (Entered into force on 21 December, 1975).

The United Nations Framework Convention on Climate Change (UNFCCC). United Nations Doc.1992. reprinted in 31 International Legal Materials 849. entered into force 21 Mar. 1994.

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United Nations Rio Declaration on Environment and Development. (Rio Declaration) United Nations Doc. 1992. A/CONF. 151/26/Rev. 1 (Vol. l)/CORR. 1 and 31 I.L.M. 874 (1992).

The Stockholm Declaration of Principles for the Preservation and Enhancement of the Human Environment, (Stockholm Declaration) 1972; United Nations Doc. A/CONF.48/14 (1972).

Vienna Convention on the Protection of the Ozone Layer, 1985 United Nations Doc. 26 International Legal Materials 1529 (1987)

The Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Western Indian Ocean. (The Nairobi Convention). 1985. I E 1385, 46

United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa. (UNCCD) 1994; reprinted in 33 International Legal Materials. 1328. (1994) and 1954 U.N.T.S. 3, entered into force 26 Dec. 1996.

The United Nations Convention on International Trade in Endangered Species of Fauna and Flora [CITES] (Lausanne, Switzerland, 3 Mar. 1973) 993 U.N.T.S. 243, entered into force 1 July 1975.

Vienna Convention for the Protection of the Ozone Layer (Vienna, 22 Mar. 1985) 1513 U.N.T.S. 293, T.I.A.S. No. 11,087, 26 I.L.M. 1516 (1987), entered into force 22 Sept. 1988.

Kyoto Protocol to the United Nations Framework Convention on Climate Change (Kyoto, 11 Dec. 1997) Decision 1/CP.3 of the Conference of the State Parties to the Convention at its third Session.

Report of the World Commission on Environment and Development: *Our Common Future* . UN Documents. 1987. A/42/427.

TABLE OF CASES

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Waverly Borough Council v Fletcher (1995) 4 All E.R 756.

Wiltshear v Cottrell, (1853) I E. & B. 674.

1.1 INTRODUCTION

Land is very central for human survival and development. In fact, it is so elemental to human survival that it can be said that it is where life begins and it is where life ends. Land is the source of livelihood and to many a Kenyan it is the source of food, shelter, clothing and even medicine. Consequently the procedure of acquisition of rights or interest over the same cannot be any less significant.

In that regard the Constitution of Kenya 2010 does recognize such right and provides for the same under Article 40. This is the right to own property as a fundamental human right under the Bill of Rights. More-so, chapter 5 of the supreme law is dedicated to land and environment. We shall have a greater in-depth of this at a later stage of this paper.

Historically, the colonization of African countries by imperialists discouraged the communal life of African communities. More particularly, the colonialists sought to eliminate the idea of communal land ownership by introducing individual land ownership[1]. They argued that communal land ownership was primitive and unproductive, throughout the period of colonization the ways, behaviors and laws of the Briton were instilled in us. We have perfected the same over the years and concerning land registration, we wholesomely adopted their laws and practice with just some minor amendments.[2]

"It is argued that generally proprietary land use particularly under tenure regimes that grant rights to individuals, will guarantee proper and sustainable management of land, this clearly has

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[1] Okoth-Ogendo H.W.O., 2000. Legislative Approaches to Customary Tenure and Reform in East Africa InToulmin C. and Quan J., 2000. *Evolving Land Rights Policy and Tenure in Africa.* London: IIED. p. 127.

[2] The Registered Land Act (Cap 300) is one of the land registration laws that was made for the locals to a greater extent having been made for the native African. This particular Act enacted in 1963 was to be applied in the native reserves and as such, the instruments prescribed therein are simplified forms that could easily be filled for transactions affecting Africans.

not been the case in Kenya. Evidence abounds to the effect that the sustainable use and management of land is a partnership between proprietors, occupiers and the state."[3]

A key pillar of individual land ownership system is the registration of interests one claims over piece of land. For one to claim any form of land ownership, it is paramount to have his/her interest put down in writing. Acquiring such interests can be through government allocation, transmission or transfer which are all registrable in the Government lands office. The process of land acquisition at allocation is started off by the application to the Commissioner of Lands by the interested parties. The physical planning is then carried out followed by the survey during which time the allottee will be called upon to pay allotment fee.[4] Valuation is done and the process is finalized at the registration and issuance of the title documents to the successful applicant.

Registration of land refers to the process through which interests in land are recorded and it happens to be the final stage in the process of acquisition. The argument for registration is that it injects certainty in the sphere of conveyancing and security of tenure. Registration of land transactions has the effect of passing interests in land from a person to another depending on the nature of such transaction. This thus spells the importance of land transactions as a tool to deliver certainty in conveyancing.

This study underscores the importance of the process of land acquisition, registration and the regulations thereof. It is precisely for this reason that I will strive to demonstrate that this process

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[3] Commission of Inquiry into the Land law system of Kenya , 2002. *Report on the Principles of a National Land Policy Framework and Constitutional Position of Land and New Institutional Framework For Land Administration.* Nairobi: Government Printer. Article 176 (Commonly referred to as the Njonjo Commission report).

[4] Ministry of Lands., 1991. *Hand book on Land use Planning, Administration and development Procedures.* Unpublished.

can be regulated and be turned into a tool to monitor land use as a way of achieving sustainable use of land and other natural resources based on land. In my purposive sampling I shall attempt to indicate how irregular transfer and allocation of land has been used to degrade, abuse and use natural resources un-sustainably, and also how the same can be regulated to sustainably manage land. In other words, to reverse the harm.

Where the use of land is not monitored during the procedure and process of effecting say a transfer, people will continue to use land away from the recommended physical development plans. This has in effect resulted in public land being illegally or irregularly allocated and land meant for educational purposes being put to some industrial or any other user for that matter. Plots initially allocated for single dwelling units have been developed into multi-dwelling units thereby straining the amenities including roads, water supply, electric supply and sewer lines resulting into overcrowding, high crime rate and generally lower standards of living.[5]

This paper dares to believe and indeed propose a way forward that will make use of the process of acquiring land as a tool to implement, effectuate and enforce the local and regional development plans that will result in sustainable use of land and thus attain sustainable development.

1.2 BACKGROUND INFORMATION

Prior to the advent of colonialism, land ownership in Kenya was communal. The community owned all land and no single individual could claim ownership of any part of it whilst everyone had the rights of access. The declaration of Kenya as a British protectorate in the year 1895

[5] Interview with Jessinca of KENSUP at Nairobi on the 7th of October 2011.

brought along with it the concept of individual land ownership from the English land system. Colonialism brought with it a free enterprise economy. A characteristic feature of that mode of production is that it is individualistic.

In 1915, the Crown Lands Ordinance was enacted (which is the current Government Lands Act)[6] (GLA) making provisions for allocating land to private owners, regulating the leasing and other modes of disposal of Government land. Of most importance to our history is that all land in Kenya was declared Crown Land,[7] and only the King of Britain could allocate the same to individuals with the radical title remaining with the Monarch. The imperial authority vested all the absolute land rights in the British Crown.[8] This was to be followed by the enactment of the 1908 Land Titles Act[9] (LTA) and the Registration of Titles Act[10] (RTA) of 1920 with Registration of Documents Act[11] (RDA) having come earlier in 1902. At independence in 1963, The Registered Land Act (RLA) was enacted to make further and better provisions for the registration of title to land and for the regulation of dealings relating to land so registered.

In 1968 the Land Adjudication Act[12] was enacted to provide for the ascertainment and recording of rights and interests in Trust Land. In the same year, the Land (Group Representatives) Act[13] was enacted to provide for the incorporation of groups who had been registered as owners of land under the Land Adjudication Act. Much later in 2007 the newest land registration regime namely the Sectional Properties Act[14] was enacted. Enactment of this statute symbolizes the increased demand for land and housing especially in the urban areas. This is due to the fact that it

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6 Chapter 280 of the laws of Kenya.
7 Supra, note 4.
8 Supra, note 1 page 123.
9 Chapter 282 of the laws of Kenya.
10 Chapter 281 of the laws of Kenya.
11 Chapter 285 of the laws of Kenya.
12 Chapter 284 of the Laws of Kenya.
13 Chapter 287 of the laws of Kenya.
14 Act No. 21 of 1987 of the laws of Kenya.

is to facilitate issuance of title documents, not for land, but rather for flats and apartments each with a title in a block of residential units.

The enactment of these statutes form the legal land registration regimes that exist in Kenya today. By order of precedence they include the RDA, GLA, LTA, RTA, RLA and The Sectional Properties Act. These different legal regimes that exist are not in essence distinct and different spheres from one another, rather, they came up in attempts to cure the weaknesses of preceding statutes and therefore they are complementary. In fact, much of the improvements they brought about could have easily been achieved through amendment of the Acts that had come first in time.

The statutes above referred have all stipulated and laid out different instruments of acquiring interests in land varying from voluntary transfer (between a willing buyer and a willing seller purely a market forces act), transmission, leasing, gift, partition, subdivision, exchange, charges and mortgages and even surrender to the Government. These statutes have little or no provisions at all on the concept of sustainable use during the process of registration of interests in land.

Section 3 of the Environment Management and Coordination Act[15] (EMCA) and Article 42 of Kenya's Constitution 2010 stipulate that everyone has right to a clean and healthy environment. The Statute and the Constitution further put down guidelines on ways to sustainably use our natural resources most of which is land itself and the rest based on the land.

Failure to abide by this can only leave Kenya, Africa and the whole world at a very disastrous position. Unsustainable use of forests for instance leads to depletion of ozone layer, climate change, global warming, droughts and desertification, flooding and soil erosion. The late

[15] Act No. 8 of 1999.

Professor Wangari Maathai speaking on K24 television indicated that Africa is under attack of desertification. This then leads to lack of water and food and attack by many diseases.

The Kalahari Desert is extending northwards with the Sahara extending southwards. If the trend continues, the two deserts will meet in the middle of Africa. All of Africa will be a desert.[16] She cautioned that the Congo forest (the largest carbon sink in Africa) and the Mau must be protected at all costs in order to curb the looming danger.

1. 3 OBJECTIVES

Main Objective

- To examine the regulation of the procedure for acquiring land as a tool to monitor land use for sustainable development.

Sub Objectives

- To identify the legal ways through which one can acquire land.
- To examine the impact of acquiring property in land on the environment.
- To put forth proposals and recommendations in the formulation of practice rules and regulations to direct and guide the process of acquiring land in such a way that will ensure sustainable use of the environment.

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[16] *Documentary on the works of Professor Wangari Maathai* (TV documentary) K24 Television on the 9th of October 2011 at 20.30.

1. 4 PROBLEM STATEMENT

Acquiring property in land and the process thereof has not been used as a tool to monitor land use for the achievement of sustainable development. Whereas, it is indeed an available, ready and adequate (to a great extent) tool to be so used, it has in the practical sense been used to degrade and abuse the environment. As a result, the aspect of implementation of development plans has largely been left to the local authorities and the Commissioner of Lands.[17] Development plans are not implemented to a large extent partly because the Commissioner of Lands and the local authorities do not have the technical expertise that is ingrained in the Director of Physical Planning. Land has progressively been abused, allocated to people and institutions it was not meant for.

Physical planning regulations do not guide anymore and subdivisions of land have gone down to as small a piece as forty by fifty feet. Disco night clubs have found home right in the middle of residential areas and close to institutes of education as junior as primary schools.[18] Churches have mushroomed even right at the top of seven-story buildings and coffee plantations have found their way right in the forest reserves. Human settlement, habitation, agriculture, industrialization and other activities have pushed right into what was naturally forestland, wildlife habitat and animal migratory corridors. This has happened due to allocation and transfer of land to private individuals slowly but surely endangering the lives of both the human and wildlife.

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[17] Physical Planning Act, of the Laws of Kenya s.5 stipulates that the Director of Physical Planning should advise the Commissioner of Lands and the Local authorities in planning matters. His is thus just a recommendation which is not necessarily binding.

[18] Interview with Masinde, a Physical planner on the 5th of August 2011.

Corruption laced with irregular and illegal allocation and transfer of land has done no good to conserve the environment. A sound and clear policy on land and management thereof is key to sustainable development for Africa and the world at large.[19] It comes out clear that the authority vested in the various Constitutional and statutory authorities in land management has been used over time for personal gain and at the peril of the environment. The discretion given under the law is in itself good but the office holders have used the same arbitrarily.

This shows how irregular procedure of acquiring land and interests thereof has totally messed the environment. It is a further indication that there are competing Government priorities and policies between settling the people and preservation of the wildlife and migratory corridors thereof.

Uncontrolled alienation and allocation of public lands and transfer and change of use thereafter have tremendously contributed (and continue so to do) to environmental degradation. Apart from the Environmental Management and Co-ordination Act, the existing laws have done little or nothing at all to regulate the use of land in a practical manner because they did not do much to establish rules and implementation mechanisms.

1. 5 JUSTIFICATION

Much research, studies, publications and journals have been undertaken and published on land, property, land and environment, transfer of land and much more ancillary and auxiliary issues. It triggers immense interest within me that there has not been sufficient study on the nexus between acquiring property in land and its impact on the environment. This is as pertains management and sustainable use of the land transferred or otherwise transacted upon.

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[19] Supra, note 1 page 134.

My study will attempt to bring out the relationship between the process of acquiring property in land and sustainable use and sustainable development. I will demonstrate that regulating this process can be used to attain sustainable use if and only if it is used as a compliance tool to adhere to the recommended land use.

1.6 RESEARCH QUESTIONS

1. Does acquiring property in land have any impact on the environment?
2. In what ways can regulation of the process for acquiring property in land be used as a tool to enhance sustainable development?
3. How can such regulation be made more effective?

1.7 HYPOTHESIS

1. Allocation, transfer and transmission of property in land without proper planning, regulations, rules of practice and adherence to the guiding statutes guidelines has a negative and adverse effect on the environment.
2. There exists a lacuna both in non - provisions by the law and non – adherence to the already existing laws and these two must be addressed in order to sustainably make use of land and realize sustainable development.
3. In order to cure this problem, the Government departments coordinating and regulating the process of acquiring land should enforce all the rules laid down especially as relates proper and sustainable use. These authorities should also be apportioned more implementer powers under the relevant statutes.

1.8 CONCEPTUAL FRAMEWORK

Acquiring property in land entails a legal process and can happen in either one of the following three ways. The first is direct Government or Local Authorities allocations, second is purchase and third transmission at succession. If the key stakeholders adhere to the broader social and environmental norms, then it would be true that these transactions of land would play a big role if not the most significant in conserving the environment and ensuring the right to a clean and healthy environment as encapsulated at Article 42 of the Constitution of Kenya of 2010. Simply laid down, the regulation of the process of acquiring land and property can be used to monitor land use and it is a huge device on management of the environment. Thus this paper will seek to conclude that proper regulation would enhance sustainable land use and result in sustainable development.

It is my opinion therefore, that, transfer of land from one individual to another or to an institute/body corporate or to and from Government not forgetting direct and indirect allocation thus has a huge and direct impact on the environments' use and sustainability.

The Physical Planning Act[20] has laid down rules and regulations that guide the planners on how to determine the use of land. Land is divided into zones which are allocated different use and every allocation, sale or transfer of any property should be in line with stipulated use. For instance, if a particular portion is set to be used as road reserve, allocating the same to someone who in turn sells it to an estate developer has an enormous negative impact on the surrounding. This is because where a road was meant to be may not be served with sewer line, electricity and water. This means that someone will organize some haphazard and illegal connections which

[20] Chapter 286 of the Laws of Kenya.

will leave the place without water or with dangerous electric connections. Such neighbourhoods are perpetually congested and over-crowded, with no play grounds for the young at heart, increased rate of crime, blocked light easements, spilled sewer among other ills[21] and this translates to a totally unclean and unhealthy environment.

It will be my assertion throughout my research that allocation, transfer and transmission of land should be made consciously reflecting on the intended user. Further, any dealings in land including transfer, change of user and application of development plans be first approved at the level of environmental audit. This will lead to greater sustainable use of our natural resources and realization of sustainable development. Where for instance, a transferor wishes to sell property, before the consent to transfer is issued, it must first be shown and certified that he or she has adhered to the special conditions and especially the user regulations.

This is especially important considering that Kenya's major towns were physically planned pre-independent[22] and I must say that then the population was much smaller and environmental issues had not taken root. Majority of the vast land in the rural areas are not planned.[23] Most of our laws including the land registration, physical planning and land control statutes were also made (or imported with minor amendments) then.

The Constitution[24] of Kenya has at its Chapter Five dealt with the land and environment creating the nexus but which is yet to be given flesh under the Acts of Parliament. It is however likely that the two issues will be legislated upon separately rather than in one document. Whichever

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[21] Supra note 5.

[22] The Grand plan especially for the City of Nairobi is what was done pre independent. Planning is however in itself a continuous process which takes place almost every day. The main concern however is that these sub plans do not fall within the main plan of the city and other towns.

[23] Supra, note 18

[24] The Constitution of Kenya promulgated on the 27th day of August 2010.

way legislation goes, it is important that transactions in land be regulated to suit environmental management. As a matter of conveyancing practice in Kenya today, transactions in land are used as a tool to make sure that land rent and rates are paid to the central Government and local authorities. It is in this same manner that the processes of alienation and allocation, transfer and transmission of land can be used to ensure that environmental rules and regulations are adhered to.

Land can also be transferred from the owner who is using it in a manner that is unsustainable to the Government or any other person who has the willingness to use it sustainably. This can be through compulsory acquisition, allocation or voluntary transfers. This is the technique that is so much applicable to the slum upgrading program in Kibera.[25] Leasing or selling and surrendering land to the Government is another way to help use the land sustainably. It is especially the technique used to conserve the wetlands or the animal migratory corridors as well as the forests and particularly the Mau forest.[26]

1. 9 METHODOLOGY

My research entailed a close examination and interrogation of the whole concept of acquiring property in land from a legal perspective and its impact on the environment. Broadly then I relied on two methods;

Desk research. This entailed a close scrutiny of library materials including books, law reports, Statutes and commission reports pertaining to land and environment. The study also made reference to the internet as a secondary source.

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[25] Supra note 5.
[26] Interview with Barsosio, Senior Land Registrar on 5th of August 2011.

Limited field-work. I interrogated and interviewed the Ministry of Lands officials both at the Nairobi head office and the district lands offices. Others included the National Environment and Management Authority officials, environmental auditors, farmers, physical planning departments officials, conveyancing lawyers, property developers as well as land owners.

I then carried out limited unobtrusive observation on the wetlands, forests, water bodies, plantations, wild life migration corridors, slums, leafy suburbs, industrial factories, crowded towns and the countryside settlements including the group ranch arrangements and the pastoralist communities. I employed purposive sampling to collect the required data. The interviews and observations enhanced the analytical approach of this paper.

1. 10 LIMITATIONS

The statutes proposed in the Constitution of Kenya 2010 have not been enacted as yet, and it is imperative that even the new statutes like the EMCA may need a rebirth just to harmonize with the Constitution of Kenya 2010. The fact that we are caught in between the transition period of two constitutions is very phenomenal. Therefore the statutes that this study relies on are either in the process of being repealed or they are bills, yet to be adopted as laws.

1. 11 LITERATURE REVIEW

The thing that comes to one's mind at the mention of the name of the late Professor Wangari Muta Maathai is either Nobel Peace Prize or fight for preservation of Kenya's environment. In her application, Maathai v Kenya Times Media Trust Ltd in 1989,[27] Maathai cited a breach of the Land Planning Act and an offence under regulation number 10 of the Development and Use of

[27] (1989) High Court at Nairobi (Nairobi Law Courts) Civil Case 5403.

Land (Planning) Regulations of 1961. She further argued that under the building by-laws of Nairobi City Council, building consent could not have been legally issued notwithstanding the fact the defendants had not made an application for the same. It was held for the defendants for the reasons that Wangari did not have any *locus standi* and that she did not disclose any reasonable cause of action against the defendant. Though the case was dismissed with costs, the international funding of the 60-story building meant to be put up at Kenya's Freedom corner/park (Uhuru Park) was cancelled and the building never put up. Maathai saved the park in the middle of the green city in the sky.

Had the case been lodged today for hearing, it would probably be heard and held in favour of any public spirited tax payer applicant following the precedent of the ruling in Opposa v Factoran[28] but more importantly the Constitution of Kenya's provisions at Article 42 read together with Article 22. This park's presence is of huge positive environmental impact to the city, its surroundings and the dwellers therein. Had it not been for her protests, the park could have been alienated and allocated to individual business tycoons or political players. Such an allocation would have been in total disregard of the physical planning regulations. It would have been illegal and irregular.

She was later to plant a tree at the park in August 2006 with the then senator Barrack Obama. Later in December 2009 while commenting on the Mau forest and settlements therein, Wangari observed that ethnic leadership made illegal allocations and settlement of Kenyans in gazetted forests. It was her opinion that the leadership should support Kenya's Prime Minister[29] in his effort to re-settle the Mau settlers elsewhere in order to save the Mau which is being destroyed

[28] (1994) 33 I.L.M. 168, 185 n. 18 or (1994) GR Number 101083
[29] The Right Honourable Raila Odinga, member of parliament for Langata constituency.

by human settlement, cultivation of crops and cattle grazing. It is important to note that the Mau is a water tower for many lakes around it including Turkana and many rivers.[30] These are a source of livelihood to many people in the wider African continent and contributories to Lake Victoria and ultimately the River Nile. The late Professor's approach was largely political-environmental and did not seek to put forth legal regulations in the procedure of acquiring land to curb environmental degradation. She however called for adherence to physical planning regulations in her case against Kenya Times Media Trust.

Professor Patricia Kameri-Mbote in 2002 wrote and published "Property Rights and Biodiversity Management in Kenya." The main thrust of her concerns was the poor management of wildlife resulting in heightened conflicts between human and the wild. She contends that in Maasai land for instance, the communal way life and pastoralism are quite compatible with wildlife maintenance.

Government has however encouraged subdivisions of land into smaller holdings and ultimately land use change and conversions. This has seen more human settlements and activities in these fragile ecosystems. Industrialization and extension of export processing zones especially in Mavoko and Kitengela areas also worsen the already ill-managed sector. She contends that property rights are in constant conflict with management of wildlife because there is that prevalent belief amongst Kenyans that the Government values its wildlife than human life.[31] In search of a solution she proposes several tactics. First, constitution of community wildlife associations (CWA) which should be legally constituted bodies composed of local land owners with power to hold land.

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[30] Supra, note 16.

[31] Mbote P. K., 2002 *Property Rights and Biodiversity Management in Kenya.* Nairobi: ACTS Press. p 124.

She proposes that the CWAs should also own the wildlife therein and their members should be allowed access rights say points of water and sustainable and limited hunting rights. She also proposes increased public participation and that the state should not own all the wildlife.

She also proposes that the locals through CWAs should be encouraged to get involved in non-consumptive wildlife activities.[32] These would include recreation, adventure-tourism, education and green hunting. She also proposes that the landowners who share their land with wildlife should get compensation. The conversion of land use to settled agricultural production should be discouraged she argues. The property rights must be secured and framed at the right levels and that way, they will be an incentive to wildlife management.[33]

Patricia's study brings to the fore the fact the property rights can be toned in such a way as to manage the biological diversity and more particularly, wildlife. It is from this point that my study carries forth to illustrate that indeed the process of acquiring the property rights can be used towards sustainability levels not only of wildlife, but of the entire environment.

According to Professor Okoth Ogendo H.W.O.(deceased), un-alienated land remained the private property of the Government and no obligation existed in law for many years since independence to consider the public interest when allocating such land.[34] *"the role of the state and its administrative bureaucracy has cast serious doubts regarding the competence in matters regarding land management and stewardship. For instance, trust land has been administered*

[32] Ibid, 224.
[33] Ibid, 231.
[34] Supra, note 1 pg 128.

like any other Government land even where legislation has required that interests of the customary occupiers override all decisions to alienate or otherwise deal with such land."[35]

Recent developments have however overturned this with the enactment of EMCA, The National Land Policy and the Constitution of Kenya 2010. Environmental considerations have further been alluded to in the yet to be Land Acts which are expected to provide more guidelines especially at allocation of un-alienated land. Okoth Ogendo further asserts that there is general contempt in East Africa for the customary land tenure and this too has a negative impact on the environment which I will expound later in this paper. In his critique on the failure of the systems, he does not create a nexus of this contempt, regulation and the environment. This gap is the subject of this paper.

Professor Calestous Juma[36] asserts that African states through their departments and Ministries of agriculture, environment, water and energy can foster climate smart infrastructure. This would create green jobs and general sustainable[37] development that will reduce emissions of green house gases to a large extent. Professor Juma in his desire for the achievement of sustainable development, has not seen the role that can be played by regulation of the procedure of acquiring interests in land.

Okidi C.O., Kameri Mbote and Migai Akech have addressed this topic in their collections entitled "Environment Government in Kenya; Implementing the Framework Law" in 2008. They address the environmental management issues in Kenya brushing through the Environment and

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[35] Ibid.

[36] Professor Juma is a teacher at Havard Kennedy School (United States of America) and a trustee of Victoria Institute of Science and Technology.

[37] Juma C. *Climate Change.* (E-Publication) available through, http://blogs.worldbank.org/climatechange/climate-change-Africa (accessed on the 5th day of August 2011).

land laws. They also look at the role of Common Law in Kenya's growth towards sustainable development but of main focus to this paper will be Professor Kameri Mbote's "Land Tenure and Sustainable Environmental Management in Kenya." She points out that trust land (which is communities' land held in trust by local county councils) is increasingly being set apart and allocated to private persons. It thus changes from trust status to private or individual ownership.[38] Mbote observes that this is a drawback to environmental management because the controls that the council can exercise over the land use are eliminated. I will agree with her and take it a step further and demonstrate that the procedure of setting apart and allocation can be regulated in order to attain sustainable land use.

Government land she asserts provides a good if not the best avenue for environmental conservation and management because public control safeguards the interests of the public. This is quite contradictory because we have seen illegal allocations of land which did not take into consideration public good. Mbote also observes the same especially because the allocations are more often followed by conversions of land use. This has a direct negative impulse on sustainable environmental management.

There is also a chapter on wise use and Sustainable Management of Wetlands in Kenya by Collins Odote. These are studies that will enable deeper analysis of the impact of land acquisition on the environment, be they positive or negative.

Tom Ojienda is a professor at the school of Law Moi University. In his book "Conveyancing Principles & Practice", 2008 he provides an insight into the historical and philosophical background of conveyancing and Land Law in Kenya. Tom Ojienda was also a consultant for the

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[38] Okidi C., Mbote P. K. and Aketch M., 2008. *Environmental Governance in Kenya*.Nairobi. East African Educational Publishers. P 268.

National Land Policy Formulation process a document that is also vital to this study. In his book and of significance to this study, addresses the technical and legal formalities and requirements that revolve around transactions of property in land. To that extent it will be a key reference material that I rely on. However the Professor has not made that connection between regulations of these transactions in land and the environment at all. His study is a focus on the procedures of the transactions in land. This study will make that missing nexus.

Waite Andrew in his "Environmental Law in Property Transactions"[39] is keen on how environment impacts the transactions in land. Not so much the other way round, that is to examine impact of transactions in land on the environment. When he does so however, it is so as to determine the purchase price. His book also enumerates the environmental information that is required especially during sale and transfer of land. Reading through his book it feels that in as much there are environmental considerations, the motive is economic in nature. It is for purposes negotiation of purchase price.

He advises that if there is any relevant environmental information held by the vendor, it better be revealed early in the negotiations. Otherwise he cautions it may lead to confrontations and create a venue for the lowering of the property price or the purchaser may even pull out of the transaction all together. In the case of Sakkas v Danford Limited[40] the vendor falsely indicated that the house on sale was not subject to any planning matter. This description was erroneous because as a matter of fact the property was zoned for public open space. It was held the purchaser was entitled to refuse to purchase the house and rescind the contract.

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[39] Waite A., 2009. *Environmental Law in Property Transactions*. 3rd Edition. London: Tottel Publishers.
[40] (1982) 46 P & CR 290.

Under the Environmental Protection Act of 1990 of the United Kingdom, the vendor is required to give relevant environmental information to the purchaser. These include water meter details, drainage system, likelihood of flooding and information on current and past land use. Whatever the motive of putting such requirements, the end product is sustainable land use. I shall in my study seek to import such regulations during all the instances of acquiring property in land.

1. 12 CHAPTER BREAKDOWN

My study will be reduced into five chapters of my project paper in the order as herein spelt out;

Chapter One:

This will be the introduction or the project proposal in which I briefly outline the flow of my thesis and bring out the research issues and the problem that this research seeks to find legal and practical solutions as pertains acquiring land and its impact on the environment. It will further outline the research questions, theoretical framework, hypothesis, objectives and also the methodology.

Chapter Two:

This chapter seeks to define and analyze property in land and then critically examine various ways through which to acquire property in land. This will be with a view of laying a foundation to tackle the problem statement. If we know how to acquire land, then we shall sufficiently be in a position to relate that phenomenon to that of the environment.

Chapter Three:

The study will make use of purposive sampling and do an analysis (case study) on a number of practical effects of allocation and transfer of land on the environment. The impact is both in the positive and negative and the study shall further examine the ways in which the same has contributed to our national growth and development. Areas of interest will include human settlement areas including the slums, the forests, wetlands, animal migratory corridors, lakes and rivers.

Chapter Four:

I shall in this chapter delve into the concept of sustainable development, Constitution of Kenya 2010, the National Land policy, the Environmental Management and Coordination Act, Physical Planning Act and the land registration laws. This will be with a view to examine how the laws seek to deal with environmental management issues at the instance of acquiring land and the gaps to be filled if any. I will seek to gauge this against any internationally set standards.

Chapter Five:

This will be the last chapter bringing out conclusive findings of the project and recommendations thereof.

CHAPTER TWO

2.1.0 ACQUIRING PROPERTY IN LAND

In this chapter my study will analyze the ways through which one can acquire property in land. We shall also attempt to examine the procedure followed because this is precisely what is to be regulated so as to achieve sustainable use of land which is key to this study. It would be prudent to define what constitutes property in land before we proceed to the modes of acquiring the same.

2.1.1 Definition of Property

Property is defined as a conception of the mind,[1] it is not material nor is it visible. It is rather the expectation of deriving certain advantages from a thing which we are said to possess. "*Property and law are born together and together they die. Before laws were made, there was no property; take away laws and property ceases.*"[2]

2.1.2 Definition of Land

Land has many definitions. The Constitution of Kenya 2010 defines land at Article 260 to include;

a) The surface of the earth and the subsurface rock;

b) Any body of water on or under the surface;

c) Marine waters in the territorial sea and exclusive economic zone;

d) Natural resources completely contained on or under the surface; and

e) The air space above the surface;

Section 205 (I) (ix) of the English 1925 Law of Property Act provides that "*Land includes land of any tenure and minerals, whether or not held apart from the surface, buildings or parts of buildings*

[1] Berger C. J., 1983. *Land Ownership and Use*. 3rd ed. Boston: Little Brown and Company, p.3.
[2] Ibid.

(Whether the division is horizontal, vertical or made in any other way) and other corporeal hereditaments; also a manor, advoerson, and a rent and other incorporeal hereditaments; and an easement, right privilege or benefit in, over or derived from land....."[3]

"*land includes all land, whether covered with water or not, and things attached to the land, or permanently fastened to anything attached to the land, and (where the meaning may be inferred) any estate, term, easement, right or interest in or arising out of land*"[4]

land is further defined at the Registration of titles Act to include "*land and benefits to arise out of land or things embedded or rooted in the earth, or attached to what is so embedded for the permanent beneficial enjoyment of that to which it is so attached, or permanently fastened to anything so embedded, rooted or attached, or any estate or interest therein, together with all paths, passages, ways, waters, watercourses, liberties, privileges, easements, plantations and gardens thereon or thereunder lying or being, unless specifically excepted*"

These definitions show that land is a complex phenomenon and is capable of having many interests all at the same time. The acquisition and transfer of land thereof needs a comprehensive and careful processing in order to secure all the rights at the time of transfer and those that may occur later. Corporeal hereditaments refer to the physical land and all that is physically attaching thereto for example trees. Incorporeal hereditaments on the other hand are the intangible rights existing in land. They include the wider bundle of rights which would mean the property rights of ownership, lease, mortgage and even easement.[5] From this we can infer that property in land is both derived from the physical and from the invisible complex rights that accrue to the owner of the land or owner of any interests thereof. A more physical meaning of what there is to land is found in the traditional Latin

[3] Stevens J. and Pearce A. R., 1998, *Land Law*. London: Sweet & Maxwell.p. 9.
[4] Land Acquisition Act (cap 295) of the laws of Kenya. Section 2
[5] Supra note 3.

maxim "*cuius est solum, eius est usque ad coelum et ad inferos*" translated to mean whoever that owns the soil owns everything up to the heaven and down to the depths of the earth.[6]

In Grigsby v Mclville[7] the Court of Appeal was quick to point out that the owner of a house had the rights to the cellar underneath. In as much as the owner could not access it from his land, he was entitled to estoppe a neighbor from using that cellar as storage and that continued usage amounted to trespass.[8] It would also be true that all items lost and found on land would belong to the owner of the land. In Elwes v Brigg Gas Company,[9] it was held that when a tenant dug up a pre-historic boat, it indeed belonged to the land owner.[10] The same position has been upheld by a 1995 case.[11] Application of the maxim cannot be experienced in its fullness. For instance, under common law, un-mined gold and silver belong to the crown. The same is applicable to coal, oil and natural gas[12] and the position in Kenya is no different. Under the Constitution's Chapter Five, all minerals belong to the state[13] and that fact was recently actualized along the Kenyan coast in Kwale district at the discovery of titanium. The locals had to be bought out by the Government under the doctrine of compulsory acquisition and purchase. The maxim is further restricted in as far as the airspace is concerned. In the case of Bernstein v Skyviews and General Limited[14] Griffiths J. held that "*the rights of a land owner to the airspace above his (her) land should be restricted to such a height as is reasonably necessary for the ordinary use and enjoyment of his land and the structure upon it; and that above that height he (she) has no greater rights in his airspace than any other member of the public*". In those circumstances there was no actionable trespass where a light aircraft had over flown the complainant's land to take aerial photographs at a height of a few hundred feet. The land owner had relied on the maxim 'whoever that

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6 Ibid, p. 10.
7 (1974) 1 W.L.R. 80.
8 Supra note 3, page 11.
9 (1886) 33 Ch. D. 562.
10 Megarry R. and Thompson M.P., 1993 *Megarry's Manual of the Law of Real Property.,* London: Sweet & Maxwell. p. 507.
11 Waverly Borough Council v Fletcher (1995) 4 All E.R 756, (1996) conv.216 Stevens – where the court held that a brooch unearthed in a public park belonged to the council that owned the park.
12 Supra, note 10 pg 509.
13 Constitution of Kenya 2010, Article 62
14 (1978), Q.B. 479.

owns the soil owns everything up to the heavens and down to the depths of the earth.' This would imply that if one puts up a house or a skyscraper, he (she) has the rights as much up as he (she) constructs and in such instances, where a third party interferes with the enjoyment of any property such as to cause trespass, injunction is available.[15]

It gets jurisprudentially complex and practically perplexing that in a block of flats of say six story building, the owner of a flat on the second floor does not own the space below nor above the same under Sectional Properties Act.[16] A second maxim goes thus – "*Quicquid plantatur solo, solo cedit*" translated whatever is attached to the soil becomes part of it, thus this takes into the definition of land plants, trees, fruits, buildings and fixtures in the same. If an object merely rests on the ground on its weight, then it is just a chattel.[17] In Potton Developments Limited v. Thompson[18] a pre-fabricated building which can be removed in sections may remain a fixture.[19] However, where the building must be destroyed in order to get it off the ground, then it is a fixture and it is regarded to as part and parcel of the land.[20] These are considerations to be ironed out when negotiating a transfer. In the case of Spyer v Philipson[21] it was decided that the more securely an object is affixed and the more damage its removal would bring about, it is highly likely that the intention was for it to form a permanent part of the land in question.

With the growth of the law and the complexity with which the term 'land' invokes and further due to the fact that some objects can well be defined both as fixtures as well as chattels, the most prudent thing to do is to be clear during the time of drawing the agreement. For purposes transfer of land, all the objects forming part of the land be they plants, buildings, machinery are all enumerated in a schedule

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[15] Kelson v Imperial Tobacco (1957) 2 Q.B. 334. The land owner was granted injunction to restrain trespass where a neighbor had erected a sign post projecting in the owners airspace.
[16] Act No.21 of 1987 of the Laws of Kenya.
[17] Wiltshear v Cottrell, (1853) I E. & B. 674.
[18] (1998) N.P.C. 49.
[19] Oakley A.J., 2002. *A Manual of the law of real property.* 8th ed. London: Sweet & Maxwell, p. 20.
[20] Ibid.
[21] (1931) 2 ch.183 at 209, 210.

and parties make an agreement specifically on them. This clears any ambiguity and reduces the likelihood of emergent litigation.

2.1.3 Tenure and Estates

After defining the property in land, it would be prudent to ask ourselves how much of that property can be appropriated to an individual. This amount or bundle of rights is what determines the use, abuse and collection of fruits there-from and further determines the impact on the environment and sustainable use and development. It is also these amounts of rights that determine whether indeed an individual has a right to transfer any interests and the procedure to be followed.

In the English common law where we heavily borrow our land laws and procedures of title regulation and transfer, all land belong to the Crown. However, very little land is in actual occupation of the Crown,[22] but land holders are tenants of the Monarch. The Norman conquest of 1066 brought with it the maxim "*nulle terre sans seigneur*" translated – no land without a lord. In England and Wales there has never been any allodial land,[23] or what in Kenya we call absolute title. The same phenomenon was imported in Kenya through the Crown Lands Ordinance of 1902 through which all land in Kenya was declared Crown Land. After independence this is what was converted into the Government Lands Act[24] (GLA) which has up to date perpetuated the replica of that scenario in England. Under the GLA, there is not a possibility of the absolute title, the highest estate one acquires is *fee-simple*. The Crown or the Monarch under the GLA was replaced by the President and the Government of the Republic.

The then conqueror, William I. regarding the whole of England as his right through the 1066 conquest would reward his principal followers through grants of land[25]. This would enable him be the overall lord, thus the feudal system that enabled the Monarch maintain and retain a military base[26]. The tenant in capite or the tenant in chief would then also grant to smaller lords known as "*Mesne Lords*", all the

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[22] Supra, see note 19, p. 24.
[23] Ibid.
[24] Chapter 280 of the Laws of Kenya.
[25] Supra see note 19.
[26] These grantees would for instance pay homage to the monarch vide provision of say 50 armed horsemen to fight for the crown for 40 days every year.

way down to the actual occupant. (tenant in demesne). All these had to pay some form of rent either by working on the farm or providing armed horsemen to retain their tenancy.[27]

The length of tenancy in terms of time is what is termed as "*estate*".[28] Estates can here-from be categorized as (a) *fee-tail* which would be long a tenancy for as long as the tenant or any of his descendants live,[29] (b) *fee-simple*, tenancy for as long as the tenant or any of his heirs, descendant or not live. More often than not, this is an eternal estate and that is why, it is the biggest estate one could get, and (c) *life estate* where one is granted a lease for as long as they live. The tenancy can also be pegged on the life of a third party.[30] For example grant of land to X so long as Y lives.[31] There was also the practice of subinfeudation (what we would term as sub-leasing) where the owner of an estate would curve out a lesser estate and create another tenant. The estate that remained rested in the main tenant and is known as the reversion. The above three estates are known as the free holds in land. The most practical and popular is fee-simple that is operational in Kenya's land registration systems under GLA, LTA and RTA.

The concept of n*ulle terre sans seigneur* is both a plus and a negative to the management of the environment and the general sustainable development. The Monarch (in England) and the President (Under GLA in Kenya) can allocate land to whoever they wish as happened in the feudal era. Section 3 of the GLA reads in part "*The President .....may subject to any written law, make grants or dispositions of any estates, interests or rights in or over un-alienated Government land."* The authorities can also use their allocating powers to settle people in the environmentally protected areas for instance wetlands. This would have a negative effect on sustainable development.

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[27] There were classes of services offered in order to remain in the feudal lordship; (a) Grand sergeant would perform some honorable service to the king in person. (b) Knight service was the provision of armed horsemen for battle and (c) Socage performed agricultural services for the lords.

[28] Supra, note 10, p. 20.

[29] Applicable in England until 1996.

[30] Supra note 22.

[31] Termed as "*Estate per autre vie*".

Under the Constitution of the Republic of Kenya 2010, the power to allocate land rests with the people of Kenya and exercised by the National Land Commission under section 67. The likelihood of abuse has been greatly reduced due to the fact that it now rests with an institution of many persons rather than a personality. It is also true that the land use rules and regulations will be revised in light of the Constitution of Kenya 2010.

In a progressive state, the concept (no land without lord) is used to control land use, development and even sub divisions. Indeed when one is granted land or lease there are conditions on the title that must be fulfilled, failure of which can cause termination of the grant. This is one way in which allocation of land is used to ensure sustainable developments.

In Kenya, there also exists absolute proprietorship of title to land, a concept that came with the RLA in 1963. Technically, it is meant to issue grants without conditions and thus the grantees can assume the rights of "*usus ubusus fructus*". This is the right to use abuse or misuse, destroy, collect fruits and basically use the land in any way one deems appropriate. Practically, however this is not possible because the state still holds some remedial radical title which it may invoke during times of compulsory acquisition or even in exercise of development control for example allowing sub-divisions to smaller units.

In England the absolute title is provided for under section 5 of the 1925 Act[32] which provides "*where the registered land is a free hold estate, the registration of any person as first proprietor thereof with an absolute title vest in the person so registered an estate in fee simple in possession in the land together with all rights, privileges and appurtenances belonging or appurtenant thereto subject to all rights and interests but free from all other estates and interests whatsoever including estates and interests of His Majesty.*"[33] It suffices however to point out that the absoluteness of a title cannot be enjoyed to its

[32] (English) Land Registration Act of 1925.
[33] Thompson M.P., 1996. *Barnsley's Conveyancing Law and Practice.* 4th ed. London: Sweet and Maxwell. p 28.

fullness as earlier pointed out. In fact in the case of Bridges v. Mees[34] a squatter's claim was upheld against an absolute title. It would be accurate thus to say that the strength of an absolute title is based not on its indefeasibility but rather on the statutory indemnity behind the same.[35] Absolute title in its absoluteness granted to promote individuals is not a good policy and it would be almost impossible to achieve sustainable management of our natural resources.

Leasehold is an estate that is less than the freehold. It is a grant of land and the rights accruing thereto for a certain stated duration of time. The person granting the lease is the landlord/lady while the one who enjoys the lease is the tenant.[36] The landlord/lady retains the ownership subject to the rights of the tenant and his/her right is basically the reversion or the remainder. It is also possible for the tenant to create a sub-tenancy thus sub-lease and a sub-tenant. This is only applicable where the lessee gives out or leases out a term lesser than that which he (she) holds. Fraudulently however, one can transfer what they do not own in terms of time.

In Kenya, a lease can be created by either the President, the local authorities or by private individuals. A lease can thus run as short a time as six (6) months to as long as 999 years. Leases are applied so much in the commercial contexts[37] and in case where the holders of the radical title want to maintain a presence and control over the management. We can infer this from the situation on the ground in the Kenyan context. In the major towns and cities, the Government has predominantly issued leasehold titles and this has enabled it have a hold of what happens and manage the developments thereof including sales, extension and renewal of leases, change of use and subdivisions. In the rural areas where it was colonially known as the native reserves and in the remote areas where the Government has little or no interest and in fact there is very limited commerce, the Government and the local authorities issue absolute titles. It is not a wonder that even the physical planning in Kenya is

[34] (1957) Ch.475 or (1957) 2 All E.R 577.
[35] Supra – note 33.
[36] Supra – note 3, p. 65.
[37] Ibid.

concentrated in the urbanized areas leaving the rural areas quite unplanned.[38] Lack of physical Planning is indeed enough recipe for unsustainable development. There exists little if any control of who settles where, where quarrying takes place, interference with wetlands, water bodies or animal migratory corridors.

Leasehold interests confer exclusive possession on the tenant to the exclusion of all others including the landlord/lady who would be committing trespass should they enter without permission. This is seisin or what is commonly known as quiet possession. A licensee on the other hand has only permission[39] which does not come with exclusive possession against the licensor. This explains why most lessors put it as a condition on the lease that the lessee shall allow and permit the lessor to enter upon the demised premises.

2.2. Who can acquire land?

Property of land in Kenya can be held by a natural person or a legal person. The natural person must however have capacity and that would imply that one is of age[40] of majority, with a competent mind and sound mental awareness. A child, infant or a minor can however hold interest in land through the next of kin who would hold the interests of the infant until the attainment of the age of majority. Two or more persons can hold land jointly as joint tenants[41] or severally as tenants in common in equal or other unequal but defined shares.[42] People hold land together for various reasons and there is no limit as to the number of persons that can do so. It may be that they are family, husband and wife, business

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[38] Interview with Masinde, a physical planner with the Ministry of Lands on the 5th of August 2011.

[39] Supra – note 3, p. 65.

[40] Attained on the first moment of the eighteenth (18th) anniversary of birth.

[41] This is where the holding of land is by several persons but they are in the position of a single owner having rights of surviving partners and this jus accrescendi takes precedence over any will made by the deceased tenant. Each joint tenant is also entitled to any part of the land as the other. No single tenant can point out ownership of a portion to the exclusion of other joint tenants, thus there is unity of possession. In Kenya this is the most common tenancy to apply for ownership of land between husband and wife.

[42] The most common feature of tenancy in common is the unity of title, the fact that owners hold land under the same document and Act or operation of law. They hold undivided shares but these are ascertainable where tenants can hold in common in equal shares. When they hold in unequal shares it means that if there are say, three owners, A may hold a half while B, C and D hold a sixth each of the whole. In Kenya, this is advisable for business partners, brothers and sisters. This type of tenancy allows transmission to each and every tenant's beneficiary/ies. The concept of jus accrescendi does not exist.

implications on the environment both positive and negative. Now that we have attempted to look at what can be transferred and who can hold such transferrable interest, we can now worry about the true meaning of acquiring property in land.

2.3 HOW TO ACQUIRE LAND

There are traditionally three legal ways through which to acquire interest in land. These include direct government allocation, transfer and transmission. We shall address ourselves to the fourth way which is adverse possession.

2.3.1 Allocation

Allocation of land is that process through which the Government issues land out from its land bank to its citizenry. It happens in three ways; first vide advertisements for private use of settlement and other individual uses, second through direct applications to the Commissioner of Lands by private corporations for special use and thirdly through reservations for use by Government or public corporations for instance Kenya Railways. Setting apart would be the same but in this case the allocating authority is the Local Authority and the subject land is known as trust land under the Trust Land Act. Freehold is the greatest interest that can be allocated and the holder gets absolute proprietorship or an estate in feesimple. The Government and the county councils also allocate leaseholds up to a maximum of 999 years for agricultural plots and 99 years for urban plots. Isolated cases see the local authorities issue 33 year leases which are later extended with a 66 year term.

Under GLA at section 4 of the subsidiary legislation provides *"the Commissioner of Lands shall not sell to any purchaser more than 1000 acres of the crown land (read Government Land) in one lot without the approval of the Secretary of State (read Minister) but nothing herein shall invalidate any sale."*

Section 9 of the GLA provides *"The Commissioner of Lands may cause any portion of a township*

which is not required for public purposes to be divided into plots suitable for the erection of buildings for business or residential purposes and such plots may from time to time be disposed off in the prescribed manner" Section 10 further provides that leases of town plots may be granted for any term not exceeding one hundred years.

Section 14 provides thus "*subject to any general or special directions of the President, the Commissioner may cause land available for alienation for agricultural purposes to be surveyed and divided into farms*". Section 27 (2) (a) leases under this part shall be for a term of nine hundred and ninety nine years. For purposes of this study, allocation amounts to an act that conveys land and the interests thereof from one party (Government) to another (Individual or Corporation).

2.3.1.1. Process of Allocation

The process of allocation is kicked off by the Director of Physical Planning, preparing a development or part development plan showing various uses like residential, educational, recreational, hospital, transport as a guide to social economic and infrastructural development projects. If this whole process is not done properly then it can have an adverse effect on the environment to be discussed in Chapter III of this paper.

The decision to prepare the physical development plan is communicated to the relevant authorities for considerations comments and approval.[50] The notice is also published to the public through the chief's office, District Officers' office and the local authority. Among the authorities that the plan is circulated to include the provincial administration, the Commissioner of Lands, Director of Surveys, Director of Water Development, Director of Medical Services, Director of Education among others.

Once approved, the Commissioner of Lands signs the plan and it becomes an official document. The

[50] Ministry of Lands, 1991. *Handbook on Land use Planning, Administration and Development Procedures*. At chapter 4. Unpublished.

Commissioner then causes the particular portion to be valued for purposes stand premium, land rent[51] and stamp duty in readiness for allocation. Members of the public are then invited through the Kenya Gazette and alerted on the local dailies. Successful applicants are then notified vide issuance of allotment letters.[52] The letter contains the allotee's name, the plot, locality and other conditions including land rent, stamp duty and stand premium.

The letter of allotment is an offer and acceptance by the allotee and payment of the required fee completes the contract. The Director of Surveys is now called upon to carry out the survey whereafter there is issuance of deed plan (in case title is to be issued under RTA) or a Registry Index Map if the land falls on an area that is governed by the RLA.[53] On receipt of either document, the Commissioner of Lands proceeds to prepare a grant of title instilling special conditions which stipulates, and of importance to this paper, the land use and the percentage of the land which can be occupied by such use.

The title also indicates the name of the allotee, the land reference or title number, the term, land rent (if applicable) and stand premium that was paid. It also shows acreage and the locality. It is thereafter issued to the registered owner.

2.3.2 Transfer

Section 4 of the RLA defines a transfer thus "*transfer means the passing of land, lease or a charge by act of the parties and not by operation of law, and also the instrument by which the passing is effected.*"

Section 5 of the ITPA provides "*transfer of property means an act by which a living person conveys property, in present or in future, to one or more other living persons and to transfer property is to perform such act.*"

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[51] Stand premium and land rent are basically the purchase price at government rate split into an initial deposit (stand premium) and equal installments (annual rent) paid every year.

[52] Supra note 50.

[53] Ibid

Section 2 of RTA defines transfers "*used in connection with land or a charge means the passing of the land or charge by act of the parties and not by operation of the law and also the statutory instrument by which the passing is effected.*"

From the foregoing transfer of land is thus the conveying or passing of the property in land from a person to another living person. It also means the instrument through which the property in land passes. It is important to note that this act is by the agreement of parties and not by operation of the law. We can also infer from the definitions that transfer of land has to be in writing or may be in written form. In modern conveyancing and Kenya in particular, transfer of land is predominantly in writing and is registered at the lands office or registry. Indeed section 100 (c) of GLA provideth; no evidence shall be receivable in a civil court "*of the sale lease or other transfer inter vivos of land registered under this part, unless the sale, lease or other transfer is effected by an instrument in writing and the instrument has been registered under this part……*"

It is however, not always in writing because where land has not adjudicated upon, titles have not been issued. Parties in such cases go through an oral agreement (more so in the rural areas) exchange the consideration which could be money, love and affection or in kind and the transferee takes possession.[54] In other instances, land could be registered and title documents don't exist due to ignorance of the legal provisions, the parties just exchange money without any agreement or instrument of transfer and only remember to do it after passage of say a period of 20 years. In case they wish to register such an instrument, nothing prevents them from doing the same only that stamp duty will be paid at the value of the date of the transfer and valuation thereof. There is however, a looming danger in such kind of conveyancing and which grows or bursts into a problem every day. When the vendee goes to ask the vendor to append his signature 20 years after the actual date of the transfer act, it may dawn on the vendor that the value of the property in that land could have gone as high as tenfold.

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[54] Interview with Barsosio, a Senior Land Registrar with the Ministry of Lands on the 6th of July, 2011.

An ill willed vendor will demand to be paid the value as at the date of registration while indeed the payment as at the date of the agreement was paid in full. In other cases, the transferor dies and the administrator of his/her estate may not be willing to execute any document in the absence of any written proof of a transfer. It becomes a matter to be determined by the courts and in absence of written evidence, it becomes a case of who has money to employ a better lawyer or who gives out convincing evidence. In my opinion however, such a transfer is still a transfer. It only becomes murky where the actual seller and purchaser are not in agreement.

In the Indian case of Ma Kyin Hone v Ong Boon Hock,[55] the judge observed that the word 'transfer' is of very wide meaning and includes every transaction whereby a party divests himself or is divested of a portion of his interest that portion subsequently vesting or being vested in other party.[56] Transfer is important to this study because the transferee or his/her agents, assignees, successors, heir and holder of power of attorney may use the land in a different way that may affect the environment positively or negatively.

There are a number of transactions in land that may constitute a transfer and I will enumerate them in no particular order. They are purchase, lease, exchange of land, gift in land and to some extent through power of attorney.

2.3.2.1 Sale and Purchase

Transfer of land through sale comes or should come after issuance of title at the instance of allocation. Some Kenyans have the tendency of purchasing the land on the strength of the letter of allotment. The Government initially allowed this as a mode of informal transfer and indeed would issue title in the name of the new buyer. This has however been stopped. It may indeed not amount to a transfer because the letter of allotment is just an offer and it needs acceptance for it to be a binding contract. However, a

[55] AIR 1937 Rang 47.
[56] Sohoni A., 2010. *The Transfer of Property Act*. 3rd ed. Mumbai: Premier Public Co. p 47.

proper transfer takes place where there is existing land and the title document has been processed. Freehold agricultural land sales require consent from the land control board who in most cases summon family members or in the least the wife or spouse of the vendor to ascertain the selling family is not left without a matrimonial home and a livelihood. In case of a Government lease, the transfer is not to be effected unless there is prior consent of the Commissioner of Lands in writing.[57] All Government leases have this as a condition, where the head-lessor is the county council or the City Council of Nairobi, it is the same authority that issues the consent to transfer. The head-lessor may also happen to be a public corporation[58] for instance the Kenya Railways Corporations in which case the consent to transfer is obtainable from the Chief Engineer – Kenya Railways Corporations. The consent may not be issued if land rent and rates have not been paid in full and where the development control conditions have not been met. For the purposes of this project, the completion documents are a very important aspect because they are way in which to impose and enforce regulations including environmental requirements.

2.3.2.2 Gift

Incase parents want to bequeath their estate to their children not through the will and administration process after death, (but rather when they still live) the same can properly be done through the deed of gift and the transfer of property in land in consideration of gift or natural love and affection. This is also the right way that spouses transfer property to one another. Spouses do not pay duty under the law in such a process but the transfer between siblings, parent to child and vice versa, duty is payable[59] on their *ad valorem* value as a matter of practice rules. Deed of gift can also be prepared in favor of any other persons including a charitable corporation, church, school or even squatters. In fact the RLA section 29 stipulates that "*Every proprietor who has acquired land, a lease or a charge by transfer*

[57] Ibid.
[58] Ojienda T.O., 2008. *Conveyancing – Principles and Practice*, Nairobi: Law Africa Publishing Ltd. p. 45.
[59] Ibid, p.54.

without valuable consideration shall hold it subject to any unregistered rights or interests .....but save as aforesaid the transfer when registered shall in all respects have the same effect as a transfer for valuable consideration". Transfer through gift therefore amounts to an actual transfer of land and actual physical possession by the donee and the donor vacates. The gift has to be registered vide transfer signed by both the donor and the donee with all statutory procedures complied with[60] and if a donee declines then it is void as a transfer. The deed of gift/transfer should be signed by or on behalf of the donor in the presence of at least two witnesses.[61]

In Mescal v Mescal,[62] there was a transfer of gift between father and son signed and the father handed all documents to the son to effect the registration. On the donor's death the question was whether the transfer was complete. Brown L.J. held "*The basic principle underlying all the cases is that equity will not come to the aid of a volunteer. Therefore, if the donee needs to get an order from a Court of equity in order to complete his title, he will not get it. If on the other hand, the donee has under his control everything necessary to constitute his title completely without any further assistance from the donor, the donee needs no assistance from equity and the gift is complete*".[63] In the case where the donee is left to process the title, then the transfer through the gift will be effected by such a processing and registration. The gift cannot be recalled even where the donee is not registered as proprietor and he (she) dies before such registration.[64]

2.3.2.3 Lease

A lease is a disposition of land from one person to another for a fixed period of time. We have earlier seen that the Government can issue a lease by way of allocation. This lease can be of 99 years or 999 or

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[60] Registered Trustees of the Anglican Church of Kenya Mbeere Diocese v Reverend David Waweru – (2007) CKLR 108 of 2002.
[61] ITPA s.20.
[62] (1984) 50 P. and CR 119.
[63] Supra note 58 p. 79.
[64] Re Rose Midland Bank Executor and Trust Bank Limited v Rose (1949) Ch 78.

even 33 years. In that regard, it was settled that a lease can constitute a transfer. On the same breath, a lessee can also sublet but subject to the prior consent in writing of the Commissioner of Lands. A person who owns land as an absolute proprietor can also create a lease in favour of any person. Leases and sub leases can be short term or long term. It is my opinion that as long as a lease is demised for such a period as to constitute a title or certificate of title other than the original title, then it amounts to a transfer and can indeed have an impact positive or negative on the environment and sustainable development.

Other than the Commissioner's consent there are also all the necessary completion documents that are required before registration of any lease. Sometimes building plans certified and registered are a requirement. This can be the point where to demand an environmental assessment report.

2.3.2.4 Exchange

Exchange of parcels of land is common where a person wants to purchase a piece of land say in place A and buy another in place B, while another person has a portion they want to sell in place B and acquire another in place A. These two persons can come together, draw up a deed of exchange and a transfer. The necessary completion documents will be required, duty will be paid and registration to alter the land register completes the paper work. The parties will then swop the physical properties and take possession. This, for the purpose of the study constitutes a transfer. The consideration quoted is the other land but for purposes stamp duty, the government valuer has to value the parcels to come up with the market value.

2.3.2.5 Power of Attorney

This is an instrument in which a person known as the principal or the donor appoints another known as the agent or the donee to act in any matter including disposition of land. A power of Attorney can be general or specific.[65] The donor must in that regard have the capacity in that they should not be of minority age or of unsound mind. In the case of Grace Wanjiru Munyinyi v Gedion Waweru and

[65] Supra note 58 p. 49.

another[66] someone who purported to hold power from an insane person was held to be null in law.[67] Section 114(3) of RLA however allows a person either guardian or one appointed under a written law to hold a power of attorney from a minor or one of unsound mind.

The principal can revoke the power at any time but a power of attorney given for a consideration is irrevocable. This is the power that is subject of this study. It is my considered opinion that it indeed amounts to a transfer. The practice at the lands office in Nairobi follows that a specific power of Attorney in reference to a particular piece of land whose land is not surveyed and issued with a title document is transfer. This Power of Attorney has to be accompanied by an agreement that purports the sale and whose full stamp duty is paid. It is then assumed that when the issuing of title documents come, the holder of the allotment letter, power of attorney (duly registered) and sale agreement (duly stamped) will be registered as proprietor. These areas include some portions in Mathare, Dandora, Kibera, Kayole and Umoja all in Nairobi.

Section 117 of RLA stipulates that "*A power of Attorney which has been registered under section 116 .....shall be deemed to be subsisting as regards any person acquiring any interest in land affected by the exercise of the power for valuable consideration and without notice of revocation and in good faith, or any person deriving title under such a person.*" Thus an instrument signed by the holder of a power of Attorney including a transfer is valid. This is thus a second instance that a power of attorney would amount to a transfer.

2.3.2.6 Process of Transfer

The process is quite intricate and in places like townships and municipalities it must involve the input of an advocate of the High Court. It is kicked off by the act of parties agreeing. Their agreement is based on prior prerequisites which dictate that both parties must be well acquainted with the land

[66] (2002) Civil case no.116 of (High Court of Kenya at Nakuru).
[67] Supra note 58 p. 39.

subject of transfer. The purchaser or their agents must also have verified the status of the land through purchase of an official search[68] from the lands office.

The agreement is an important document as it covenants the parties into a binding contract. Such being the case, the contract must meet all the basic requirements of a contract. The parties must have capacity in order to create a legal relationship.[69] It stipulates the purchase price, mode of payment and more importantly it indicates the party responsible for the completion documents.[70] It is at this point in the process that there need be a requirement for an environmental impact assessment. At the signing of the agreement an agreed amount is paid as a commitment fee and the title documents are handed over to the purchaser's lawyer.

The vendor goes into securing the completion documents as the purchaser's lawyer draws up the transfer document. After its approval and execution, the stamp duty is paid and the transfer is lodged for registration. Upon a successful registration, the title is handed over to the purchaser and within an agreed period of time, the purchase price balance is released to the vendor. Ideally these two should happen simultaneously and the process is complete.

2.3.3 Transmission and Succession

Transmission on succession is the vesting of a deceased's property to her/his heirs, survivors, successors and/or beneficiaries through inheritance. The process of succession can be a complex procedure depending on someone's personal law. In the African customary tenure, the family would appoint an administrator of the deceased's estate who was in most cases the first born son on the deceased to be assisted by the elders of the village and the greater family. This was the case even where the first born son was a minor. In the current law of Succession Act, the administrator has to be

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[68] Supra note 58 p. 39.
[69] Ibid p. 34.
[70] Completion documents include the consents needed, the rent and rates clearance certificate and any other compliance or approval letter.

certified by a court of law of the family division. The administrator would divest the shares according to the purported will of the deceased following testacy or intestacy and the court would issue a certificate of confirmation after the expiration of six (6) months of gazettment of the issuance of the Grant of Letters of Administration or Grant of Probate. This grant is then registered against the title and it is supported by the certificate of confirmation. The six months provided under the law between the appointment of the administrator/administratix and the confirmation is meant to allow time for any objections by an aggrieved beneficiary, survivor or dependent. It is however, not very useful because this gazette is published by the Government printer and most Kenyans are not aware of this fact and if they know, they may not afford to buy it every Friday to check whether there is administration in process touching or concerning them.

That being the case, many widows have been disinherited and orphans alike and this has an environmental impact. Considering this is a transition era between the African Customary and the modern land tenure, women and the girl child plus the orphan are disinherited and left without access to land thus without a livelihood. They then end up as street families or in crowded settlement areas, sometimes as squatters to be expanded in Chapter 3. Transmission of land at succession amounts to acquisition of property in favour of the beneficiary. The beneficiary(ies) then takes up physical possession and use of land and sometimes it comes with sub-division. It can in that case have an impact on land use and may require regulation in-order to attain sustainable development.

2.3.4 Adverse Possession

This is the process through which an occupant of a piece of land for a certain uninterrupted period of time (varying from a jurisdiction to another) acquires title to it. It is the extinguishing of the title of the owner who fails to protect it as stipulated by the limitations of time.

In Kenya, the Limitation of Actions Act[71] at section 7 states "*an action may be brought by any person to recover land after the end of twelve years from the date of which the right of action accrued to him (or her)* ....." It may be true that the person in favor of whom such an order is issued may have committed a wrong or trespass when he/she first occupied another person's land without title. However, this is based on the policy that those who go to sleep on their claims should not be assisted by the courts in recovering their property.[72] Adverse possession cannot be construed where there was permission to occupy the land. It can only start running after the expiry of such permission, license or contract.[73]

To be registered the owner under this mode, one then has to show that they physically occupied the subject land for the period of twelve uninterrupted years. This is effected by the court issuing an order to that regard directing the land registrar accordingly. The order is registered against the title upon payment of stamp duty and at this instance it is not expected that the claimant could produce the earlier title document. The process is finalized by issuance of a fresh title to the new owner. It is important to note that it is the court that can make such an order and not the land registry.

Under the newly enacted Environment and Land Court Act,[74] in exercise of its jurisdictions the court is called upon to be guided by a host of internationally accepted principles of environmental law. They are the principles of sustainable development including;[75] public participation, intergenerational and intragenerational equity, polluter pays principle and pre-cautionary principle. Some of these principles will form the basis of chapter four of this paper.

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[71] Chapter 22 of the Laws of Kenya.
[72] Supra note 58 p. 96.
[73] Ibid.
[74] Act No. 19 of 2011 of the Laws of Kenya.
[75] Ibid section 18.

CHAPTER THREE

ACQUISITION OF LAND THAT DEGRADES THE ENVIRONMENT

This Chapter of my study has employed purposive sampling to do an in-depth analysis and various case studies on how acquisition of land has contributed positively or in the negative to sustainable use of land as a natural resource if and when it is used to monitor the use of land. We shall examine a number of areas within and without Kenya to establish whether indeed acquisition of property in land has any impact on the environment. The areas we shall look at in are as follows; wetlands including rivers and lakes, forests, wildlife, human settlement areas, recreational parks as well as agriculture.

3.1 **WETLANDS**

3.1.1 **River Nile**

River Nile is the longest river in the world with the Amazon coming a close second and mostly associated with Egypt. Egypt relies on it for agriculture, commerce, and transportation with major cities falling on its banks including Cairo. It runs through the desert but brings with it such black soils from the Ethiopian highlands and it floods the Egyptian desert with the siltation which is good for agriculture. The origin of the name Nile is "*Neilos*" which is Greek for valley.

Ancient Egypt paid special attention to preserving the Nile and it was believed that "*Every Egyptian who polluted the Nile would not enter Paradise*".[1] To them, the water of the Nile was the secret of their life. Pharaohs' written orders on protection of the Nile were found on papyrus dating several hundreds of years.[2] On protection and conservation of the Nile currently, there are several programmes one of them being The Nile Basin Capacity Building Network for River Engineering (NBCBN-RE) which

1 Egypt State Information Service. 2008. World Environment Day. (e-bulletin) available online through m http://www.sis.gov.eg/VR/environment/5.htm. (accessed on Sunday the 11th Sept. 2011)
2 Ibid.

was initiated in the year 2000 with a goal of reaching a common vision to manage the use of water resources of the basin efficiently and in a sustainable manner.[3] It draws professionals from the states sharing the river giving them an opportunity to exchange ideas and learn from each other on the best ways to manage their common natural resource.

The Nile flows 6600 kilometers draining an area of approximately 3.1 million square kilometers and it is home to about 160 million people from ten countries including; Burundi, Congo DRC, Egypt, Eritrea, Ethiopia, Kenya, Rwanda, Sudan, Tanzania and Uganda.

It is a well settled opinion in my mind that the waters of River Nile are relatively well protected. Under the 1959 Treaty, Egypt and Sudan have 100% of the Nile water hindering the upstream nations from pursuing water projects along the river.[4] Egypt has over the years maintained a powerful position over the Nile despite its poor location because it is the most powerful state militarily and economically. In fact according to Professos Kameri Mbote 2007, except Kenya and Egypt, all the countries are among the world's 50 poorest nations. Egypt has thus engineered and promoted a number of trans-boundary environmental programmes mostly based in Cairo for effective basin-wide stakeholder cooperation on protection of the Nile, a good example is the Nile River Basin Cooperation Framework[5] which proposes a Commission for the river basin. This can be said to be somewhat selfish on the part of Egypt but it has indeed served to protect and promote sustainable use and development of the Nile.

A country by country case study shows different challenges on conservation of the Nile the major one being river bank erosion. Along the Blue Nile in Sudan for instance, case studies revealed that natural vegetation cover has been removed through human activities of agriculture, electricity energy

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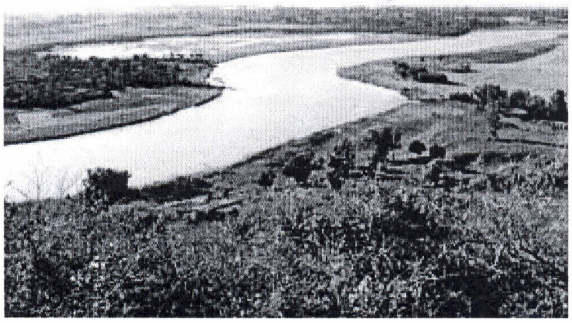
3 Ahmed A.A., et al 2010. *Nile River Bank Erosion and Protection.* (E-Article) (pdf) available through http://www.nbcbn.com/project.documents/progress_Reports_2010/River_Morphology (accessed on Sunday the 11th Sept. 2011).

4 Lauren H., 2009 *Hydropolitics of Nile River: Conflict, Policy and the future*. (E-Article) Unpublished available through http://www.pdftop.com. (accessed on the 10th of September 2011)

5 Ibid.

generation purposes and overgrazing.[6] The Forestry Department has been spearheading conservation practices by planting several tree species and encouraging attraction that is sustainable.[7] There have also been a lot of studies and research undertaken to protect the Nile from unsustainable human activities and much of this has seen real protection of the Nile.

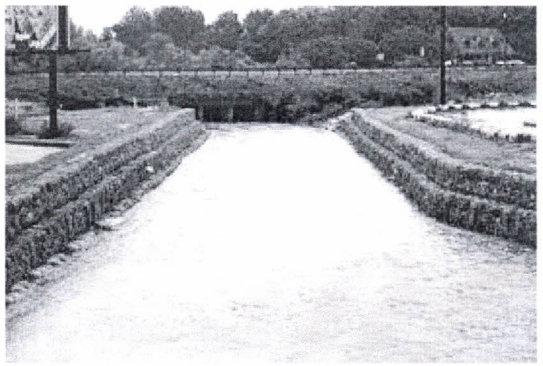


A picture showing sustainable use along the banks and the riparian of River Nile.

The Nile has also been politically protected by the position of Egypt as a big brother including threats to any riparian state that dared use the Nile water without its consent. Egypt has on a number of occasions demonstrated its preparedness to go to war to protect its national interests in the Nile. For instance during the 1970s, when Ethiopia wanted to establish projects in the Blue Nile, Cairo warned Addis Ababa against such actions and it was prepared to go to the battle field.[8]

There has also been various ways of constructing the banks and guiding them so as to have the waters contained in the river channels. In recent developments, gabions are built in cages filled with stones as well as other ways of guided banks. .

6 Supra note 3.
7 Ibid.
8 Hassan H. and Rasheedy A., 2007. *The Nile River and Egyptian Foreign Policy Interest.* (E-Article) available through http://www.pdftop.com. (Accessed on the 10th of September 2011).



Guided banks of the Nile

In July 2009 Nine (9) Nile Basin Initiative (NBI) nations met in Alexandria Egypt to discuss a cooperative Framework Agreement. Sudan and Egypt refused to sign it while Kenya was quick to point out that the two states wanted to monopolize the Nile waters as under the 1959 Treaty.[9] Egypt was willing to offer economic incentives to maintain status quo even though the Nile could provide water to all the states if well managed. The agreement could not be signed then.

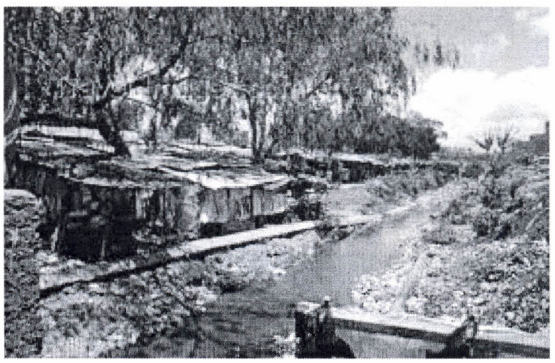
According to Fahmi Aziz about 99% of Egypt's population live along the Nile Valley and delta with the same meeting 90% of Egypt's water needs. The Nile Valley and Delta is really one of the oldest agricultural areas having been under cultivation for the last 5000 years.[10] It is clear to me that Egypt's persistence on preservation of the Nile has seen the riparian states shy away from allocating land to their citizenry along the riparian. This has resulted in clear river banks with minimal, optimal and sustainable human activities.

9 Supra, note 4, pg 34.

10 Fahmi M. A. 2007. *Water management in the Nile Basin: Opportunities and Constraints*. (e-article) (pdf) available through http://www.pdftop.com. (accessed on the 16th of September 2011).

3.1.2 **Nairobi River**

The Nairobi River Basin comprises three main rivers namely, Ngong, Mathare and Nairobi. Nairobi River flows through Nairobi Central Business District and finally they meet River Athi flowing south eastwards to the Indian Ocean.[11] There are looming and real challenges facing sustainability of the Nairobi River. These challenges include highly congested informal settlements along its banks, rapid urbanization, industrialization, poor urban planning and weak enforcement of the environmental laws and regulations resulting in environmental degradation. There is so much of human population and uncoordinated human activity along the River with a lot of waste finding its way into it. Just to mention there is the untreated industrial effluent, raw sewage, solid waste swept into the river during rain storms and a lot of illegal discharges into the river. These include both point and non-point source pollutants.



Photos showing the uncontrolled human activities along Nairobi River. The first are cars being washed and the second shows informal human settlements.

It is true to note that the riparian reserves of the three rivers are inhabited informally and lack of proper sanitation and sewerage systems contribute highly to the degradation of the rivers. These settlements and industrial uses are all as a result of allocation and transfer of property in land to the inhabitants

11 *Nairobi River Basin Protection*, 2011. (e-journal). Available through www.nema.go.ke/index.php?/Nairobi river basin rehabilitation. (accessed on the 11th Sept. 2011).

formerly or informally.

The Nairobi Rivers originate from catchment areas which are under serious threats of poor land use practices and rehabilitation is dependent on proper land management practices. The river rehabilitation draft[12] programme document states that good land husbandry is believed to enhance the quality and quantity of river waters. However, proper land use and land management in Kenya is a major challenge. Most riparian reserves, the paper observes are heavily settled and most of the land is privately owned. This paper indeed concurs that poor planning and issuance of title documents and allocating individuals land along the riparian does no good to sustainable use of Nairobi River. It has all ended up in complete misuse and abuse of the river to the extent that even the waters are completely polluted and cannot be put to any good use.

If the Government could revoke all titles and stop allowing transfers along the riparian, it would help. Indeed the key strategy for rehabilitating the river include survey and delineation of the riparian reserve after which those who are found to have been issued with title documents or given possession of the riparian are to be resettled whether they are industrial or domestic settlers.[13] Another proposal is also to prepare and develop a master plan for proper utilization of the riparian zone. This indeed is very crucial because it entails physical planning and the transfers thereof should be highly controlled to ensure that any new allotee or transferee will adhere to the stipulated special conditions of the title and especially the user putting in mind development approvals from the local authority and National Environment Management Authority (NEMA). The Nairobi River scenario is an indication of how acquisition of land has been used to the detriment of the environment. Compulsory acquisition and resettlement are ways that can be used to relocate people living along the riparian reserve and allow the settling in

12 Ministry of Environment and Mineral Resources. 2008. *Nairobi Rivers Rehabilitation and Restoration Programme*. (E-Article), available through, http://www.ministryofenvironment.go.ke (accessed on the 11th of September 2011).

13 Ibid.

accordance with principles and guidelines that follow sustainable development for the greater realization of the "Green City in the Sun."

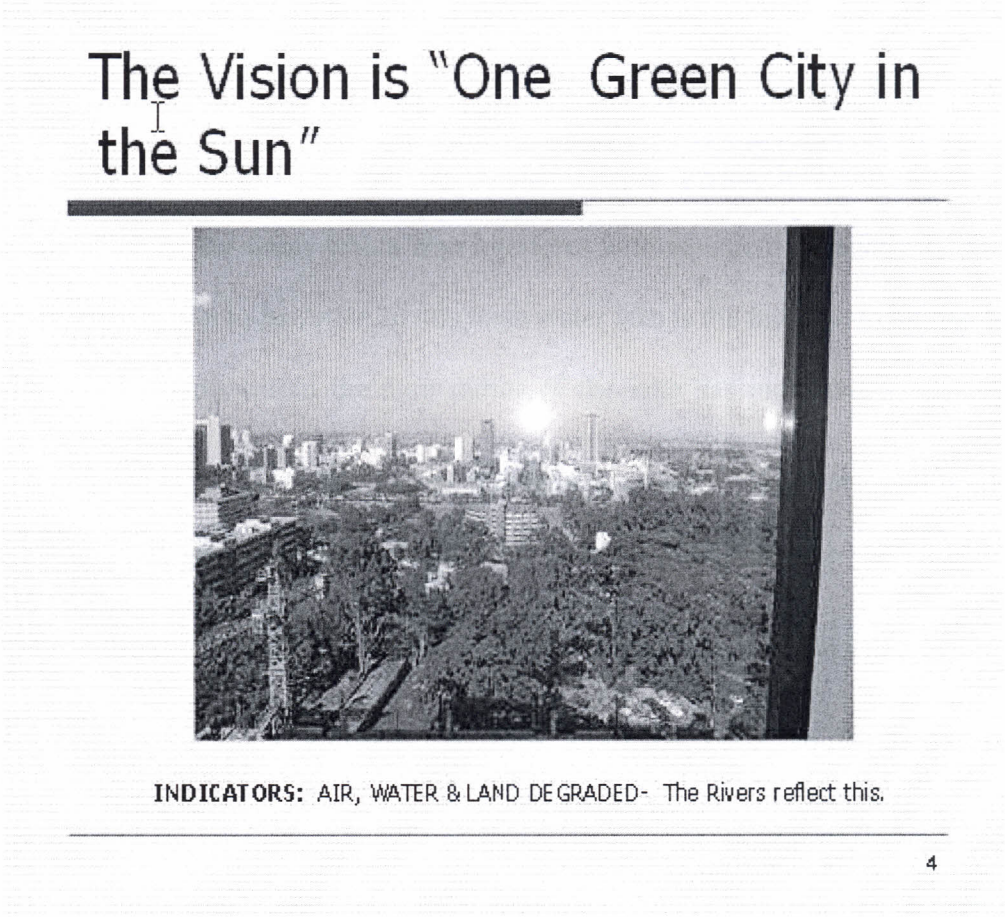


photo *on Nairobi river intervention:*

3.1.3 **Lake Naivasha, flower farmers and informal settlers**

The only fresh water lake in the Eastern Rift Valley is under serious threats according to environment experts. There is on its riparian direct pollution due to run off from the flower farms. The chemicals used by the farmers including fertilizers are washed into the lake during the times of rain and storms.[14] These fertilizers and other chemicals accelerate the growth of the blue green algae which are actually

14 *Lake Naivasha Pollution Menace*. (TV news item) KTN. (video) 21st Feb 2010. Available through http://www.youtube.com/watch?v=A8NImD3ljqI (accessed on the 15th of October 2011).

good for fish as food and also other aquatic life. However pollution is defined as the presence of a substance natural or un-natural but in excess or in amounts greater than in the state of nature.

What then happens is that these fertilizers have the algae growing in excess much more than usual. This has a tendency of competing for oxygen with other aquatic life including fish and can lead to death of fish out of suffocation.[15] The algae also release toxins into the water changing the chemical composition of the water which also interferes with aquatic life negatively. Other than this cause, the other contribution to pollution in this fresh water lake is the increase in human population. It is reported that people living within the 5km radius of the lake has increased from 7,000 in the 1969 to over 300,000 due to the farming activities that have increased.[16] This comes with informal settlements, poor sanitation and lack of sewer system. It has been reported that even the birds that ate the contaminated fish had died,[17] meaning that even the fish themselves had been poisoned by the chemicals.

According to NEMA's Dr. Mwinzi on the 4th of March, 2010, the fish died of suffocation because their mouths and fin were open as they floated lifeless.[18] He attributed this not to the flower farms but to natural causes which could have been accelerated by the flower farms or even the raw sewage finding its way into the river.

According to Dr. Mwinzi, there is so much reliance on the fresh water lake with every farm draining up water for irrigation and the dwellers relying on it for domestic purposes. This has seen water levels continue to drop and the number of fish is also going down due to over fishing. All the rivers that use

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15 *MP vows to take Lake saga to Parliament*. (TV news item) NTV. (video) 6th March 2010. Available through http://www.youtube.com/watch?v=xAJ7hig5tTU&feature=fvsr (accessed on the 24th september 2011).

16 The Council of Canadians. 2010. *Lake Naivasha withering Under the Assault of International Flower Vendors*. (e-journal)available through http://www.pdftop.com/view/aHR0cDovL2NhbmFkaWFucy5vcmcvd2F0ZXIvZG9jdW1lbnRzL05haXZhc2hhUmVwb3J0MDgucGRm (accessed on 23rd Sept. 2011).

17 Ibid

18 *NEMA Rules Off Chemical Polution in Lake Naivasha* (TV news item) Citizen TV (video) 4th March 2010. available through http://www.youtube.com/watch?v=Couj_u-VElk (accessed on Sunday the 11th Sept. 2011).

to feed that lake have either dried up or become seasonal. Such a use of a natural resource is quite unsustainable. This unsustainability is due to the transfer, sale and allocation of property in land in an uncontrolled manner and subdivisions at transmission. The initial user of the riparian changed drastically from a natural habitat for wildlife and a sustainable number of people. It turned into a hub flower farming and residence of people under complete unplanned circumstances including other agricultural activities and tourist hotels all encroaching on the riparian.

Environmental lawyer Odhiambo Mc Oloo, blamed NEMA for sleeping on its job and watch as all the biodiversity supported by the lake face danger of extinction.[19] The situation could be further dire than we thought and could even be facing extinction should the lake dry up. The area Member of Parliament Mr. James Mututho was quoted as having said that the deepest point of the lake is now only 3 meters as opposed to the earlier depth that was 16 meters.[20] It is not a doubt that acquisition of land and the process thereof is the culprit. The process of acquisition should and must be used to regulate land use, the other option would be to compulsorily acquire all the riparian land and fence off the land as protected land.

3.1.4 **Lake Victoria and the sea weed (Hyacinth invasion)**

Lake Victoria is Africa's largest fresh water lake and got its name from the first Briton to visit it naming it after his queen.[21] It is also known as Lake Nyanza and it is shared between the three East African states of Kenya, Tanzania and Uganda. Its major outlet is the White Nile and main inflow being River Kagera. It is a main source of livelihood to many occupants of its riparian in terms of provision of fresh water for domestic use as well as agriculture and industrial use. It is also a fertile ground for fishing and

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19 *Pollution: A case of a lake and dead fish* (TV news item) KTN. (video) 20th Feb 2010. Available through http://www.youtube.com/watch?v=uouqgCF33hs&feature=relmfu (accessed on Sunday the 11th Sept. 2011).

20 *Lake Naivasha Environment Audit* (TV news item) K24TV. (video) 24th Feb 2010. Available through http://www.youtube.com/watch?v=D3BDWVZPx4w&NR=1 (accessed on Wednesday the 21st Sept 2011.

21 John Speke who was the first Briton to discover the source of river Nile.

many make a living from the same. The fact that the White Nile flows from it all the way down to the Sudan to the main river Nile then to Egypt and Mediterranean, its usefulness cannot be underestimated not forgetting transportation and hydropower generation.

Water hyacinth was first sighted on the lake in the late 1980's and it has spread as to be termed as pollution to the lake.[22] It forms a thick mat of vegetative cover on the lake shore spreading to cover as much of the lake as the eye can see. This hinders fishing and it is in itself not so co-existent with fish. This is because it reduces the natural lighting and the oxygen that the fish may need. Other uses of the lake that are hampered include the transportation system through the lake and drawing up fresh water for drinking and other domestic purposes.

It is thought that the contributing factors to the growth and spread of this weed is the surface run off that carries with it fertilizers from agricultural activities on the riparian and other chemicals from the industrial wastes being directed into the lake.[23] The Kenyan coast is especially invaded around the gulf of Winam, Kisumu Bay and Nyakach Bay.[24] Heavy rains that pound the riparian are also contributing by carrying the chemicals into the lake. Another factor that has increased pollution to the lake is the increase in population of people around the lake with towns, industries informal settlements and agricultural activities. Hotel and catering industry have also been on the rise leading to much waste being directed into the lake to include raw sewage due to poor planning of the towns around the riparian. This has seen a sharp decrease in the lakes biodiversity in terms of numbers and species and the water drawn from the lake is no longer fit for human consumption.

There has been a complete invasion of the lake by humans and human activities and the fresh waters seem to be suffocating. The Government and the local authorities have just been transferring the land on the riparian without much control as per the user. Poor planning of the area around is also to blame

22 Albright Thomas, 2004. *The Rise and fall of Water Hyacinth in Lake Victoria and Kagera River Basin.* (E-Article) available through http://www.pdfop.com. (accessed on the 21st of September 2011).
23 Ibid.
24 Ibid.

because it is evident that it has not taken into consideration the environmental aspects of the land use and tenure around the lake which has proved to be highly unsustainable. Much of this land around the lake is privately owned and the relevant authorities including NEMA have not been keen enough to attain and reach sustain sustainable use and development of the lake and its environs. Transfer of land and change of use have been going on without much control and restrictions around this precious natural resource.

3.2 WILDLIFE and FORESTRY

3.2.1 Nairobi National Park and the Kitengela Animal Migratory Corridor

The Green City in the Sun, as Nairobi was popularly known is the only city in the world that has a national park located just about 7 kilometers from the city centre.[25] The park is approximately 117 square kilometers with a vast ecosystem and almost a complete wildlife.[26] The park is fenced but for the south of the park leaving Athi-Kapiti plains and Kitengela to allow room for wildlife spread and life of the wildlife in the state of nature or as natural as possible. These plains are thus migratory corridors on the southern side of the park. Of late there are however human-wildlife conflicts[27] owing to growth in human population and settlements in these areas. There are also land uses that are not compatible with wildlife including estate development, industries at the Export Processing Zone (EPZ) and other commercial activities including agriculture. The owners of the land therein are taking advantage of these opportunities to subdivide and sell the land especially to unsuspecting settlers who want to work at the EPZ and other industries around.

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25 KWS. 2010. *A Park Within the Capital City.*(e-journal) available through www.kws.nairobi national park. (accessed on the 16th of September 2011).

26 Ibid.

27 Okidi C., Mbote P.K. and Aketch M., 2008, *Environmental Governance in Kenya.* Nairobi. East African Educational Publishers. p. 281.

Rapid growth in human population and changing social economic lifestyle is not only phenomenon to Kenya, it is a worldwide trend and has been identified as a great threat to wildlife conservation. In 1946, when the Nairobi National Park was gazetted,[28] much of the migratory corridor was the home of Kenya's Maasai, a people whose way of life was highly communal and nomadic without permanent settlement.[29] The mid sixties saw the beginning of privatization of land previously held as communal to group ranches. This tenure allowed for large land holdings and could comfortably afford undisturbed movement of wild animals through the corridor. Later the group ranches in Kitengela could not hold and the Maasai individual members pushed for sub-divisions and this was done in 1988[30] resulting to individual land ownership. This initial sub-division saw rapid changes from the pastoral use to diversified uses extending to agricultural, industrial, quarrying and permanent residence and the more population pulling EPZ. Invasion by the non Maasai populants has seen increased demand for human settlement especially due to the area's proximity to the city of Nairobi and the EPZ. This has led to high rate of sub divisions, partitions, changes of user and transfer of land with many portions being fenced off. This has definitely been a huge barrier to migratory movements and mobility of the wildlife.

This has seen a huge reduction in the numbers of wildlife gracing the park as was initially. Kenya Wildlife Service (KWS) has struggled to keep down this trend that is seeing unsustainable use of the corridor. Key among the suggestions was to stop fencing, cultivation and permanent settlement by people and encourage community based tourism activities but which failed.[31] The friends of Nairobi National Park inspired the wildlife lease program as a way of managing the ecosystem and reduce the human wildlife conflict. A survey carried out by International Livestock Research Institute (ILRI) and

28 Gichohi, Helen, 2003 – *wildlife conservation lease program.* (E-Article) available on http://www.pdftop.com. (accessed on the 21st of September 2011)
29 Ibid.
30 Ibid.
31 Ibid

African Conservation Centre (ACC) in the year 2000[32] indicated that most land owners were willing to leave a part of their land under a leasing program to accommodate wildlife for monetary gain. By July 2003, with financial support from donor funding, 115 households had signed up 8400 acres with more families on the waiting list to release their land for wildlife migration. This is in actual sense a realization of Kameri-Mbote's proposal to have the land owners willing to share their land with wildlife get some form of compensation.[33]

The (Wildlife Conservation Leases) WCL payments were made thrice a year at the beginning of school term[34] and the advantages that came along are numerous. Just to mention a few conservation of wildlife habitat and the participants made more money than they would, had they relied on cultivation of small pieces of land. Further, there was increased enrollment of children to school especially because the payments were made at the opportune time for school fees payment. The girl child schooling is also another huge advantage to the society in general and also to this study.[35]

This whole scenario has clearly indicated how the acquisition of land has been used both in the positive as well as in the negative at the instance of sustainable use of animal migratory corridors. Initially, the sub-divisions and transfers of shrinking land sizes saw deprivation of the wildlife of their natural habitat. By the year 2003 the tool of transfer of land this time as a WCL was used to lease land for the wildlife. Humans had to give out actual physical possession of the land, and this as seen in the earlier chapter would constitute transfer of property in land.

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32 Ibid.

33 Mbote P. K., 2002. *Property Rights and Biodiversity Management in Kenya.* Nairobi: ACTS Press. p 124.

34 Ibid.

35 This is because, when the girl goes to school, the issue of unwanted pregnancies is reduced and thus the children who would have ended up in the street have a better mother. Street children and street families contribute to environmental degradation because the informal settlements they live in for instance along Nairobi River have little or no sanitary facilities.

In the case of Jamii Bora Charitable Trust v Director General of NEMA[36] the appellants submitted a project review for consideration and approval by NEMA. They proposed to construct two thousand homes for two thousand families in Kisaju location of Kajiado District. This was to be on a 293 acre plot, land reference number Kajiado/Kisaju/58 and which would constitute a town just along the Kitengela wildlife migratory corridor and dispersal area. NEMA rejected the application for EIA licensing while the Tribunal granted the same.

The Tribunal, this study suggests made a wrongful reversal of NEMA's decision and this might result in further blockade of wildlife movement since the southern boundary of the corridor will be full of human population. This might see increased poaching and a further reduction of the wildlife population in the city's national park. The Trust has the blessings of the National Environmental Tribunal (NET) to put up the structures despite the concerns raised by NEMA, KWS and the local residents.

It is clear to my mind that the process of land acquisition at allocation or even the subsequent transfers has not been adequately regulated. Both the physical planning and environmental impact assessments have not been done, and if they were, the relevant Government agencies are not properly advised.

3.2.2 Mau Forest

This is a gazetted forest in Kenya's Rift Valley and indeed one of the largest catchment areas we have in East and Central Africa. It is approximately 900 square kilometers and was gazetted in 1932.[37] Forests and especially the natural forests play a key role in keeping the ecological balances of any locality. Mau forest is no exception, it plays a significant function in the whole of Kenya and Africa at large. It is the catchment area for many streams and rivers including Njoro River, Ewaso Nyiro and

36 National Environment Tribunal Appeal No. NET/02/03/2005: Reported in Gazette Notice No. 4944 of 30th June, 2006 Kenya Gazette Vol. CVIII-No. 46, p. 1375

37 *Documentary on the works of Professor Wangari Maathai* (TV documentary) K24 Television on the 9th of October 2011

Sondu River some of which feed into Africa's largest Lake Victoria. Lake Victoria then is the source of the White Nile and so its importance spreads across Africa.[38]

Forests are also one of the clean development mechanisms adopted because of their nature and role in carbon sequestration and as carbon reservoirs which has a direct positive impact on climate change and global warming. Forests attract and sustain a huge and varied number of species both flora and fauna and thus can be termed as the sustenance of biological diversity. This then leads to herbal advantages that enable extraction of important substances of great medicinal value to the whole of human kind. Forests also control soil erosion and are a source of biomass fuel for human domestic uses. Indeed the advantages of any forest ecology are enormous with social, ecological, economical, cultural, research and educational values that cannot be enumerated fully by this paper. Such a natural resource must be used sustainably in order to maximize on its benefits today and for the people around without compromising the needs of the future generations and the needs of other communities. This is what was defined as sustainable development by Brundtland (in her report dubbed "our common future") as well as the ruling in the case of Opossa v Factoran.[39] I need not to mention that Mau forest must be used sustainably. Acquisition of property in land can be used as a tool to achieve this goal as has been the consideration throughout this paper. Indeed regulating allocations and transfers of land in the Mau forest can lead to sustainable or unsustainable development.

Historical events reveal that the Mau has been the home of a hunter-gatherer people known as the Ogiek. The use by this community was and is to some extent even today considered sustainable.[40]

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38 Interim Coordinating secretariat, Office of the Prime Minister of Kenya, 2009. *Rehabilitating the Mau forest Ecosystem*. (E-Article) available on http://www.kws.org/export /sites/kws/info/mauforest/maupublications/Mau_Forest_Complex_Concept_paper.pdf. (accesed on the 7th of October 2011).

39 (1994) GR Number 101083.

40 Corrie D., 2009. The Ogiek – *The Ghost Tribe of Kenya*. (E-Article) available through http://www.pdftop.com. (accessed on the 16th of September 2011).

These people are hunter gatherer and their culture and social fabric is tied to the forest. They did not involve themselves with agricultural activities nor logging for commercial or any other purposes. To that extent their use of the forest is quite sustainable. The increase of populations of the Ogiek and other communities around saw interactions, change of culture, inter and intra-marriages, dynamism of cultures and other factors lead to higher infiltration of the forest by almost all other surrounding communities. In the 1980's and 90's there were Government allocations of the land within the forest and this is what this paper terms as unsustainable.[41]

Sub-divisions and transfer of land followed leading to increased human activities, settlement, logging of trees for purposes of agriculture, cash cropping, biomass fuel and clearing of the forest has now reached alarming levels. Rivers and streams have been reported to reduce in the amounts of water[42] that flows and the Ogieks' way of life is now disrupted. These allocations and subsequent transfers of land and property have been termed irregular and illegal and unsustainable. Revocations of the titles therein and re-settlements of the populations have now been ongoing since the Government's initiative in the year 2008 but it has been marred with political machinations and public resistance. The Ndung'u Report[43] was quick to mention the names of politicians Franklin Bett and Zakayo Cheruiyot to be among the retired President Moi's loyalists who were rewarded with huge chunks of land for their political support.[44]

The report recommends revocation of all these titles and I would not support anything less of this. Other names in the report include but not limited to Kericho Rural Multi-Purpose Society which has

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41 Supra note 37.
42 Ibid.
43 Government Printer, 2004. *The Report of the Commission of Inquiry into Illegal and Irregular allocations of public land.* (The Ndung'u report) unpublished.
44 *Kenya: selfish Interests Threaten Mau Forest*. 2008. (e-poster) available through www.africanconservation.org/content/view/946/405/ (accessed on 13th of Sept. 2011).

since changed its name to Sinendet Rural Cooperative Society and among its members is a former Permanent Secretary to the Ministry of Lands.[45] This shows abuse of office that spills to unsustainable development with hundreds of acres of the forest land ending up with tea plantations. Bomet County Council and Elburgon Urban Council also got allotments of chunks of land within the forest.[46] This is un-regulated acquisition of land through allocations that resulted in unsustainable land use.

3.3 HUMAN SETTLEMENTS

3.3.1 Karen

Karen is a residential leafy suburb situate within the city of Nairobi towards the border of Kajiado County lying approximately 20 kilometers west of the City Centre. It is a fairly expansive in its acreage holding the residents of the city's middle to high and high income earners. It is an example in Kenya of a sustainably well used and developed locality. Being pre-dominantly residential, the City Council of Nairobi does not approve transfers or sub-divisions of pieces of land below half an acre.[47] There is also controlled development and approvals of change of user with fully demarcated feeder roads and other public and social amenities. Most of Karen is not served with the main sewer but each household is permitted to sink a sewer tank that is regularly emptied by collecting tankers.[48] Those that are not served with Nairobi water are allowed permits/licenses to sink own private boreholes or share with neighbors. It is this paper's opinion that the use of the land in Karen is quite sustainable and it has taken proper planning, observing the zoning rules and transfer of property in land as tools to achieve the same. The fact that the owners rarely fell trees and the vegetative cover is an indication there is enough fresh air due to carbon sequestration.

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45 Ibid.
46 Ibid.
47 Interview with Jethro, a resident and land owner in Karen, Nairobi.
48 Ibid.

3.3.2 Kayole in Nairobi

Kayole is a residential estate approximately 15 kilometers east to the City Centre of Nairobi and within the city or the vicinity of the Nairobi district. It initially started as an informal settlement but later grew to be accepted as an estate for moderate to low income earners gaining popularity and has become quite developed in that regard. It has grown from the 1980s and now it is one of the highly populated estates in Nairobi.[49] Its feeder roads are fairly developed and also have a transportation system in place to ferry workers to the city and back. The City Council has also provided or installed water and sewer lines but which have been strained over time due to over population and rural-urban migration. This has also seen a hiked demand for housing resulting into the coming up of high-rise buildings[50] that do not meet the basic minimum standards as per physical planning rules and environmental regulations. The blocks of flats are so close to each other as to block air and light easements such that some houses are perpetually damp and dark and without natural light and air.

Poor physical planning and developments in Kayole.

49 http://www.standardmedia.co.ke/archives/InsidePage.php?id=2000009081&cid=470 (accessed on the 25th Sept.2011).
50 Ibid.

This also puts a strain on the sewer and water supply leading to lack of water and bursting of the sewer lines. There is also likely to be illegal electricity connections[51] and poor drainage system which may lead or wash sewage into someone's house during the rainy seasons. This leads to infestation of mosquitoes leading to malarial attacks and other sanitary diseases including bilharzia, cholera and typhoid. All these are because of the unsustainable use of the property in land occasioned by uncontrolled acquisition of land and unregulated developments as well as change of user.

Within a space of say half acre of land, there can be six (6) to eight (8) blocks of flats each running as high as six(6) to seven (7) floors spelling out the strain on the land. Garbage becomes the order of the day coupled with dust, heat and dampness. This same phenomenon thanks to uncontrolled allocation and transfer of land is replicated in other areas of residence within the city and especially in Nairobi's East-lands including Umoja, Huruma, Dandora, Pipeline and the same is likely to catch up with Kileleshwa and Buruburu. This uncontrolled type of development is unsustainable and can only serve to strain the environment. So far, buildings are just coming up as fast as their demand dictates.

Several instances have seen the collapsing of hastily built up houses that ended up destroying many lives and property. Such places unfortunately have the audacity to have mixed user in one building. For instance the basement or ground floor is used for industrial purposes while the second floor serves a commercial herb and the rest are residential mixed with discotheque clubs and restaurants. A paint factory is reported to have burst into flames in such a building in Nairobi's Kariobangi area in May 2011 and the disaster was quite enormous with ten reported deaths.[52] This inevitably also leads to a dent on the moral fiber of a people. Acquisition of land can be regulated to reverse all these wrongs or in the least to make the situation more bearable and sustainable.

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51 Interview with Jassient an officer with Kenya Power and Lighting Company Limited. On 22nd of September 2011.

52 *Eight burned to death in Kariobangi*. (TV news item) NTV (video) 25th of March 2011. Available through http://www.youtube.com/watch?NR=1&v=dCqmYoE_Z3s&feature=fvwp (accessed on the 24th of Sept. 2011).

3.3.3 Kibera Slums

Kibera is the biggest slum in the Republic of Kenya spreading over an area of approximately 700 acres to the south of Nairobi City, about Seven (7) kilometers from the City Centre. It sits on Government land with no official documentation of land ownership to the inhabitants.[53] It started as an informal settlement for the Nubian soldiers as their reward from the colonial Government for their participation in the First World War. At independence, the Government illegalized the settlements thereof which were informal but did not physically resettle the populations.[54] The populations have continually increased on this informal set of settlement with much influx of Kenyans from the rural areas complicating the problem. There exists a set of landlords who consider themselves the first inhabitants from the Government or allotees though the Government has up to date not officially transferred the property to any individuals. There is however, a set of Kibera Trust Trustees and of late settlement executive committees (SEC) who negotiate with the Government with a view to formalizing the allocations.[55]

The Government through the relevant Ministry is either not in a position to or is not willing to officiate this, further compounding the issue. The living conditions in Kibera are extremely wanting and without access to the basic social and public utilities.[56] It is pathetic to say the least for a Government that prides itself as one of the best and most stable in Africa. There are little or no basic amenities now that the Government refuses to officially recognize the settlement. Water, electricity, schools, hospitals, public toilets, sanitation, roads, drainage system, sewer lines and shopping centers are all lumped together and everything and any user of land is anywhere and all over. Children play around fresh and raw sewage amidst flying toilets with the ground composed of filth and rubbish. A church or mosque

53 Obbayi Laureen, *The Kibera Challenge*. (E- Article) available through http://www.pdftop.com (accessed on the 10th of September, 2011

54 Ibid.

55 Interview with Jessinca, an official of KENSUP on the 7th day of October 2011

56 Ibid.

can crop up anywhere and there is complete disconnect, disunity, un-planning and un-coordination. Electric power lines are dangling dangerously, illegally and children and grownups alike have fallen victims of these naked electric transmitters and met their deaths.

Diseases, crime and moral decay abide in this place comfortably. This is as a result of a Government that is not so careful as to consolidate and actualize land rights to leave its citizenry to grab for themselves the way the squatters would. The poor who cannot afford decent housing, street families and the widows, orphans, single mothers who are sent away by their husbands and also girls sent away due to unwanted pregnancies are all contributories to the existence of Kibera – the slum and other informal settlements. Kibera housing is poor with units being predominantly semi-permanent. With the increase of population and a high influx of youths migrating from the rural areas to the city in search of greener pastures, a house or a "kibanda" can be put up anywhere and as fast as within an hour.[57] Raw sewage can find its way right through someone's house. The Government does not control or even regulate the acquiring and transferring of land interests in Kibera and this has acted negatively towards sustainable development. Kibera is being used in such a way as not to meet the needs of let alone the future generations but even the current generation. The Government had to use transfer of land as a tool to bring social political as well as economic and moral order to the slum and reverse the un-sustainability. The Government in conjunction with UNHABITAT is implementing the slum upgrading programme started back in the year 2003.[58] There are also other players including the people of Kibera through SECs, Ministry of housing mainly through KENSUP, local CBOs and international NGOs.[59] The program entails the putting up of decent housing schemes in and around Kibera and demolishing the old structures clearly planning and zoning the whole area to bring out feeder roads, sanitary facilities and other public amenities and getting filth out the way.

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57 Ibid.

58 Owuor A., 2011. (E-Article) *Kibera Residents Rent out Houses, Move to Slums* http://www.standardmedia.co.ke/InsidePage.php?id=2000034968&cid=4 (accessed on the 25th of September 2011).

59 Supra see note 49.

Kibera has been like a huge dumping site on top of which settlement structures are built. The project though started has not been completed successful owing to a couple of factors including resistance due to inability to pay the rent for the new flats, court cases instituted against demolition of the older structures and the fact that there are more squatters coming everyday as the old ones are moved to the new blocks of houses. If the whole programme succeeds, it will be a case of the process of property acquisition in regulation as a tool for sustainable land use. This will leave the railway line to serve its purpose, create roads, play grounds, schools and public hospitals where there were non and clearing all garbage to a designated dump site.[60]

3.4 RECREATIONAL FACILITIES

3.4.1 City Park – Nairobi

City Park is a recreational park mainly composed of a forest within the vicinity of the City of Nairobi and approximately three (3) kilometers from the City Centre to the north east along Limuru Road.[61] It was established in 1921 as a zoological park and became a public park in 1925.[62] It is home to a large number of both flora and fauna while to the City dwellers it provides a leisure park. To others, it is a ground for collecting firewood and yet to others, provides a place to meet for a date and to everyone around, it freshens the air through the process of carbon sequestration. Due to its fairly small size and proximity to the city, it has had its fair share of disturbances including attempts to allocate and transfer parts of the same to individuals for commercial or even residential purposes. The park is so near many lucrative business parks or blocks as well as high class residential schemes. It is true though not substantially that some portions therefrom have been allocated to private individuals for their own personal gain but lately the friends of City Park are being so watchful as to keep the whole park

60 Ibid.
61 Friends of City Park. 2011 (e-publication) (poster) available through http://www.naturekenya.org/Friends%20of%20City%20Park (accessed on the 25th of September).
62 Ibid.

intact.[63] Transfer to individuals would only serve to quench their own personal thirst towards making money at the expense of the city dwellers who benefit from the same as a recreational park and at the expense of all the flora and fauna whose home is the park.

The City Council of Nairobi, the Government and the Commissioner of Lands have all ears on the ground so as to protect City Park for the common good.[64] In fact under the new Constitutional dispensation, the park will be the property of the public members of Kenya to be held in trust by the City Council of Nairobi or the National Government.[65]

A few instances of dumping waste and illegal collection of firewood have been a challenge but with the friends of City Park and the watchful eye of the City Council the park is retaining its beauty and playing its part in maintaining the status of the Green City in the sun. If it were to be allowed, private greedy few individuals would rather have it subdivided and transferred to private use. Such a course would however be defeated by the ruling of Opossa v Factoran. Such is the spirit behind the sustenance and protection of other such facilities that have previously faced the threat of privatization in and around Nairobi but have not succumbed. These include the Karura Forest, Uhuru Park and the Nairobi Arboretum.

63 See Interview with Barsosio.
64 Ibid.
65 Constitution of Kenya 2010 s. 62.

CHAPTER 4

APPLICATION OF SUSTAINABLE DEVELOPMENT IN ACQUISITION OF LAND

In this Chapter of my study I will focus on sustainable development spreading the debate as from the 1972 Stockholm Conference, the United Nations Conference on Environment and Development (UNCED) 1992 all the way to the now expected Rio + 20 Conference in 2012 in Brazil. The internationally acceptable standards are what I shall use to gauge our local statutes. I will then attempt to tie sustainable development to the concept of acquisition of property in land.

4.1 Sustainable Development

The Mainstay of this Chapter is the concept of sustainable development which has variously been defined by scholars and other bodies. One of the popular definitions of the same is to be found in the Brundtland's "World Commission on Environment and Development."[1] It states that "*sustainable development is development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs*" there has over the years existed a tangible and real controversy between economic development and environmental concerns.

While pure economic developmentalists will put all the available natural resources to as much use as possible to gain maximum financial benefits, the environmentalist raises some very serious concerns. Continued and unsustainable use of the resources most of which are a "common heritage for human kind"[2] causes depletion and degradation. A good example is the African elephant pouching/hunting of the same for its "economically" precious tasks gives huge profits to the poacher. Unsustainable hunting of the elephant has shown that it will render it extinct and the beast which has other sentimental values is likely to disappear from the face of the earth. The future generations can only hear of the animal that was.

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[1] UN Doc. 1987.Report of the World Commission on Environment and Development : *Our Common Future* . A/42/427.

[2] UN Doc., 1992. *Rio Declaration on Environment and Development*. A/CONF. 151/26/Rev. 1 (Vol . I)/CORR. 1

Some of the depletion of the natural resources results in global catastrophic effects that are more likely than not irreversible. A good example is depletion of the ozone layer which modern scientists cannot repair once damaged/depleted. This is precisely the reason why the world under the auspices of the United Nations Environment Programme (UNEP) has organized many conferences and has come up with a number of documents key among their address being economic development and environmental protection and conservation.

The United Nations Conference on the Human Environment in Stockholm in 1972 is one such conference. Though there was no signing of a treaty, there was adoption of an Action Plan of Recommendations and a declaration of 26 principles.[3] It is also at this Conference that the controversy between development and environmental degradation was first set on the international arena. The Conference adopted a resolution on institutional and financial framework that saw the establishment of United Nations Environment Programme (UNEP) in Nairobi Kenya. This is the one body charged with the responsibility and development of International Environmental Law. Though it has seen adoption of numerous environmental Treaties, it has played a relatively low profile arising partly due to under-funding[4] and partly due to the intricacies that surround international law implementation and enforcement. One of the most loaded declarations of the 1972 Stockholm Conference[5] proclaims "*A point has been reached in history when we must shape our actions throughout the world with a more prudent case for their environmental consequences. Through ignorance or indifference we can do massive and irreversible harm to the earthly environment on which our life and well being depend. Conversely, through fuller knowledge and wiser action, we can achieve for ourselves and our posterity a better life in an environment more in keeping with human needs and hopes……man must use knowledge to build in collaboration with nature, a better environment. To defend and improve the human environment for present and future generations has become an imperative goal for mankind. A*

[3] Stuart B. and Gillivray D., 2006. *Environmental law.* London: Oxford University Press. p. 156.
[4] Ibid, p. 160.
[5] U.N. Doc. A/C onf.48/14/Rev. 1(1973); 11 ILM 1416 (1972).

goal to be pursued together, and in harmony with the established and fundamental goals of peace and of worldwide economic social development."[6]

This sounds an alarm to all nations and individuals alike to employ tactics towards sustainability. It is also a clarion call requiring both immediate and gradual changes in production and consumption. It has been reiterated in *Gabcikove/Nagymaros* case[7] that both the existing and future (new) economic activities will require regulatory changes and which will incur costs to align with sustainable development. Among other principles that were adopted, principle number 5 in particular serves to shed a lot of guiding light to most resultant conventions more so the Rio Conference in 1992 – it reads *"The non renewable resources of the earth must be employed in such a way as to guard against the danger of their future exhaustion and to ensure that benefits from such employment are shared by all mankind."*

The declarations and principles are more persuasive than legally binding. The 1972 Conference used more of the term "should" as opposed to "shall" but nevertheless it set the stage for environment protection discussions and put forth guidelines for international cooperation and national action. It is on this premise that Kenyans and our Government must regulate acquisition of land inorder to achieve sustainable development. This is the only way to save our forests, lakes, rivers, wildlife, human bahitat, wetlands and our world at large. Unsustainable use of our natural resources that is devoid of regulation will see them depleted leaving people without food, water and other essentials.

4.1.1 United Nations Conference On Environment And Development (UNCED)

UNCED dubbed the "the Earth Summit" was held in Rio de Janeiro, Brazil from the 3rd June to the 14th June 1992. The Rio Conference as is commonly referred was attended by more than 172 governments and thousands of nongovernmental organizations and individuals. This was twenty years after the

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[6] Ibid, Declaration Number 6.

[7] (1997) 25th September general list, 92 ICJ.

Stockholm Conference and was arguably the second most important international environmental conference. The main agenda of UNCED based on the 1987 Brundtland's report.

The Conference came up with various principles and documents for adoption and observance by the world population. The nations were urged to make eco-efficient policies in their development plans and implementation. Key among the proposals was to come up with alternate sources of energy to reduce over-reliance on fossil fuels linked to global warming and further emphasized use of public transport so as to reduce vehicle emissions of anthropogenic carbon dioxide. The Rio Conference came up with sustainable development international law that had developed that far.[8] The texts that came up and adopted were as follows;

- The Rio Declaration
- The Convention on Biological Diversity[9]
- Agenda 21[10], and
- The United Nations Framework Convention on Climate Change (UNFCCC).[11]

4.1.2 The Rio Declaration

The Declaration is a main (soft law) international environment protection document and very useful in exemplifying the principles of customary International Environmental Law. It consolidates 27 principles upon which major IEL documents find their basis. Key among these articles stipulates "*states shall co-operate in a spirit of global partnership to conserve, protect and restore the health and integrity of the earth's ecosystem. This is in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.*"[12]

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8 Supra see note 3 p. 157.
9 UN Doc. 1992; reprinted in 31 ILM, 517.
10 UN Doc. A /CONF. 151/26 (1992).
11 UN Doc. 1992. reprinted in 31 ILM 848.
12 Supra, note 2, Principle No. 7.

This is largely the principle of "common but differentiated responsibilities". Based on this principle, I would argue that it among other things imply equity and it is used to assert that the more responsible states are in degrading the environment through use and depletion, they bear the higher responsibility in acts geared towards restoration of the same. This implies sustainability or sustainable use in the art of trying to reverse the damage exerted on the environment. This is the principle largely applied in the text to the United Nations Framework Convention on Climate Change (UNFCCC).

Another principle of sustainable development spelt out in the declaration is principle 15. It reads "*in order to protect the environment, the precautionary approach shall be widely applied by states according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation*". Thus goes the precautionary principle, it is clear self explanatory and directly focuses on sustainable development. It has been variously applied in the subsequent treaties and conventions on international environment.

These includes at the preamble of the Convention on Biodiversity, the Vienna Convention for the Protection of the Ozone Layer and the UNFCCC. The principle simply requires that where parties have to make decisions based on the phenomenon though without tangible proof of danger, the decision should be made on the side of safety. Precaution is to be applied in dealing with the allocation of lands near wetlands, within and near forest land, along the riparian of lakes and rivers as well as along the peripheries of the wildlife habitation.

Principle 16 reads in part"..... *taking into account the approach that the polluter should in principle bear the cost of pollution*...." This is the "polluter pays principle" and was well utilized in the case of Indian Council for Enviro Legal Action vs Union of India.[13] The Court held that it is immaterial whether the person bringing about harm from a hazardous activity took reasonable care, the person carrying on activity that is inherently dangerous is liable to make good any loss caused to any other

[13] (1996) 2JT (SC) 196 (1996 AIR SCW 1069).

person. The court imports absolute liability where the person causing pollution not only pays/compensates the victim but also restores the environment from any degradation that might have been incurred. This in Kenya can be applied against those who pollute the lakes and the rivers and especially the industries.

4.1.3 Convention on Biological Diversity (CBD)

This Convention's principal object is to protect and preserve the world's flora and fauna from unsustainable use and depletion. In its text it fully employs the principle of sustainable development. The Convention was proposed in 1987 by the UNEP Ad hoc Working Group of Experts on Biological Diversity. The drafting of the same began in earnest in 1989 and tabled for signature at UNCED on the 5th day of June 1992 at Rio. Of direct focus to sustainable use is article 2 which stipulates that all biological diversity be used to meet the need of the present as well as the future generations.

Article 8 of CBD urges the Northern Countries to offer financial support to the southern states to help in conservation of biological diversity, scientific research and training. This is because the Treaty recognizes that wealth is concentrated in the North whereas biological diversity is concentrated in the South. The pre and post of the CBD signing has been riddled with disagreements. The developing nations objected to terming biological diversity as "common heritage of humankind"[14] due to the fear that the developed nations would encroach onto their territorial sovereignty. As such the final draft did not bear the same. Later the developed nations especially the United States of America raised issues directing them to offer training and transfer of technology basing their argument on the notion that transfer of technology erodes intellectual property rights.

One other problem facing the Convention is that it has not created an international authority to manage shared biological resources. This thus largely lies to be solved vide bilateral negotiations and agreements which ends up creating a whole mixture of principles applied differently from a place to

[14] Hunter D., Salzman J. and Zaelke D., 2007. *International Environmental Law and Policy*, 3rd ed. New York: Foundation Press. p. 1023.

another. The CBD secretariat has however set the agenda for international agreements for instance the Cartagena Protocol on Biodiversity.

Articles 8 and 9 of the Convention promotes sustainable use of the biological diversity through establishment of conservation areas, seed and gene banks and zoos. Article 13 delves on the issue of public education and awareness placing the burden on the states to have their citizenry well equipped with the information on the flora and fauna in their localities.

This Convention helps conservation of plants and animals and save them from extinction and unsustainable population reductions due to hunting and overharvesting of for instance the tiger, whales, sharks and the African elephant. Other human related causes of extinction and population reductions include but not limited to pollution, climate change and invasive species. The provisions of this Convention have so much bearing and applicability in protection of wildlife, indigenous trees and forests as well as fisheries. Acquisition of land in these areas must be regulated along environmental and conservational considerations.

4.1.4 Agenda 21

This is also one of the documents tabled for adoption at UNCED or the Earth Summit. It had as well been drafted for close to three years, from 1989 covering a wide range of provisions all touching on sustainable development. In fact, some people have used the terms Agenda 21 and sustainable development interchangeably. The document is forty (40) chapters and a length of about 700 pages. The main agenda of the document can be broken further to be the elevation of poverty, hunger, sickness and illiteracy all over the world and putting a stop to deterioration of ecosystems which sustain life.

During the Earth Summit, Maurice Strong[15] said the lifestyle of the middle class was no longer sustainable with high consumption of meat, high reliance and driving oneself as opposed to public

[15] Secretary General, United Nations Conference on Environment and Development. 1992.

transport coupled with air conditions at home and in the office. These concerns are on the same breadth captured in the agenda largely under chapter 4 which calls on consumers to make sustainable choices and may also need a change in consumption patterns. The document is quite broad and attempts to cover all dimensions of sustainable use of our natural resources calling upon individuals, private institutions, governments and the international community to apply principles of sustainability in almost all areas of life.

Part two addresses how our resources can be protected including mountains, land use, deforestation, wetlands, biodiversity, oceans, handling hazardous and toxic wastes and also protecting the atmosphere through reduced reliance on fossil fuels. Part III of Agenda 21 focuses on who is responsible to bring about sustainable development. They are called upon to take into account the special interests of the vulnerable, children, women and the indigenous people. Part 4 beginning with chapter 33 is on the tools and facilities employed and the same has been broken down into education and public awareness, severance for sustainable development, finances, transfer of technology, training and capacity building, law and policy and creation of an international framework.

4.1.5 THE UNFCCC

This is the Convention that squarely deals with one issue of the climate change caused by emission of greenhouse gases into the atmosphere thereby depleting the ozone layer by and large causing climate change. The Convention calls on all the states to reduce their greenhouse gas[16] emissions. At its preamble the Convention employs a number of principles of sustainable development. Among these are:

- Common concern for humankind.
- Common but differentiated responsibilities.
- Polluter pays and to some extent, the

[16] These refer to the six gaseous compounds enumerated at annex A of the Kyoto Protocol and believed to be the causes of Global warming.

- Precautionary principle.

The Convention at Article 3 focuses on protection of the climate for the benefit of the current and the future generations, and that the protection of the same should be based on equity and on common but differentiated responsibilities. The document is clear and applies itself upon all states both developed and developing. During the conference of parties held in Berlin in 1995, parties to the Convention realized the need for a legally binding commitment and this led to the drafting and the eventual adoption of the Kyoto Protocol in Kyoto Japan at COP-3.[17]

The Protocol stipulates quantifiable commitments for the reduction of emission of anthropogenic carbon dioxide and sets an upper limit that the 39 states listed in its Annex 1 should not exceed. This is much applicable to Kenya considering that forests are a carbon sink and unchecked acquisition of land within forests leads to clearing of forests and more depletion of ozone layer. This causes a chain reaction leading to global warming, desertification, droughts, lack of food and water and an infestation of diseases.

4.1.6 The United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa. (UNCCD)[18]

The text of the UNCCD was adopted in 1994 in Paris, France and entered into force on the 26th day of December 1996.[19] At its preambular provisions, the Convention recognises that desertification is a global problem affecting the whole earth. It provides in part; "*Noting also that desertification is caused by complex interactions among physical, biological, political, social, cultural and economic factors,* (and)

Mindful that desertification and drought affect sustainable development through their

[17] The Third Conference of Parties of the UNFCCC held in Tokyo Japan in 1997.
[18] UN Documents, 1994. 33 ILM. 1328.
[19] UNCCD (E- Article) available through http://www.doc_bd.org/UNCCD.pdf (accessed on the 11th day of Nov. 2011)

interrelationshipswith important social problems such as poverty, poor health and nutrition, lack of food security, and those arising from migration, displacement of persons and demographic dynamics," This is the world's recognition that indeed desertification is affecting all the human populations as well as flora and fauna and contributing to poverty. Indeed on the same breadth it stresses the fact that UNCCD's success would also contribute graetly to the success of the UNFCCC's goals as well as those of the Convention on Biological Diversity. The preamble further calls upon the nations of the earth to enact national legislations geared towards public awareness and participation in combating desertification. It also reckons that this is a problem that is closely connected to climate change.

Article 19 (f) provides "*by providing appropriate training and technology in the use of alternative energy sources, particularly renewable energy resources, aimed particularly at reducing dependence on wood for fuel;"* Further, Article 8 (b) (iii) of its Annex 1 states "*ensuring the development and efficient use of diverse energy sources, the promotion of alternative sources of energy, particularly solar energy, wind energy and bio-gas, and specific arrangements for the transfer, acquisition and adaptation of relevant technology to alleviate the pressure on fragile natural resources"* This is of particular importance to us as a country considering the high dependence on wood fuel. Application of such provisions will help cure the problem of deforestation and other adverse effects related thereto.

4.2 Applicable Components/Principles of Sustainable Development to Land Acquisition

Sustainable development must be a very loaded terminology despite the definition adopted by the Brundtland report, it remains to be the sole subject of the Earth Summit. The whole of Agenda 21 in its magnitude has been referred to as the sustainable development. The Rio Declaration sets principles that are a breakdown of what it is, and yet all the Conventions of international environment have their basis on its very concepts.

I would in that case and in broad terms come to the conclusion that, what constitutes application of sustainable development would be in line with the Rio Declaration principles which include but not limited to the following;

- The precautionary principle
- The Principle of Common but differentiated responsibility
- Common concern for mankind
- Common heritage for humankind
- The Principle of inter and Intra-generational equity
- Obligation not to cause harm

Because a number of the above principles have been mentioned earlier, I will mention the aspects of the same and those that I had not mentioned and which are relevant to this study.

4.2.1 Precautionary Principle

This is Principle 15 of the Rio Declaration and application of the same has to be weighed against a number of its aspects. Firstly, there must exist risk of threat of serious damage, that damage has to be provable and if it happens, it has to be irreversible and finally with or without full scientific certainty. The Scientific certainty here is in reference to the likelihood of occurrence. However, there must be evidence of imminent danger and damages which are irreversible and for one to rely on this principle, the case must pass the test.

In Shehla v Wapda[20] a factory was engaged in industry that produced some electromagnetic fields. People suffered some sickness in that locality but it was not possible to show the electromagnetic connection to the sickness. It was however proved that in other towns where such electromagnetic fields were, people suffered and experienced similar health issues. The court held that the applicant would rely on the precautionary principle, notwithstanding non availability of scientific certainty.

[20] (1994) PLD supreme Court 693.

If I could import this to our country, the fact that we are experiencing climate change and droughts in some parts of our country, lack of scientific proof that felling trees in the Mau is the cause should not be used as an excuse not to regulate allocation of land therein. The same reasoning can be applied in that lack of evidence or the connection between deaths of fish and usage of a certain fertilizer in the farms on a lake's riparian is no excuse to continue unsustainable agricultural activities on the riparian.

4.2.2 Intergeneration and Intra generational Equity

At the Principle of Intergenerational equity, the subjects of the current generation are called upon to ensure that the productivity of their activities are sustainable as to meet their needs as well as those of future generations. Intra generational equity involves consideration of equalness within various sectors or sections of the same generation. A perfect example would be on the equitable distribution of the waters of River Nile between say Egypt and Uganda. In the case of Opossa vs Factoran[21], some Phillipino children sued a timber company for cutting down trees not only because they were children but also for future generations. The timber company was actually stopped form cutting down trees based on the sustainable of intergenerational equity. In its ruling the court said "*we find no difficulty in ruling that the children can for themselves, for others in their generation and for succeeding generations file a suit...*"

This principle is perfectly applicable in the case of Wangari Maathai v Kenya Times Media Trust where she helped save Uhuru Park. The principle is also applicable in the cases of Mau forest, City Park, the wildlife, rivers and lakes. All these resources must be used in a sustainable way and in a way that depicts that the current generation is only a trustee rather than the absolute proprietor. To achieve the same, acquisition of land has to be regulated accordingly.

[21] (1994)GR Number 101083.

4.2.3 Common Heritage for Humankind

This Principle subsumes the Public Trust Doctrine at the international level where a state holds a resource in trust for the common good of all mankind. This applies to resources such as Lakes, Rivers, Forests, economic exclusive zones, the air, ozone layer among others. Common concern recognizes that the subject matter though may be within a state's jurisdiction, its continued usage causes concern to the whole human race. Example is the ozone layer which is currently a concern an indeed this principle is applied at the preamble of the UNFCCC.

As the Kenyan society there is so much that we hold and should administer for the welfare all mankind. These include wildlife, the forests and Lake Victoria. If we use them unsustainably, It will affect all mankind adversely. For instance if allocation of land in the wild migratory corridor is not regulated, the some if not all species will become extinct from the face of the earth.

4.3.4 Obligation not to cause harm

"*states have in accordance with the charter of the United Nations and the Principle of international laws, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdictions or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction*".[22]

This principle is differentiated from that of polluter pays in that with the latter there is the rule of strict liability and it does not matter that a state had applied care or not, where environmental damage is proved, the victim has to be paid and the environment restored.[23] In Kenya several industrialists have used land in a way that harms human health and the environment. Such are the instances of application and this has well been domesticated at EMCA.

[22] Supra, note 2, Principle Number 2.
[23] Supra, see note 13.

Ten (10) years after the Earth Summit in Rio and the adoption of the principles of sustainable development encapsulated in the Rio Declaration and Agenda 21, the international community met again under the auspices of World Summit on sustainable development (WSSD) from the 26th August to 4th September 2002 in Johannesburg, South Africa. This Conference registered representation from 191 governments and thousands of participants. The summit came up with the three pillars of sustainable development; economic pillar, social pillar and the environment pillar.

The summit did not crystallize any convention but it came up with WSSD plan of implementation and a declaration in addition to partnerships to implement commitments thereof. Commitments that were agreed upon though not on any Treaty included

a) To halve the number of world's poorest people by the end of 2015
b) To significantly improve the lives of about 100 million slum dwellers by the year 2020.
c) To halve the number of people without safe drinking water by the year 2015
d) To halve the number of proportionate population without access to sanitation by 2015
e) Phase out chemicals with detrimental health impact by 2020, and,
f) Significantly reduce the loss of biological diversity by the year 2010.

The conference in 2012 expected to be held in Rio de Janeiro, Brazil marks the 40th Anniversary of the Stockholm Conference and the 20th for Earth's Summit in Rio. It has variously been referred to with some calling it Rio + 20, yet others call it Earth Summit 2012 and others the "Green Meeting".

The Brazil officials have announced the dates for the Rio + 20 Conference to be the 4th to the 6th of June 2012 and the host country promised to make the conference a "greener and cleaner affair".[24] The World Bank has for instance in March this year approved a US$ 15 million loan to Jamaica[25] aimed at funding the country's detailed policy on renewable energy and afforestation thus reducing heavy reliance on fossil fuels.

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[24] *Newsletter of the United Nations Conference on sustainable Development*, 2011 March. (E-Article). Unpublished available through http://www.pdftop.com (accessed on the 5th of May 2011)

[25] Ibid.

Land use and Agriculture sector need to be harnessed to ascertain that land use conversions are not approved in such a way that enhances pollution to the environment and unnecessary congestion and crowding in the urban areas. This is due to the fact that overcrowding brings about increased rate of crime, compromised sanitation and diseases. Forestation and reforestation should form big part of green growth and green economy. It is time the whole world realizes that if something is not done in terms of production in the industrial world, use of a new and renewable energy and sustainable technology, the world is indeed depletable. The natural resources will soon be wiped out, flora and fauna will become extinct, there will be untold suffering in the third world countries owing to the deforestation and desertification. Food scarcity will set in and temperatures will continue to rise. It is without a doubt a scary picture ahead but very few people if any at all can be able to visualize the problem that is facing the current and worse, future generations. Something has to be done, the world has to embrace green growth, the world has to know what lies in waiting for us and the consequences of our actions. Someone has to tell it and the Rio+20 Conference is tasked with this humongous duty of spreading this knowledge to all the populations of the earth. That is the beginning point in saving the earth.

4.3 Kenyan Context

Issues of sustainable development in the Republic of Kenya are addressed in various legal and policy documents starting with no other than the supreme law of the land - the Constitution.[26] Others are various land statutes, physical planning statutes, EMCA, the National Land Policy[27] and various other regulations. This study will however not pretend to address the whole concept under the various

[26] The Constitution of Kenya 2010 – printed and published by the Government Printer Nairobi, enacted and promulgated on 27th day of August of 2010.
[27] Sessional Paper Number 3 of 2009.

provisions. It will be limited to the extent that touches on acquisition of property in land and ways in which it can be used as a vehicle to the achievement of sustainable development.

4.3.1 The Constitution

The preambular provisions of the Constitution[28] at the fourth paragraph states "*RESPECTFUL of the environment, which is our heritage and determined to sustain it for the benefit of future generations*:" further under the article on the national values and principles of governance, it includes "*sustainable development*" as a value and principle of good governance.[29] This is an indication that the people of Kenya though their grund norm have adopted/assumed and yearn to follow the road that leads to sustainable development. It is also true that under the same Constitution, the provisions of article 2(5) and (6) stipulate in black and white that "*the general rules of international law shall form part of the law of Kenya"* and *"Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution*". This means that all the international laws that Kenya has signed or will sign form part of our laws without the necessity of domestication. Following are some of the conventions that are in this case a part of Kenyan laws, but which have in any case been domesticated variously. The most obvious being at section 2 of EMCA which defines a number the internationally accepted principles of environmental law. Sections 50 to 54 of EMCA also largely domesticate the provisions of the Convention on Biological Diversity on *ex-situ* and *in-situ* conservation of flora and fauna.

- UNFCCC
- CBD
- Kyoto Protocol
- The Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Western Indian Ocean.

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[28] Supra. Note 26.
[29] Ibid s. 10 (2) (d).

- The United Nations Convention on International Trade in Endangered Species of Fauna and Flora.
- The United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa.

The Constitution goes further and provides a provision specifically on the environment reading "*Every person has the right to a clean and healthy environment protected for the benefit of the present and future generations though legislative and other measures* ……."[30]

Chapter 5 of the Constitution has further provisions on the same stipulating "*Land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable* ……."[31]

All these provisions are aligning our national laws to the Brundtland's Report carrying fourth the spirit that drove the Earth Summit to developing the Agenda 21. It is important to note that under the Constitution every person has a right to institute court proceedings to make good any violation of the fundamental Human rights. Article 22 further provides that such a person can act on their behalf or for another person group or even the public. This is a Constitutional cure to the dismissal of Professor Mathaai's case on protection of Uhuru Park. The Constitution must thus be commended for its articles on conservation and sustainable use of the environment. This study is hopeful and optimistic that the laws that will flow therefrom will carry the spirit forth and more so with at least equal force if not more. Our Constitution has further dedicated sections 69 to 72 of chapter 5 to the environment and natural resources. Among the key statements is that which calls upon the state to ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources.

[30] Ibid s. 42(a).
[31] Ibid s. 60(1).

The state is further called upon and mandated to achieve and maintain a tree cover of at least ten (10) percent of the total land area in Kenya. Protecting biological diversity, genetic resources and eliminate any processes and activities that are likely to endanger the environment. Under section 69(f) the state has the responsibility to establish systems of environmental impact assessment, environmental audit and monitoring of the environment.

4.3.2 National Land Policy

This is Sessional Paper Number 3 of 2009 that is a comprehensive policy on land issues and which took five years to prepare and publish. This policy paper adopted by the Government of the Republic of Kenya on the 25th day of June 2009 is based on the views and expert opinions collated and collected though an all inclusive and consultative process. It has done its best in bringing out the departmental issues of all Ministry sub-sectors but it is to be noted that it is in conflict with the Constitution mildly and also strongly at other provisions. The Constitution having been enforced after the policy and being the supreme law takes precedence where such incidences occur.

Notwithstanding the foregoing, the provisions and stipulations of the policy are outstanding and quite sound so far as sustainable use of land is concerned. It is therefore a paper that this study cannot ignore. Paragraph 2.1.3.18, states that "……*the National Development Plan (2002-2008) proposed the formation of a National Land Use Policy that would facilitate the preparation and implementation of land use plans for all urban and rural areas*". This will cure the haphazard and lone planning that has characterized most of our cities and towns. Part development plans have been the order of the day and they have been following a national plan that was carried out at independence.

This paper also admits that due to the multiplicity of land registration regimes, rapid urbanization and poor planning, there has been "l*ack of capacity to gain access to clearly defined, enforceable and transferable property rights.*"[32] Population increase and lack of environmental management policies

[32] Supra, note 27 paragraph 2.3.24(d).

further complicates the scenario leading to "*a severe land pressure and fragmentation of land holdings.*"[33]

This in a nutshell is the problem statement that this study set out to find a cure for. It captures the problems that have arisen but which would be cured through proper planning, zoning and controlled acquisition of property in land. The Sessional Paper directs that the radical title shall be vested in the people of Kenya collectively and the exercise of its aspects of compulsory acquisition "*should be based on rationalized land use plans and agreed upon public needs established through democratic process.*"[34]

Paragraph 103 further expounds on the problems that have marred the sector of physical planning to include disconnect between the plan preparatory authorities and the implementers of the same. While the planning and zoning is recommended by the Department of Physical Planning at the Ministry of Lands, the local Authorities are the supposed implementers of the plan.

The Local Authorities are in need of technical and institutional capacity to carry out their functions. Lack of a nationwide plan complicates the problem and this is brought out or results in "*unmitigated urban sprawl, land use conflicts, environmental degradation, and the spread of slum.....*" and loss of biological diversity.

4.3.3 Environmental Management and Coordination Act[35]

This is the Statute that focuses on provisions and the establishment of "*an appropriate legal and institutional Framework for the management of the environment and for matters connected therewith and incidental hereto.*"[36] The interpretations section has adopted the Brundtland's definition of the phrase "sustainable development". This is a clear adoption of the international laws on environment by way of domestication vide legislation. Section 3 provides that any person in Kenya is entitled to a clean

[33] Ibid paragraph 25.
[34] Ibid paragraph 43.
[35] Act No.8 of 1999 of the Law of Kenya.
[36] Ibid preamble.

and healthy environment including access to various public elements or segments of environment for recreational, educational, health, Spiritual and cultural purposes. In further domestication of the international environmental law (IEL), the Act at section 3(5) provides for the principles of IEL including the polluter pays principal, intergenerational and intragenerational equity. Others include public participation and public awareness provided for under paragraphs 20, 21 and 22 of the Rio Declaration. Section 7 establishes the NEMA to be a body corporate with perpetual succession and a common Seal. Its objects among others include "*Examine land use patterns to determine their impact on the quality and quantity of natural resources*"[37] and also to "*monitor and assess activities, including activities being carried out by relevant land agencies in order to ensure that the environment is not degraded by such activities, environmental management objectives are adhered to and adequate early warning on impending environmental emergencies is given*".[38]

If such as these provisions are implemented with the full force of the law backed by political goodwill, such tragedies and incidences as the Sinai Village[39] of the Mukuru slums could easily have been avoided. Had NEMA assessed the disaster in waiting before it happened and sounded an early alarm and had the relevant authorities taken the relevant protective measures and precaution (including Kenya Pipeline Company), then the deaths and loss of property could have been contained. The informal settlements especially along the rail, pipeline and the rivers can and should be a thing of the past. This can be effected by the Government transferring the land to its agencies and these agencies should take physical possession of such properties and not allow any informal settlers. Thus, controlled acquisition of land provides a solution.

Part V of EMCA lays out protective and conservation measures to be laid out including regulations, guidelines and gazettment of protected areas. These include the forests, traditional interests of local

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37 Ibid s. 9(2) (d).

38 Ibid s. 9(2)(i).

39 On the 12th day of September, 2011 in the heavily populated Sinai village almost a hundred lives were lost in a fire that broke out. The Kenya Pipeline Company pipeline burst releasing premium petrol into the slums that are established informally along the pipeline. As it flew fire broke out burning the informal settlements and a huge number of lives were lost and property.

communities, hilly and mountainous areas, rivers, lakes, sea, wildlife conservation areas, costal zones and even protection of the ozone layer. This is for purposes preservation of and promotion of certain specific natural ecological processes, natural environment systems, natural beauty or species of indigenous wildlife and biological diversity in general. The Act also prescribes other tools including environmental impact assessment, licensing, audit and monitoring all which can be used to license projects and land use in accordance with set rules and guidelines. These just like regulation of acquisition of land play a key role in enhancing protection and conservation of the environment.

Schedule two of the Act gives a detailed list of projects that cannot be undertaken before the license is issued while section 68 prescribes that environmental audit report should be prepared at the expense of the applicant and submitted annually to the Authority or at such other intervals as the authority may in writing require.

Under section 112, any person can apply for an environmental easement aimed at furthering the principles of environmental management set out in the Act. The court in granting such an easement should make considerations aimed at preserving flora and fauna, the quality and flow of water in a dam, lake, river or aquifer. Further, considerations are preservation of scenic view or open space, natural contours and features of the burdened land or create and maintain migration corridors for wildlife among others. "*where an environmental easement is imposed on burdened land on which any person has at the time of the imposition .....any existing rights or interest, there shall be paid to that person, by the applicant .....such compensation as may be determined in accordance with section 116.*"[40] The court may if satisfied that the environmental easement sought is of national importance, order that the Government compensates the person[41](so to be compensated). This is meant to keep in line with the constitutional provisions on compulsory acquisition.[42] This is one instance where EMCA

[40] Supra, note 35, s. 112(5).
[41] Ibid, s. 116(4).
[42] Ibid, s. 116(5).

is quite on point that regulation of acquisition of land is a tool for the conservation of the environment and a lead to sustainable development.

4.3.3.1 Environmental (Impact Assessment and Audit) Rules - 2003

The rules are for the most part, the most developed (piece of legislation in Kenya) in terms of sustainable development and the environment. They clearly bring out the role of the public in decision making and public participation in matters environment. Section 4 of the rules state that "*no proponent shall implement a project likely to have a negative environmental impact or for which an environmental impact assessment (EIA) is required....unless an environmental impact assessment has been concluded and approved in accordance with these regulations*"

of importance to note is that when preparing a project report for approval, the proponent as per section 7 (f) must state the "*potential environmental impacts of the project and the mitigating measures to be taken during and after implementation.* It is clear to this study that if these regulations are adhered to during the process of land acquisition, then EIA will also play a key role to achieve sustainable development.

4.3.4 The Physical Planning Act of 1998

Chapter 286 of the Laws of Kenya is the statute whose "*principal purpose is to provide for the preservation and implementation of physical development plans.....(regulating) Physical Planning and development in all parts of the country.*"[43] Collins Odote observes that the applications for development approvals are submitted and are examined by the local authorities before granting such approvals.[44] This Act enumerates the functions of the Director of Physical Planning to include;

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[43] Okidi C., Mbote P.K., and Aketch M., 2008, *Environmental Governance in Kenya.* Nairobi: East African Educational Publishers. p. 344.

[44] Chapter 286 of the Laws of Kenya, s. 29.

(C) "from *time to time initiate undertake or direct studies and research into matters concerning Physical Planning*

(d) advise the Commissioner of Lands on matters concerning alienation of land under the GLA and Trust Land Act respectively,

(e) advise the Commissioner of Lands and Local Authorities on the most appropriate use of land including land management such as change of user, extension of user, extension of leases, subdivision of land and amalgamation of land; and

(f) require the local authorities to ensure proper execution of physical developments control and preservation orders."[45]

In this regard, the Director prepares or causes to be prepared regional[46]or local[47] physical development plans for purposes improving land use and providing for proper development and sustainable use of such land and secure sustainable provisions for transportation, public utilities, commercial uses, industrial lands, residential and recreational areas including parks and open spaces. A plan can be long term or short term and can also be a renewal or a re-development plan.[48] It is in line with this that Odote further observes that one of the important functions of every local authority is to preserve and maintain all land planned for open spaces, parks, urban forest and green belts in accordance with the approved Physical Development Plan.[49]

Under section 29, the Local Authorities have powers to;

(b) Control or prohibit the subdivision of land or existing plots into smaller areas;

(c) To consider and approve all development applications and grant all development plans;

(d) To ensure the proper execution and implementation of approved Physical Development Plans;

(e) To formulate by-laws to regulate zoning in respect of use and density of development.

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[45] Ibid, s. 5.
[46] In respect to land within jurisdiction of a County Council.
[47] In respect of land within jurisdiction of a City Council, Municipality, Town or Urban Council.
[48] Supra, note 44, s. 24(2).
[49] Supra, note 43, p. 345.

In order to effect the foregoing in the land register at registration of documents, the Act has stipulated that "*The Registrar (of lands) shall refuse to register a document relating to the development of land unless a development permission has been granted as required under this Act in respect of such development unless the appropriate conditions relating to such development permission have been complied with.*"[50] This provision is quite loaded and the implications therefrom are far reaching and can indeed be invoked severally to attain sustainable development and protect the environment from further degradation. This provision has however not been fully implemented but the current practice at registration of land transactions makes some use of it. For instance, at transfer of land in relation to a subdivision of land, the registrar has to be provided with the necessary approval showing the permission of the Commissioner of Lands in writing.

If, for instance, under the RTA an applicant wants to register transfer of flats, maisonettes or even town houses, where the title user is indicated as one private dwelling house, the application is bound to be rejected. The applicant is forthwith advised to seek the necessary approvals for change of user from one private residential home to multi dwelling units (flats/maisonnettes/townhouses). It is my considered opinion that such approval must be given jealously after a careful environmental impact assessment has been carried out. This is a perfect use of the process of acquisition of property in land (at transfer) as a tool towards sustainable development. I however insist that, this provision is not fully exploited.

At section 38 it is directed that if a development of land is alleged to have been effected without development permission or that which has contravened the development plan, then the developer shall be served with an enforcement notice to restore the land to its original state within a specified period of time. The notice may require demolition, alteration or discontinuance of any use of land or the construction or the carrying out of any other contravening activities. This provision has been applied partially in Kenya with some peoples' developments having been demolished. Others have been left standing and many informal settlements and places of conducting businesses informally (kiosks and

[50] Supra, note 44, s. 37.

semi-permanent shops) have been demolished especially by the City Council of Nairobi(Local Authorities derive such powers from the Act at section 39).

Before registration of any sub lease in respect to a flat or office space, the registrar of lands requires a prior registration of building plans which have been approved by the Director[51] of Physical Planning. Many registrars are however not well aware of the reasoning behind this requirement. Many are the times when production of the plans is either dispensed with or may not relate to the transfer in question.[52]

However, there are pockets of localities which the layman refer to as "*places of controlled development*" to mean that the Local Authority responsible has taken special interest in that particular locality. Following that it means that development follows a particular pattern. A good example is Karen in Nairobi. In such places, before one starts to put up a project, they ensure that the necessary approvals are obtained from the director of Physical Planning, NEMA, the Local Authority and any other applicable requirements. This practice is however applied to urban centers and is greatly ignored in other smaller towns and rural areas.

4.3.5 Water Act [53]

The preamble to the Act that came into force in the year 2003 states that the Act is to "*provide for the management, conservation, use and control of water resources and for acquisition and regulation of rights to use water; and to provide for the regulation and management of water supply and sewerage services*".[54] This is thus the specific statute that legally provides for all water issues in the Republic. The importance of the Act to this study is to examine how it can be used to facilitate protection and conservation of the environment towards sustainable development and more specifically through acquisition of property in land along wetlands.

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[51] Supra, note 44, s. 41(2).

[52] interview with Jezebel a registrar of Land with Ministry of lands in a district.

[53] Act Number 8 of 2002.

[54] Ibid, preamble.

Parliamentarians thus found it prudent to legislate

"*(a) where the Authority (Water Resources Management Authority) is satisfied that special measures are necessary for the protection of a catchment area or part thereof, it may, with the approval of the Minister, by order published in the gazette declare such an area to be a protected area.*

(b) The Authority may impose such requirements and regulate or prohibit such conduct or activities in or in relation to a protected area as the Authority may think necessary to impose, regulate or prohibit for the protection of the area and its water resources."[55]

The Minister in charge of water may further reserve "*state scheme*" of a water resource for any public purpose, and the land reserved for a state scheme may be acquired in any manner provided by law for the acquisition of land for public purposes. This is what section 21 (2) of the statute dictates. These provisions make it so clear to this study that transfer of land through compulsory acquisition is available to be used for the conservation of the environment.

Under this Act, land can be also compulsorily acquired for public use in relation to water supply and sewerage services and also for protection of a source of water supply, taking into account all pollution and other degradation considerations.[56]

The state derives such authority from the doctrine of "*eminent domain*" which refers to the state's power to acquire private property for public purpose being the holder of[57] the radical title. In the case of Park View Shopping Arcade v Kangethe & 2 others[58] the plaintiffs applied for an order to restrain the defendant from trespassing. The plaintiff being the registered owner of the suit land sort to evict the defendant who (the defendant) was in the business of planting flowers and trees and on this particular one claimed that the suit land being a marshland and a wetland along Nairobi Rivers needed protection. The court held that while indeed the wetland needed to be preserved, the legal provisions had to be adhered to in order to enhance the same. This being a case filed in the year 2004, the court held that in

[55] Ibid, s. 17.
[56] Ibid, s. 78.
[57] Supra – note 43, p. 348.
[58] High Court Civil suit No.438 of 2004 reported in KLR (E & L) 591-610.

the circumstances, the correct thing for the defendant would have been to write to the Minister seeking compulsory acquisition of the land in question.[59] It is anyone's guess that should the case be filed today under the Constitution of Kenya 2010 section 22(1)[60], the learned judge would not have required the defendant to have petitioned the Minister. On that point, the court would rule for the defendant. This to this study demonstrates that under the Water Act, acquisition of land can be used to protect and preserve the wetlands under the doctrine eminent domain.

4.3.6 The Wildlife (Conservation and Management) Act[61]

One of the biggest challenges facing the conservation of Wildlife in Kenya today "*include loss of biological diversity, loss of habitat, fragmentation (of land) due to land use changes, competing land uses……increased human wildlife conflicts ……and non-involvement of (local) communities and land owners.*"[62] This problem has been discussed in the previous Chapter of this study and it is what the Act is attempting to cure. At its preamble, the Act provides that its object is to "*consolidate and amend the law relating to the protection, conservation and management of wildlife in Kenya and for the purposes connected therewith and incidental thereto.*"

The Act further dictates that "*the Minister …… (may) prohibit or regulate any particular acts in any area adjacent to the Park, National Reserve or Local sanctuary, he may by notice in the gazette declare the area to be a prohibited or restricted or regulated to the extent or manner of the restriction or regulation.*"[63] This provision enables the Minister responsible for wildlife to influence the activities of land within and adjacent the protected areas for purposes of environmental protection. This declaration especially in the areas adjacent to the National Reserve, Park or Sanctuary is as good as a compulsory acquisition. This is because the land use therein is regulated and or restricted and in fact if

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[59] Supra, note 43, p. 351.

[60] "every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened".

[61] Chapter 376 of 1976 of the Laws of Kenya.

[62] Supra, note 43, p. 281.

[63] Supra, note 61, s. 15.

anyone clears, cultivates or breaks up for cultivation any land in a national park [64] among other acts commits an offense. It is true that the initial declaration of any land as a National Park, National Reserve or even a game park is an act of transfer of property aimed at preserving and conserving especially the wildlife of our country. At such an instance I see land being acquired so as to sustainably use the same away from unsustainable and unregulated use.

4.3.7 The Forests Act[65]

The precursor statute to the 2005 statute had a number of shortcomings and among them did not offer incentives for the community and private land owners to get involved in matters of forest management. There existed (and there still exists) illegal felling of trees and conversions of land use from forestry to farming[66] and other activities especially on the major forests that are of huge environmental importance. Such illegal use led to degradation and destruction of major habitat for indigenous flora and fauna rendering many at the danger of extinction. Despite the many uses of the forests to Kenya specifically and many other of the developing world, forests provide a major source of energy in terms of biomass. This accounts for 68% of all energy needs in Kenya.[67] This current Act on forestry offers facilitative mechanisms into development and enhancement of the forest industry in the Republic.

The Minister is empowered on the recommendation of the (Forests) Board to declare by notice in the gazette any un-alienated government land or any land purchased or otherwise acquired by the Government to be a state forest.[68] Under section 24 of the Act, the Minister has powers to also declare forests on land under the jurisdiction of any local authority. Such gazettement must be for some certain purposes and importance in terms of being some of water springs, catchment areas, biological diversity or certain rare and endangered species. Other reasons such for declaration would be that the forest

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64 Ibid s. 13(2) (1).

65 Act No.7 of 2005 repealing the earlier chapter 385 of the Law of Kenya.

66 Supra, note 43, FDP Situma, writing on Forestry Law and environment at p. 240.

67 Mumma A., 2011. *Energy Sector in Kenya – An Overview of the Policy Legal and Institutional Framework.* unpublished also see The Energy Policy, Republic of Kenya. Sessional Paper Number 4 of 2004.

68 Supra, note 66.

supports an important industry or is the major livelihood to a people or has significant ecological, scientific and cultural values. The Forests Act is without a doubt using the tool of transfer of property in land in the form of Ministerial gazettement or even by way of purchase so as to conserve or use the environment sustainably.

At section 25(3), the Minister can prescribe a private forest to be a provisional forest which will be managed by the Kenya Forest Service in conjunction with the registered owner for purposes reclamation. This is where a private person or local authority fails to manage such private forest and it carries with it such cultural or environmental significance. This is however not in any way a compulsory acquisition.

Mining and quarrying activities in the forest areas shall be allowed only in certain circumstances and where the miner has executed a bond undertaking to rehabilitate the site upon completion of their operations to the levels prescribed by the Board.[69] This is a clear indication that acquisition of land can be regulated to manage forests.

OTHER LAWS

The other statutes that make use of acquisition of property in land to work towards sustainable development would include but not limited to the following:-

4.3.8 The Land Acquisition Act [70] of 1968

This is one of the most important statutes to this study because to initiate any transfer to itself, the Government or its agencies has to involve the provisions of this statute. It is thus possible to conclude that without this particular law, then all the other environmental statutes can only be implemented halfway. This is because this is the Act of Parliament that lays down the procedure, process and guidelines of how the Government exercises the doctrine of eminent domain through compulsory

[69] Supra, note 65, s. 42(1).

[70] Chapter 295 of the Laws of Kenya.

acquisition. The Constitution provides, *"The State shall not deprive a person of property of any kind……, unless that deprivation results from and acquisition of land …or is for public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament……"*[71]

Section 6 of the Land Acquisition Act provides that *"where the Minister is satisfied that any land is required for the purpose of a public body and that the acquisition of the land is necessary in the interests of defense, public safety, public order, public morality, public health, town and county or the development or utilization of any property in such manner as to promote public benefit ……..and so certifies in writing to the Commissioner (of Lands) he may in writing direct the Commissioner to acquire the land compulsorily under this part*". Key elements that have to be complied with at compulsory acquisition are;

a) The subject land to be acquired must be for reasons (disclosed to the court) public utility importance.
b) The acquisition to be complete must be accompanied by prompt and adequate compensation.
c) Allow the owner access to court of law.

This was made so clear in the case of Commissioner of Lands and another v Coastal Aquaculture Limited.[72] The reason for the acquisition was stated to be "*for Tana river Delta Wetlands*" and Ringera J. in overturning the judgment to rule for the respondents said that the public purpose and body for whom the land was being required was not stated/disclosed.[73] This Act, the study reiterates is the heartbeat and takes a very central position to the extent that its implementation results in acquisition of land for purposes environmental protection.

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[71] Supra, note 26, s. 40(3).
[72] (1996) Civil Appeal No.252 KLR (F&L) Vol.1, 264-295.
[73] Supra, note 43, p. 349.

and being the main source of sustenance and livelihood to Kenya's rural populations. Section 186A empowers the Minister to purchase land or compulsorily acquire if unable to agree with the owner (or the holder of interests thereof) for purposes of production of particular crops.

The Minister has further powers to make rules for any of the following:-

" (a) Prohibiting, regulating or controlling;

(i) The breaking of clearing of land for purposes of cultivation,

(ii) The grazing or watering of livestock,

(iii) The firing, clearing or destruction of vegetation including stubble .....(such power is for)

A. For protection of land against storms, winds, rolling stones, floods or landslides;

B. For preservation on soil or ridges or slopes of in valleys;

C. For preventing the formation of gullies;

D. For protection of the land against (soil) erosion or the deposit thereon of sand, stones or gravel

E. For the maintenance of water in a body of waters within the meaning of the Water Act.

F. For the protection of roads, bridges, railways or other lines of communication .....

(b) Requiring, regulating or controlling:-

(i) The afforestation or re-afforestation of land;

(ii) The protection of slopes, catchment areas ....;

(iii) The drainage of land, including the construction, maintenance or repair of artificial or natural drains, gullies, contour banks, terraces and diversion ditched....."[78]

[78] Ibid, s. 48.

These stipulations enable the Minister for Agriculture to change the land holding, interfere with the interests in the land tenure and change the use of land for the benefit of the environment and promotion of Agriculture. It is clear to this study that the legislature did have in mind environmental considerations while legislating the above. It is also important to take cognizance of rule 6 under its Agriculture (Basic Land Usage) Rules which stipulates that there should not be carried out agricultural activities of cultivation or grazing of any land lying within 2 meters of a water course or in case of a water course more than 2 meters wide within a distance equal to the width of that water course to a maximum of 30 meters. Contravention of this rule constitutes an offense under the Act. This is an effort geared towards the protection of wetlands by avoiding human activities that would compromise sustainable use of the water resources. This is yet another way the Act is seen to regulate acquisition of land and interests thereof for purposes sustainable land use.

4.3.11 Trust Land Act[79] 1939

This is the one Act that governs community lands held by the local authorities on behalf of the people within their jurisdictions. Section 13 lays out the procedure of allocating such land through the process of setting apart. Nothing in this section insinuates anything environmental or even land use that is sustainable during the process of setting apart. "The Council may grant licenses to any person for purposes grazing, removal of timber and other forest produce from Trust Land which is not within a forest area."[80] It is good to note that the Act protects gazetted forests from arbitrary deforestation. At section 38A, any lessee wishing to change user of the trust land allocated to him or her should apply to the Council for consideration and approval. The rules under the Act as per allocation are not comprehensive enough to cater for environmental concerns during allocation of Trust Land.

[79] Chapter 288 of the Laws of Kenya.
[80] Ibid, s. 37

4.3.12 Public Health Act[81] of 1921

It is delightfully interesting to note that under section 124 of part ix to the Act, the court may order the demolition of housing facilities that do not fit human habitation. Section 125 stipulates "*it shall be the duty of the Medical Department -*

a) to collect, investigate and publish facts as to any overcrowding or bad or insufficient housing in any of the districts of Kenya;

b) to incquire into the best methods of dealing with any overcrowding or bad housing so ascertained to exist."

and under section 126 the Minister is empowered to make rules as per the building codes and of dwelling houses, factories, trade premises and inspection keeping the same clean and free from nuisance. Other rules relate to drainage, streets, disposal of wastes, rubbish, refuse and offensive liquids. This (the Medical Department) to me seem to be the Department responsible for the upgrading or reccommending the upgrading of the informal settlements including the slums.

4.3.13 Petroleum (Exploration and Production) ACT[82] 1986

This Act has at its subsidiary legislation, provisions that relate to land access, taken into account sutainable land use to some extent. It is fairly a recent legislation but it also needs to be updated in order to be aligned to the current trends of sustainable development. The regulations have to a great extent tried to control land occupancy by the oil explorers. It stipulates that no oil exploration license will be granted in-

b) any area situated within fifty meters of any building in use, or any reservoir or dam;

c) any public road, within the meaning of the public roads, railways or streets....

e) any land declared to be a National Park or a National Reserve under the Wildlife (Conservation and Management) Act.

[81] Chapter 242 of the Laws of Kenya.
[82] Chapter 308 of the Laws of Kenya.

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

This study has indeed been able to show that the acquisition of land and environmental management is a wide area and this paper cannot study it exhaustively. It has also come out clear that indeed acquisition of property as a transaction in land and a process is a good tool if not a perfect one that can be put to use in order to curb environmental degradation. This will in the long run enable the achievement of the use of the natural resources in a way that meets the needs of the present generation without compromising the ability of the future generations to meet theirs.

Some of the areas where this can be applied would include preservation of wetlands and water bodies, forestry, wildlife and their migratory corridors, agricultural land and human settlement areas. This paper has shown how acquisition of land can also be used to degrade the environment mostly through illegal and irregular allocations of land on the protected areas or areas that are supposed to be reserved for particular purposes. Another way it has happened is through illegal and informal settlements that are within the forests, leisure parks or the wetlands and which cause a huge environmental strain on the natural resources. There has also been a lacuna in the laws and policies and thus land is used in a way that endangers human life, flora and fauna. This is for instance the phenomenon on the animal migratory corridors at various national parks. Sometimes the authorities are at a loss weighing between social –economic and political gains on the one hand and environmental considerations on the other.

This is well illustrated by the Mau Forest phenomenon. There are people who are landless and they can make a living from the forest on which they can farm and fell trees for biomass fuel in terms of charcoal and firewood. To allow or not to allow them is the big question. It is politically correct to allow human settlements in the forest but environmentally unsustainable. Indeed on one occasion the retired President Moi was quoted as wondering how settlements in the Mau Forest would cause drought

and lack of rain in other parts of the country. Whereas reversing the environmental wrongs through direct purchase of property by the Government or vide compulsory acquisition in order to put land back to the right use could be socially, economically and politically very wrong and very expensive, it is in the long run a very treasurable thing to do for the environment and sustainable use of our resources. Another reason why it is not easy to use land acquisition as a tool to reach sustainable development and flowing from above is lack of the ability, social economical or political to implement the policies and the laws that are in place.

It is for instance illegal to settle on a piece of property that you do not own. Getting all the slum inhabitants to move out and putting up descent housing for them is an uphill task. Firstly because of the finances involved and secondly because after the descent houses are put up, the social set up of the dwellers is not in tandem with the new way of life. The dwellers in Kibera are streaming back to the informal semi-permanent houses even after being housed by the government.[1] In fact they rent out the improved houses from the Government and go back to their shanties.

Political goodwill can be used to change a peoples' social-cultural lifestyle and adopt a more environmental friendly settlement pattern. This was well illustrated by the usage of the Nile Delta and Valley. The Egyptians know and believe that the river is the secret of their life. The political leadership of Egypt has also gone out of its way to protect and use the river sustainably. Compared to Kenya's Nairobi River, there are illegal and informal settlements and discharge of affluent from all over. The Government must garner all political goodwill and tighten its enforcement and implementive mechanisms and infrastructure. The laws especially on this particular area are very clear and I would say almost adequate to deal with the menace of illegal settlements along the riparian of Nairobi River and the toxic wastes into the same as well as into lakes Naivasha and Victoria.

[1] Interview with Jessinca, an official of KENSUP on the 7th day of October 2011

A well-known international response and which Kenya is party to as pertains the challenges and conservation of wetlands is the Convention on Wetlands of International Importance Especially as Waterfowl Habitat[2] (The Ramsar Convention). Wetlands and water bodies have important roles in maintaining and supporting biological diversity, hydrological cycle, climate stability, water table, underground water supply, water purification, storage of water and controlling soil erosion.[3] The Ramsar Convention was adopted in 1971 and its main agenda is national cooperation and national action for the conservation and wise use of wetlands and their resources.[4]

Article 2(1) of the convention stipulates that "*Each contracting party shall designate suitable wetlands within its territory for inclusion in a list of wetlands of international importance , hereinafter referred to as "the list" .....each wetland shall be precisely described and delimited on a map and they may incorporate riparian and coastal zones adjacent to the wetlands .....* " thus the Ramsar Sites list. In Kenya they include Lakes Baringo, Bogoria, Elementaita, Naivasha and Nakuru. Designation in the Ramsar Sites list mean that they are of international importance and "*the party state shall with international cooperation in terms of the text of the Treaty formulate and implement their planning so as to promote their conservation .....and .....wise use of their territory.*"[5]

Closer home, EMCA prohibits any activities that would have adverse effects on all water bodies within 100 meters of the wetlands with the Agriculture Act prohibiting the same within an area of up to 30 meters. Section 62(1)(i) of the Constitution of Kenya 2010 directs that all rivers, lakes and other water bodies as defined by an Act of Parliament is public land. This land is not to be subject of private ownership; it is to vest in either the County[6] or National Government.[7] Such land is to be administered by the National Land Commission on behalf of the Government. Also added here is all land between

[2] 996 UNTS 2ys (1976) reprinted in II ILM 97 (Entered into force on 21 December, 1975).

[3] Okidi C., Mbote P.K. and Aketch M., 2008, *Environmental Governance in Kenya.* Nairobi: East African Educational Publishers. p. 337.

[4] The text of the Ramsar Convention. Available on line through www.ramsar.org/cda/en/ramsar-home/main/ramsar/1-4000-0- (accessed on the 17th September, 2011).

[5] Supra, note 2, Article 3.

[6] *The Constitution of Kenya* 2010 – printed and published by the Government Printer Nairobi, enacted and promulgated on 27th day of August of 2010.Article 62(2).

[7] Ibid, Article 62(3).

the high and low water marks at section 62(1)(l) of the Constitution of Kenya. Government must implement this and all settlements and human activities that are to the contrary should be checked and stopped without any further delays.

Another area where the Government has to flex its muscle and fully implement the laws and its policies is in the area of forestry and wildlife. Kenya Constitution stipulates that public land consists of "*Government Forests .....Government game reserves, water catchment areas, National parks, Government animal sanctuaries and specially protected areas.*"[8]

At its preamble, the Convention on Biological Diversity[9], is conscious of the intrinsic value of biological diversity and of the ecological, genetic, social, economic, scientific, educational, cultural, recreational and esthetic values. It reaffirms the states' responsibility in conserving their biological resources sustainably and is aware of the lack of information and knowledge by the greater populations. The preamble states that lack of full scientific certainty should not be used as a reason for postponing conservation measures.

The Convention also provides that "*each contracting party shall as far as possible and appropriate*

(a) Establish a system of protected areas or areas where special measures need to be taken to conserve biological diversity;

(b) Develop, where necessary guidelines for the selection, establishment and management of protected areas .....

(e) Promote environmentally sound and sustainable development in areas adjacent to protected areas with a view to furthering protection of these areas .....

(f) *Rehabilitate and restore degraded ecosystems .....*"[10]

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[8] Ibid, Article 62(17) (g).

[9] The UN *Convention on Biological Diversity,* 3 June (1992) U.N. Doc. DPI/130/7, also in 31 I.L.M. (1992)

[10] Ibid article 8.

The Government will need to employ the full force of the law in rehabilitating all the gazette forests and wildlife habitats that are at the risk of total degradation. The Ministry responsible for forestry and wildlife needs to gazette areas as protected under the respective enabling statutes. The implementing authorities as well as the general public must comply and show the Government total support. There thus has to first be rebirth of the Kenyan common man. This will be accompanied by cleansing aided by the provisions of the Rio Declaration[11] which stipulates "*Environmental issues are best handled with participation of all concerned citizens,.....states shall facilitate and encourage public awareness and participation by making information widely available .....*"[12]

"*Women have a vital role in environmental management and their full participation is therefore essential to achieve sustainable development.*"[13] The same is observed about the youth[14] and the indigenous people and their communities and the local communities.[15] For the longest time in Africa and most parts of the world, matters environmental have been left to the environmentalists and the elite. The rural population and the common man and woman and the youth have little knowledge or information (if any) as concerns sustainable development and wise use of our resources. In order to achieve the goals thereof, these provisions of the Rio Declaration must be actualized.

Kameri-Mbote writing in Okidi, Mbote and Akech at the chapter titled "land tenure and sustainable management in Kenya", observes that the traditional African land tenure was quite sustainable. The communities then recognized the need to pass on all natural resources including land to the future generations in a wholesome state.[16] She explains that those generations did not see themselves as

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[11] *Rio Declaration on Environment and Development*, 13 June 1992, 31 I.L.M. 874 (1992).
[12] Ibid Article 10.
[13] Ibid Article 20.
[14] Ibid Article 21.
[15] Ibid Article 22.
[16] Supra, note 3, at p. 264.

absolute owners, rather they were trustees for themselves and us; the future generations. This is the spirit in the heartbeat of sustainable development.

The land ownership was communal with the members having the rights of access. The leader of the people or the elders ensured access by all members while preserving the land and other resources for posterity. Mbote quotes the Ghanian Chief Nana Ofari "I conceive that land belongs to a vast majority of whom many are dead, a few are living and countless host are still unborn."[17] Agriculturalists knew that farming by shifting was beneficial, they did not use chemical on land, the land was left to fallow. Pastoralists on the other hand also grazed in blocks.

According to Mbote, the state has two residual powers that facilitate its regulation on of property rights and these are the police power and eminent domain. These refer to development control and compulsory acquisition respectively.

While it is true that Government should not settle or allocate land to people irregularly and illegally as in the forests and wildlife habitats, for reasons physical planning, I also need to point out that the reasoning should also be made environmental and this may see some intended allocation stopped. The main gap to be tackled is that after the regulation at allocation, regulations at the instance of transfer and transmission are completely disregarded. This paper has indeed shown that such disregard leaves the land to be used quite unsustainably. This has been the case in river and lake riparian, animal migratory corridors and human residential areas including Kayole and Kileleshwa and many other overcrowded towns in Kenya today. Environment impact assessments must be made a prerequisite to any land allocation, transfer and subdivisions including subdivisions at transmission.

There exists more than one way in which acquisition of land can be used as a tool to attain sustainable development.

[17] Ibid at p. 262.

5.1 When Allocating Land

We have established that the process of land allocation is elaborate and in it among other players are the physical planners both at the Ministry of lands and the Local Authorities. It is my proposal that the NEMA officials also be involved so as to carry out an environmental Impact Assessment. Other Government departments that must be involved for purposes sustainable land use are the officials from ministries of environment, water, forest, wildlife, agriculture and housing.

The process must be regulated by officers who must be well oriented to environmental issues. Land should be allocated a use that is compatible to sustainable development and the allotees should be made aware of the same. If it appears likely that the allotee may not comply with the stipulated use conditions, then I propose the land to be retained by the Government. If the ecosystem is so fragile as not to be entrusted in private persons, that land should be registered in the name of a Government agency rather than be allocated out.

Such authorities should be restricted and the areas be registered as fragile and protected ecosystems. The authorities responsible and the physical plan must clearly lay down the various uses that the same can be put to without compromising sustainability. If fencing would help or any other form of restrictive demarcation can help, then, it should be so done. These would include areas that are under the danger of depletion including forests, wetlands, areas adjacent to wildlife habitat and their migration corridors as well as ecosystems holding endangered biodiversity.

5.2 Special Conditions on Land Title Documents

5.2.1 Resumption Clause

This is one of the special conditions clauses that allow the Government or its agents to enter upon land and lay some infrastructure or acquire part of it for public purposes. This clause is as of practice in the Government conveyancing put on title documents whose user is for public purposes for instance educational or religious. It also applies to those allotees who are charged rent at nominal value. The

current Government nominal land rent is Kenya Shillings 72/-. It is charged on those private owners but who want to designate the land to a public cause including charity.

5.2.2 Reversion Clause

This is another special condition this time indicating that should the allotee change the use of the land away from that of the time of allocation or intend to sell, then the Government will determine the lease. In that case the title reverts to the Government, thus a reversion. It is also applicable to cases of those land uses that are for public purposes.

These two clauses are a strong tool in monitoring land use and regulating the same. They are however available and applicable to certain types of leases and are not spread across the board. The application of these two conditions is based on the public use but does not have a bearing to environmental issues at all. It is for this reason that this study proposes the application of the two clauses be adopted and applied to all allotments that touch on any fragile ecosystems. That way, change of user and transfers of property in land on such lands will only follow strict provisions of the law.

5.3 Compulsory Acquisition

We have seen how under the various Acts of Parliament the Minister is empowered to employ the doctrine of eminent domain over land. Such is under the Water Act, Agriculture Act, Forests Act and Wildlife Protection Act. Under these statutes the Ministers responsible can on recommendation declare an area as protected for purposes under the relevant Act and thereafter acquire the same compulsorily. It is strongly suggested by this study that Government should invoke the provisions of the Land Acquisition Act and apply the same for purposes environmental sustainability.

Ecosystems that it can be applied to include all the areas that have been case studies of this paper. These include forests for instance the Mau, wetlands and there riparian, wildlife habitats and

overcrowded human settlement areas including the slums and blocks of residential flats and apartments that do not adhere to sustainable use of land. This remains the single most important tool that can salvage and reclaim all the fragile ecosystems in Kenya that are currently. Section 6 of the Land Acquisition Act should be amended by inserting the terms 'for environmental protection', so as to make it a basis upon which the Minister of Lands can propose a compulsory acquisition.

5.4 When Transferring Land

Any subsequent transaction in land after allocation and especially the transfer must adhere to proper land use and environmental regulations. This process must be regulated and controlled to reach the desired results. We saw that the registrar of lands does require some completion documents in order to certify and sign a transfer in favour of the buyer under the Land Control Act, the GLA, RTA and RLA. This paper is clear in putting forth a practice rule that any transfer of land in the fragile ecosystems and other designated areas must be approved environmentally. Apart from the consent to transact and other clearances, this paper proposes that there should be in addition an environmental assessment report and approval before registering land acquisition transactions. NEMA and the Department of Physical Planning must carry out a thorough environmental assessment and put forth recommendations for or against any transfer.

All other transfer of property in land including subdivisions, change of user and sale of flats and apartments must also be subjected to some environmental test. This paper proposes that there be carried out and environmental audit to indicate whether indeed the transferor has put the land to the right use. It should also be the opportune time to bring the transferee up to speed on sustainable land use and both parties should sign a covenant with the local authority indicating willingness to adhere to sustainable land use. This process however should not be as rigorous as that of fragile ecosystems, nonetheless there should be an environmental approval. This will also go a long way in enlightening the public on matters sustainable use of the environment. This is one way that the transfer can be used as a process

and regulated for the sake of the environment.

Secondly, transfer can be used by the Government to buy land from private land owners through an agreement. This can be employed where under recommendation of NEMA, the Government through the relevant agency should buy land in order to salvage the environmental cause. I propose this because there are those instances that land was regularly allocated but with the passage of time it becomes necessary for the Government to acquire and manage it. This is for purposes of attaining levels of sustainable use of land as a natural resource.

5.5 Environmental Impact Assessment Clearance Certificate

This study proposes that whenever there is a transfer or allocation of land within the fragile ecosystems, there be introduced an EIA clearance certificate. A specific regulation stating that, the Reistrar of lands shall not register any transaction in land without production of an EIA clearance certificate should be enacted. This will serve to protect and control activities within and along all the fragile ecosystems enumerated by this study.

5.6 Enforcement of Laws

Kenya enjoys the legislations of very well thought out regulations at acquisition of land but which are not implemented. We have in our earlier chapter seen that under EMCA and the Water Act, agricultural and other human activities are not supposed to be carried out within some measure of the wetlands. Cars have continued to be repaired and washed right in the middle of Nairobi River. Informal settlements have found their way all along the River. There is an authority that is sleeping on its job. The City Council of Nairobi must stop all these activities along the River.

Various Ministers in the Government departments have under the enabling Statutes been accorded powers of compulsory acquisition and other forms of control over the fragile ecosystems. Wetlands, forests, human settlement areas and wildlife habitats in Kenya need urgent reclamation. This paper

reckons that it is long overdue and such powers should be employed to restore the environment. These includes the Ministries for the responsible for agriculture, water and water resources, wildlife, housing and forestry. Laws that touch on these matters should and must be exercised devoid of any political machinations.

There are so many environmental regulations that are not implemented for many reasons. For instance, when carrying out transfer of land, the Commissioner's consent should be pegged on land use and development. The Commissioner should through his office before issuing consent to transfer verify that indeed the subject property in land is developed as per the special conditions on allocation. Due to lack of capacity and being overwhelmed by the members of the public, site visits do not happen.[18] Consent issuance in many instances is pegged to payment of rent. This is not right, had it been the intention, then we could as well just do with rent clearance certificate.

Commissioner's consent or the land control board consent to land transactions has a bigger reason than just to check payment of rent. These other purposes include those that are environmental in some way, it is in itself an approval of some sort. The Commissioner of Lands must indeed crack the whip and see to it that all environmental conditions on the title are fulfilled before issuance of such consent. Where there is lack of capacity, training can cure the ignorance and employment of personnel who are environmentally alert will enhance sustainable management of land.

The law must prescribe stricter penalties for non - observance of the provisions that regulate sustainable use. Penalties must be meted on both the land owners public or private and any implementing authority that has not played its role diligently. Law is central to regulation in the resource management, it prescribes the rules for resource use and makes provision for implementation and enforcement mechanism.[19] It must then be used to regulate the acquisition of land as above proposed to achieve sustainable development.

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[18] Interview with Jairus Lands officer on 13/10/2011

[19] Supra, note 3, p. 7.

5.7 Public Participation

Though public participation is not in any way a mode of land acquisition, in this era of expansion and the spread of information and human rights, it is only fair and wise that the public is made aware of the danger that lies ahead. It is important that members of the general public are enlightened in the direction that sustainable use is that use of our natural resources in such a way that the current generation is not the sole and absolute owner. We have to apply intergenerational equity. We hold the resources in trust of our use and for future generations. If the current trend of unsustainable use is carried forth not for too long, the world may as well be depleted. Indeed the earth is depletable. Forests are being cleared every day, rivers and lakes are drying up, flora and fauna are facing the danger of extinction. We too may face extinction, the earth may get too hot or flooded and most of our species may not survive through all the calamities that are a likely result of unsustainable land use.

In order to achieve sustainable development, the larger and majority populations must be informed of the ways through which they can be involved and how to contribute. People must be made to own and desire the land acquisition processes and transactions that are geared towards this cause. Both the County and Central Governments must take steps to reach meaningful public participation. The Government alone may not achieve much, there needs to be input from all members of a nation.

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TABLE OF INTERVIEWS

Interview	Interviewee Pseudonym	Occupation	Mode of Interview	Place & Time
1	Jessinca	Kensup Office	L & D	Nairobi 7/10/2011
2	Jairus	Lands officer	L & D	Nairobi 13/10/2011
3	Jethro	Land owner	F & D	Nairobi 10/10/2011
4	Masinde	Physical Planner	L & D	Nairobi 5/8/2011
5	Jemal	Advocate	L & D	Nairobi 14/10/2011
6	Joakim	Land developer	L & D	Nairobi 15/10/2011
7	Barsosio	Land Registrar	L & D	Nairobi 6/7/2011
8	Jacob	Lands Officer	L & Q	Nairobi 5/10/2011
9	Jezebel	Land registrar	Q	Machakos 5/10/2011
10	Jasient	KPLC Office	F & D	Nairobi 5/8/2011
11	Jasreer	NEMA Lead Expert	F & D	Nyeri 7/10/2011

Where ;

L = Face to face interview

F = Interview over the phone

Q = Interview by questionnaire

D = Interview by discussion