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AN ANALYSIS OF SECTION 143 (1) OF THE REGISTERED
LAND ACT

A Research on the Social, Political and Economic Impact of
that Section on Kenya's Land Resources (A Dissertation Paper
submitted in partial fulfilment of the requirements for the
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PREFACE

The Impact of S. 143 (1) of the Registered Land Act has never been adequately investigated and an attempt is made in this paper to analyze the social, political and economic implications of that section in order to crystalize the dilemma that has faced lawyers (both judges and practitioners alike) in dealing with the problems which this provision raises. Throughout this paper, I have attempted to demonstrate that the de facto effect of the section is to confer on absolute proprietors greater rights than do in fact exist in Law. The conclusion reached is therefore inevitable; that the provision is repugnant to principles of law and equity and should be amended. By doing so, I hope the law will be more acceptable to people. I cannot say that my investigations in this field were as exhaustive as could be expected but I hope that the issues raised in this paper will provoke further research on the subject.

I am greatly indebted to my Supervisor, Dr. H.W.O. Okoth-Ogendo, whose expert advice in the writing of this paper was quite invaluable. I also extend my thanks to Mr. J.F.H. Hamilton and to Mr. Humprey Slade, E.B.S., K.B.E. both of whom made valuable comments and criticisms and also lent me some of their papers.

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Scope of Investigation

Section 143 (1) of the Registered Land Act¹ (hereinafter called the R.L.A.) provides as follows:

"143. (1) Subject to subsection (2) of this section, the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than first registration) has been obtained, made or omitted by fraud or mistake."

This section has been interpreted to mean that first registration within the meaning of S.14 (d) of the Act is unchallengeable even if fraudulently obtained. It follows by virtue of this provision that a court's power to rectify the Register by directing cancellation or amendment of any registration or entry therein is limited to registrations or entries other than the first registration of the title to any land made in accordance with the provisions of the Act²

The purpose and scope of this dissertation is to describe and analyze the social, political and economic impact of that interpretation on Kenya's land resources. It is essential in this regard that we should analyze the legal and political history of the section, to ascertain what rights are conferred on a proprietor by first registration and to consider judicial attitudes to the problems that the section raises.

CHAPTER ONEINTRODUCTIONTHE HISTORICAL FACTORS UNDERLYING S.143 (1)
OF THE R.L.A.

There are two kinds of problem which underlie S.143 (1) of the R.L.A. both of which were a result of reform in African tenure. These problems are either of a political or of an economic nature, and an analysis of them will indicate what factors brought about the inclusion of S. 143 (1) in the R.L.A. as well as explain the sense of urgency and the great haste to complete consolidation during the Emergency while Emergency regulations were in force, the politicians were detained, and the people themselves were submissive following villagization.³

The creation and consolidation of the Reserve system by the Colonial Government had created an agrarian problem in the African areas. This system, together with other measures taken by the Government of the time, such as its taxation policy, the "Kaffir Farming" Agreements and the prohibition of the growing of cash crops by Africans,⁴ disrupted land relations and resulted in the displacement of pastoral and agricultural communities. Problems of human adaptation, hitherto unknown, became widespread as did the disruption of the equilibrium between patterns of land use and the availability of land which was seen in the rapid deterioration of land resulting in fragmentation, over population by man, over-stocking of beasts and soil erosion.⁵

Up to the end of the Second World War it was felt by the Colonial Government that the development of the African areas was inconsistent with the demands of the settler economy, the two most important of which were the acquisition and ownership of land considered "suitable" for European settlement, and the subsequent need for a continuous supply of cheap and dependable labour for plantation agriculture. It was also feared that tenure reform would lead to a premature breakdown of traditional controls thus increasing the problems of maintaining law and order in the Reserves.⁶ Despite these fears, tenure reform in Kenya began in the 1940s when the settler economy began to stabilize again after the disastrous results of the inter-war economic depression. Demands for internal self-sufficiency in cereal and horticultural products could not be satisfied by the settler economy alone, and it therefore became necessary for the African sector to assist in production. Political control to direct and regulate economic activity in the African areas was therefore necessary, and measures were effected to try and relieve population pressure by moving peoples in the African Reserves and re-conditioning the land. Sessional Paper No.8 of 1945 established the African Settlement Board composed of settlers who knew of the "problems of African settlement" and "primitive agriculture". This scheme failed, and such failure marked a turn in the development of African agriculture.

Tenure reform as a political measure became most desirable with the outbreak of the Emergency in 1952.³ As a measure of legal reform, land consolidation and registration were designed to end the uncertainty of customary tenure and to provide an indefeasible system of registered titles guaranteed by the State. The entire process of tenure reform was expected to create a stable middle class built round the "loyalists", who were regarded by many politicians of the Colonial Government as the "natural" leaders of the future. Such a class, it was hoped, would be too interested in farming to be seduced by the Mau-Mau into further subversion.⁷

It was important to expedite the process of tenure reform before the more intransigent detainees were released but a considerable amount of research and investigation had to be carried out before a system of registration of title could be created. The Native Land Tenure Rules,⁸ 1956 were passed by virtue of S.64 of the Native Trust Lands Ordinance,⁹ 1938. Not only did these Rules provide for the determination of existing private right-holdings and for consolidation and demarcation of land-holdings but they also provided for the preparation and maintenance of a Register showing the right-holders and other persons interested in each piece of land in respect of which an individual right had been recognized. The Rules gave the Government power to control and regulate (but did not confer title or change) tenure. They were strengthened by the African Courts (Suspension of Land Suits) Ordinance,¹⁰ passed "to suspend the institution in

African courts of proceedings relating to certain land situate in the Native Lands" and to avoid any conflict between the administrators and the courts, as the former were not using any known system of customary law and the tenure reform programme was repugnant to the natives. This Ordinance aimed at giving some assurance of quietude of possession which would carry the occupiers of consolidated holdings over the interim period before registration of title was complete. It is significant to note that the Colonial Government was anxious to ensure that the work of its administrators to consolidate parcels of land was not abortive, and that it was unchallengeable on conclusion. The Forfeiture of Lands Ordinance¹¹ had been passed in 1954 to authorize the Colonial Government to seize the property of persons sympathetic with the Mau Mau, while the Indemnity Ordinance¹² was enacted to restrict the taking of legal proceedings in respect of certain acts and matters done during the Emergency.

One of the effects of the mass of legislation described above was the enactment of S. 143 (1) of the R.L.A. It was argued by the Working Party on African Land Tenure 1957/58¹³ that to allow first registration to be open to challenge would endanger the whole process of tenure reform. It was further argued that a provision such as S.143 (1) would benefit Africans by relieving them of the crippling burden of payment for law suits brought before African courts. "We came to the conclusion that the advantages for the Africans of making first

registration final and absolute far out-weight any advantage that might result from allowing the original adjudication to be challenged.¹⁴" It is submitted that in the light of the legislative measures outlined above, the conclusion reached by the Worling Party is a misrepresentation of the facts and of the position as it obscures the deliberate policy of the Colonial Government to exclude certain people from owning land. Tenure reform was used therefore, as a punitive measure against subversive elements.

Section 143 (1) was not incorporated in the R.L.A. merely to guarantee the work of the administration in the process of tenure reform. It was not enacted to relieve Africans of the burden of paying court fees as the African Courts (Suspension of Suits) Ordinance¹⁰ and the allied legislation noted above had already seen to that. The inclusion of S. 143 (1) in the R.L.A. is a glaring example of the continuance of colonial land policy even after Uhuru. The Colonial Government was anxious to safeguard settler interests at Independence and this fear necessitated the inclusion of S. 143 (1) to give legal sanctity, as did S. 75 of the Constitution, to the continuance of the capitalist legal order and to neo-colonialism. The concept of absolute proprietorship in the R.L.A. retained in the hands of the Europeans and the African middle class the power to exploit Kenya's

land resources. Since individual title was seen as being "superior" to the traditional system of tenure, it was necessary to have a provision such as S. 143 (1) in the 1963 Act in order to protect the political, economic and ideological forces of colonial entrepreneurs.

The unimpeachability of first registration is also significant as a political measure in that it aimed at quickening registration to punish Mau-Mau detainees and their sympathisers when they returned from detention to find that their land had either been allocated to someone else or lost by virtue of the Forfeiture of Lands Ordinance¹¹. S. 143 (1) strengthened colonial policy during the Emergency by creating an African middle class of landowners who were "loyal" to the Crown and who could be seduced into safeguarding settler interests at Independence. Further, the section maintained a cardinal principal of capitalism, namely that of justifying the economic suffering of a small minority if it be for the general good. Thus, if the majority of first registrations were correct and only a few were obtained by fraud or mistake, this was justifiable.

Along-side these political considerations should be seen the arguments of economists, summarized in a policy statement in the Swynnerton Five Year Plan¹⁵ "to intensify the development of African agriculture." In favour of tenure reform as a basis of an agrarian revolution for solving the problems associated

with the reserve system, it was argued that tenure reform should be focused on establishing individual proprietorship which was in itself an incentive to development as it generated industry and enterprise.¹⁶ It was hoped that this economic approach would solve the problems arising from traditional customs of inheritance, namely the division of family land into many fragments scattered over miles of country and of a size scarcely worth the labour of cultivation. Further, it was argued that a tenure system based on individual proprietorship would generate the raising of funds through legal charges and other securities facilitating agricultural planning and consequently technological innovation.¹⁷ Out of better planning, individual enterprise and a booming agriculture would evolve employment to absorb the landless class, thereby creating a stable peasantry. The processes of adjudication consolidation and registration thus evolved.¹⁸ Instead of communally "owned" land being held in usufruct by individuals, in the new system each consolidated farm was actually "owned" in the western sense, by an individual who had a registered title to it. Land thus had become chargeable, rationalized and subject to sale or legal exchange without regard to clan membership.¹⁹

The fears and objects which underlie the political and economic policies outlined above go to show why S.143 (1) was enacted in the R.L.A.

The provision first appeared in its present form as S. 89 (1) of the Native Lands Registration Ordinance²⁰, 1959 which was the result of the work of the Working Party¹³. This Committee made recommendations relating to, inter alia, the status of land in respect of which title was to be given, the nature and form of title to be conferred, the substantive legislative framework for the entire tenure reform and matters regarding the control and registration of land transactions. The Ordinance set up a comprehensive procedure of land tenure reform and registration of title. Under S. 89 (1), first registration became completely unimpeachable to ensure that action taken by the administration was guaranteed once it entered the Register²¹. Once such land entered the Register it ceased to be governed by customary laws (s.38) unless such rights were shown on the Register (s.40). S.89 (1) is now S. 143 (1) of the R.L.A. which Act re-enacted the registration provisions of the Native Lands Registration Ordinance²⁰ (The Land Registration (Special Areas) Ordinance²² after 1960) in 1963.

In conclusion, S. 143 (1) was used as a legal solution to political unrest which had been sparked off long before 1952 by the "agrarian" problem in the African Reserves. It was hoped that political pacification would bring with it economic development. Tenure reform brought with it many problems which were anticipated by the Colonial Government. S. 143 (1) of the R.L.A. was aimed at shutting the door to the past by giving legislative sanctity to the un-impeachability of first registration.

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As will be argued in the course of this paper, this policy was to prove to be a fatal mistake. First registration has failed in many instances to recognize all existing rights to land as a result of which many of the transactions in land, including transmissions, which have taken place have not been registered. An accumulation of such glaring injustices could well lead to the complete breakdown of the system of registration.

With this picture in mind, let us examine the provisions of S. 143 (1) in the light of the rights created under absolute proprietorship to indicate why the process of registration must be free from blemish.

In an attempt to determine what kind of estate absolute proprietorship is, it is important to address our attention to the following questions: first, what kind of estate is it? Is it a fee simple, or is it the nature of an absolute ownership or an estate in property? Secondly, what is the content of that estate i.e., how much ground can one have? Is it a fee simple?

Under the Law of Property Act, 1925 (hereinafter called the L.P.A.), the fee simple is defined in scope and duration in that the fee simple owner is said to possess unrestricted powers of use, abuse and disposition. All of the Act's prohibitions and limitations to these powers, subject to restrictions by the State.

CHAPTER TWO

The Nature and Content of
Absolute Proprietorship
under the R.L.A.

1. The Nature of Absolute Proprietorship
Under the R.L.A.²³

Before an analysis of the socio-economic and political significance of S. 143 (1) can be undertaken, an enquiry into the nature and content of rights conferred by first registration is necessary. According to the R.L.A. registration as a proprietor of land under S. 27 (a) confers absolute ownership of that land with all the rights and privileges belonging or appurtenant thereto. In an attempt to determine what kind of estate absolute proprietorship is, it is important to address our attention to the following two questions: first, what kind of estate is it? Is it a disguised fee-simple, an estate in the nature of an allodial ownership or an estate sui generis? Secondly, what is the content of that estate i.e. how much proprietary power does it in fact confer?²⁴

Under the Transfer of Property Act²⁵ 1882 of India (hereinafter called the I.T.P.A.), the fee simple is unlimited in scope and in duration in that the fee simple holder is said to possess unrestricted powers of use, abuse and disposition. S.11 of that Act prohibits any limitation to these powers, subject to restrictions by the State.

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The system of absolute proprietorship under the R.L.A., by virtue of S. 27(a) also confers upon owners of land the rights to control exclusively certain property of which they are registered under the Act as the absolute proprietors. In order to enforce this section, S. 88 prohibits any purported limitation of disposition and any barring in use except under SS 94 - 100.

It is significant to note however, that absolute proprietorship under the R.L.A. is an estate wider in its nature than the fee simple under the I.T.P.A. because the radical title under the R.L.A. system is vested in the absolute proprietor and not in the State as is the case under the I.T.P.A.. On first registration under the R.L.A. the radical title in the County Council is extinguished and vested in the owner; the State however retains its sovereign rights of that land even though it can no longer be said to own the radical title²⁶. In this regard, absolute proprietorship would appear to be closer to an estate in the nature of an allodial ownership in that there is no feudal superior. In practice, however, the rights of a fee simple holder and those of an absolute proprietor are dependant upon what society and the law permit, and the quantum of rights cannot be determined in isolation from these factors²⁷. As a result, although both estates do confer unrestricted powers of use, abuse and disposition, the activities of the holders of either of these estates will greatly vary according to social, economic and legal needs. Does this then mean that absolute proprietorship is in fact a disguised fee simple? It is true that there are no feudal

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burdens on fee simple holders under the I.T.P.A. However, it is submitted that as the radical title to land under the R.L.A. is vested in the absolute owner, absolute proprietorship is in fact an estate sui generis guaranteed by the State by virtue of a registered title.

2. The Content of Absolute Proprietorship

Having sketchily looked at the nature of absolute proprietorship we must now examine the second question in the analysis namely, what is the content of that estate?

Section 28 of the Act provides that the rights of a proprietor whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court shall be rights not liable to be defeated except as provided in the Act and shall be held in the manner provided by S. 27 (a) subject to S. 30 of the Act and any encumbrances shown on the Register. It would appear from the cases that the scope and content of the estate conferred under the R.L.A. is extremely wide.

In Thuku Mbuthia v. Kaburu Kimondo²⁸ the plaintiff granted some land to his son under Kikuyu customary law. His son died before the land was registered under the R.L.A. and the Plaintiff subsequently registered the land in his own name while the wife of his deceased son was still in possession.

The Plaintiff threatened his daughter-in-law with eviction, and she sought the assistance of the District Court which awarded her compensation for the loss of her land and the coffee growing thereon. Thuku appealed to the Court-of-Review which held that he must succeed as the District Court had awarded compensation on moral and not legal grounds. The rights of the Plaintiff to the exclusive control of the land were held to be rights of ownership of an absolute proprietor conferring all powers under S. 28 of the R.L.A.

This decision has¹ been strengthened by the recent High Court decisions in Esiroyo v. Esiroyo²⁹ and Selah Obiero v. Oregio Opiyo and others³⁰ which have interpreted the provision in S. 28 of the Act as extinguishing all customary law rights to land unless such rights are shown on the Register as encumbrances or are enumerated as overriding interests under S. 30 of the Act. S. 143 (1) gives legislative sanctity to this interpretation which imposes a "superior" law of an essentially capitalist nature on an "inferior" law. Thus, an African cannot plead customary land rights against first registration because customary law is inferior to and subject to all written law.³¹

The wisdom of the above decisions has been doubted and Mr. Justice Madan has offered an interpretation of the law in Mwangi Maguthu

v. Maina Maguthu³² which is in my view to be preferred. His Lordship contended that the provisions of S. 143 (1) may be averted if an implied trust is declared in the case of a first registration which has been obtained by fraud or mistake. This would mean that the registered proprietor would hold such property upon trust for others with the duties inherent in trusteeship under SS 126 and 127 of the Act.

An action based on Mr. Justice Madan's proposition would not seek to rectify the Register but merely to recognize that the registered proprietor was a trustee holding the rights and privileges conferred by S. 27 (a) upon trust for others subject to an express or implied trust. If customary law recognizes an inherent trust as suggested by Madan, J, then customary law rights need not be shown on the Register as encumbrances. It should be noted, however, that this case is not authoritative on S. 143 (1) but the obiter dictum of the Judge establishes an opening that could be more widely explored to avert the unjust effects of the section.

It should be clear from our discussion of the nature and content of absolute proprietorship that the rights of a registered proprietor are extremely wide. The cases reveal that the provisions of S. 28 of the Act are exhaustive and that customary law rights cannot be pleaded against a first registration. This being the

CHAPTER THREE

The Conduct of Tenure Referees and S. 143(1)

position in law, it is of the utmost importance that the process of registering rights on first registration should be without blemish since such a registration cannot be challenged. It is not only dangerous and most undesirable but also most unjust that the wide powers conferred on an absolute proprietor should be registered in favour of the wrong person. Experience in Kenya unhappily reveals that the system of registration is not without blemish and that S. 143 (1) has built great injustices into the system³. The next chapter will focus on some of the attempts which have been made to redress the situation and to save the section from further abuse.

1. The Conduct of Land Tenure Referees and S. 143 (1)

Under S. 143 (1) of the Act, a court may order rectification of the Register where it is satisfied that any registration (other than first registration) has been obtained, made or carried out fraudulently or in error. This provision is not only most unsatisfactory but also dangerous. First registration is the final stage in the process of tenure reform as originally set out by the Native Land Tenure Act, 1956, and by subsequent legislation in 1959²⁰ and 1968²¹. As it is impossible to discuss the legal problems of S. 143 (1) without an understanding of the process of tenure reform, a short digression is here considered desirable.

CHAPTER THREE

The Conduct of Tenure Reform and S. 143(1)
and the Judicial attitudes to problems
arising from it

We have examined briefly in the last two chapters the political history surrounding S. 143 of the R.L.A. as well as the nature and content of the rights created by absolute proprietorship under the Act. In this chapter we shall analyze the legal problems which the section raises, the socio-economic and political impact of the section on proprietors and the attempts which have been made both by the courts and by administrators to deal with the problems which the section raises.

1. The Conduct of Land Tenure Reform and S. 143 (1)

Under S. 143 (1) of the Act, a court may order rectification of the Register where it is satisfied that any registration (other than first registration) has been obtained, made or omitted by fraud or mistake. This provision is not only most unsatisfactory but also dangerous. First registration is the final stage in the process of tenure reform as originally set out by the Native Land Tenure Rules⁸, 1956, and by subsequent legislation in 1959²⁰ and 1968¹⁸. As it is impossible to discuss the legal problems of S. 143 (1) without an understanding of the process of tenure reform, a short digression is here considered desirable.

Tenure reform consists of a three-tiered process involving first the adjudication of claims and secondly the allocation of a single plot of land equivalent to the plot, or to the aggregate of the plots where there were more than one, to which each person had been found to be entitled. This second stage may be omitted where fragmentation is not too grave and in all cases to which the 1968 Act applies. The process is concluded by registration which enters the rights of the individual proprietor in a State Register.

As the law now stands, the Adjudication Register prepared as a result of the adjudication officer's decisions on disputes is uncompromisingly final although there are provisions for appeals to be made to an Arbitration Board or to the Minister of Lands and Settlement. Under SS. 10 and 11 of the Land Adjudication Act⁸ an adjudication officer is given extensive quasi-judicial powers with a wide discretion in exercising them. S. 34 of that Act indemnifies all such officers appointed under the Act as well as other persons from liability for any act done or omitted to be done in good faith in the exercise or supposed exercise of their duties under the Act. This is the interpretation which has been given to S. 34 by the High Court in Apollo Odhiambo v. James Otieno Odonyo and the A.G.³³ which also suggests that S. 34 not only protects public officers from tortious liability but in addition precludes parties deprived of their land from recovering it.

Unhappily, adjudication officers do not always act in good faith and courts have found their hands tied from doing justice by S. 143 (1) in that they cannot order rectification of a Register by directing the Land Registrar to rectify a fraudulent entry. Although clerical errors in the Adjudication Register may be corrected, no court and no administrative authority may otherwise question either it or the first registration based thereon. The Working Party on Africa Land Tenure¹³ when discussing this point, as we saw in the first chapter, justified it on the ground "that to allow the first registration to be open to challenge would endanger the whole process". The position has changed since 1958 and there is evidence that the process of tenure reform is now quite successful.³⁴ Sorrenson³ has outlined several instances of unfairness and corruption during the process of land consolidation in Kiambu, Murang'a and Nyeri. The events leading to the enactment of the Land Registration (Special Areas) (Fort-Hall District) Special Provisions Ordinance³⁵ reveal that demarcation officers were bribed, and rumour has it they are even bribed today, to include fictitious fragments in the Adjudication Register so that on a first registration a fraudulent party would receive more land on the re-allocation than his just entitlement.

During the Debate in Parliament on the Land Adjudication Bill in 1968, Mr. Martin Shikuku, M.P. made the following interesting comment:

"I have heard cases, and there is one in the sub-location of Shatsala in which somebody had a dispute: the matter was sent to the adjudication committee which awarded him the land, and then later on somebody fought and killed him. The brother of the deceased went to claim the land only to find that the number of the land had been changed - the registration number had been changed.....
..... Somebody played a game, though. He went to the adjudication officer and changed the number in the registration office, and, in place of the deceased's name that other person's name was put in"³⁶

To further highlight the problems presented by the way in which land adjudication is conducted, it is useful to record a case from Siaya revealed recently by the Chief Land Registrar in which an Adjudication Committee and an Arbitration Committee awarded certain land to the person whom they regarded as the rightful owner. The Adjudication Officer however, refused to implement the decisions of the two tribunals and the losing party was entered into the Register as absolute proprietor on the first registration.³⁷

It is clear from these observations that adjudication officers can and do abuse their powers, either as a result of a bribe or as a result of political pressure. It is understood not to be uncommon for political pressure to be used to coerce honest

adjudication officers to make "clerical errors" thereby avoiding the implementation of just decisions of Adjudication Committees.

In spite of Apollo Odhiambo v. James Otieno and the AG³³ and the letter of the law,

adjudication officers exercise an absolute discretion and in many cases abuse their powers in the execution of their duties.

The cases have indicated the dilemma which has faced the courts in attempting to do justice in cases falling squarely under

S. 143 (1) of the R.L.A. The courts have been willing to recognize the rights of

others where the registered proprietor is tainted with fraud or where the Plaintiff establishes a claim under customary law.

However, there are solid precedents which bar any rectification of a first registration or any recognition of customary rights. In

Obiero v. Opiyo and Others³⁰, the plaintiff was registered as the absolute proprietor

of a piece of land under the R.L.A. and no encumbrances were noted on the Register.

She sued for possession of the land and the Defendants admitted that they were in possession but claimed to be owners under

customary law. They further alleged that the Plaintiff's registration which was a first registration was obtained by fraud.

It has been argued that such person as aforesaid may sue the attorney-general

Following the reasoning of the Court in Thuku Mbuthia v. Kaburu Kimondo²⁸ the High Court held that even if fraud had been proved, the Plaintiff's title was indefeasible as it was a first registration. The Court further held that the Plaintiff's title was not subject to any encumbrances and was therefore free from all interests and claims and also that customary law rights are not overriding interests. This case was followed in Esiroyo v. Esiroyo and Another²⁹. The effect of these decisions is that there can be no direct rectification of the Register on a first registration no matter how high the degree of injustice. The de facto effect of S. 143 (1) is to confer greater rights than do in fact exist in law.

It has been suggested that in view of the fact that there can be no direct rectification of the Register due to the provisions of S. 143 (1), any person who has suffered damage by reason of a mistake or omission in the Register or as a result of any rectification thereof shall be entitled to be indemnified by the Government by virtue of S. 144 (1) of the R.L.A. The Torrens principal incorporated in S. 144 relies on the simple admission of injury, and it has been argued that such person as aforesaid may sue the Attorney-General

and recover damages for injury suffered as a result of a mistake or omission by a public officer involved in the adjudication process.³⁸ This argument seems to rely on the 1969 Court of Appeal decision in Kimani v. A - G. It is submitted that this reasoning does not represent the true position of the law because S. 34 of the Land Adjudication Act¹⁸ indemnifies all such officers as aforesaid so long as the officers act in good faith. But even where mala fides on the part of such officers is proved, no action against the Government can succeed if it is based on a mistake or omission in a first registration as this is specifically excluded by S. 144 (1) of the Act.

It is clear from these observations that the only way of avoiding the provisions of S. 143 (1) is to find an indirect method of circumventing the section. The case of District Commissioner Kiambu v. R and Others Ex Parte Ethan Njau² indicates how firmly the door was closed by S. 143 (1) of the R.L.A. to African land litigation as well as how the section prevents any appeals against executive acts of the adjudication committees and government officials involved in land adjudication.

This decision became a solid precedent and with the demarcation errors hereinbefore outlined illustrates how various injustices have been built into the system of land registration. By making first registration unimpeachable, S. 143 (1) affords protection to the Government against contingencies such as inaccurate surveys as a result of which the Registers are increasingly failing to reflect the true position on the ground.

2. The Attitudes of the Courts and of Administrators in regard to problems raised by S. 143 (1)

Attempts to deal with the problems which the section raises have taken two forms, namely those by the courts and those by administrators.

To take the latter case first, the Chief Land Registrar, recognizing that it could not have been "the intention of the Legislature that the law should be used as an instrument of encouraging fraud" issued a Practice Note in April, 1972 on S. 143 (1)⁴⁰. In his summary on the effect of this section the Note best speaks for itself as follows:

"that where in the case of a first registration the court finds its hands tied by the section from doing justice in that it cannot order direct rectification of a Register by directing the Land Registrar to rectify the fraudulent entry, a court would be well within its powers and within the spirit of the Act to make an Order in personam directing for instance, A (the registered proprietor tainted with fraud) to transfer the parcel to B."

The Attorney-General accepted the Practise Note but expressed the view that the process should be taken in two stages, namely:

- (a) "The declaration that A holds the property as a trustee for B including the order in personam to A to transfer the property to B".
- (b) "In default of A obeying the court order a second application made to the court so that a person other than A be authorised to transfer for and on behalf of A⁴¹".

On principle and authority the position of the Chief Land Registrar would appear to be sound; "a court of equity converts a party who has obtained property by fraud into a trustee for the party who is injured by that fraud"⁴².

There are, unfortunately, no cases in point in which the courts have rectified a first registration based on fraud or mistake. The principle of equity that a statute cannot be used as an engine of fraud⁴³ however may be invoked even in the

case of a first registration. S. 143 (1) "does not exclude recognition of a trust provided it can be established³² and a court of competent jurisdiction which finds its hands tied by the section from doing justice may rectify the Register on the basis of the Practice Note discussed above. In the unreported case of Mungora Wamathai v. Muroti Mugweru⁴⁴ the Plaintiff was seeking a court order declaring the Defendant to be a trustee in the matter of a certain plot. He asserted that he was the sole surviving son of one Mungora who died in 1921 and who prior to his death was siesed of certain fragments of land under Kikuyu customary law. The Plaintiff further asserted that after the death of the deceased, the Defendant adopted the Plaintiff's mother as his wife and adopted the Plaintiff as his son. He alleged that during the land consolidation programme, the Defendant was registered in the title to the said fragments in trust for the Plaintiff and that the Defendant pursuant to that trust delivered to the Plaintiff a portion of three acres only. Finally, the Plaintiff complained that the Defendant was in breach of the said trust in trying to sell the said land and also by attempting to evict the Plaintiff. Before a local Unity Committee, the Defendant admitted that the Plaintiff was entitled to inherit the whole of his deceased father's land.

In his judgment, Mr. Justice Bennett suggested that the proviso to S. 143 (1) may be averted by invoking the proviso to S. 28 of the Act which reads as follows :

"Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee."

His Lordship went on to say that " a person, who, not being a trustee and not having authority from a trustee takes upon himself to intermeddle with trust matters or to do acts characteristic of the office of trustee makes himself a trustee de son tort, a trustee of his own wrong, or, as such a person is also termed, a constructive trustee. The responsibility which attaches to a trustee may extend in equity to a person who is not properly a trustee, if he either makes himself a trustee de son tort or actually participates in any fraudulent conduct of a trustee to the injury of the cestui que trust".

If the learned Judge's reasoning is correct, and it is submitted with respect that it is, then although the rights of an absolute proprietor are rights not liable to be defeated, a proprietor who is proved to be holding land upon trust for others must hold the same subject to any liabilities, rights or interests to which such land is subject.

This is clearly stipulated by S. 126(3) of the R.L.A. and is supported by the decision in Mwangi Maguthu v. Maina Maguthu.³²

The effect of these decisions is that S. 143(1) may be circumvented by a declaration that a registered proprietor tainted with fraud is a constructive trustee holding land upon trust for others subject to such rights, interests or liabilities as are proved. In Ashby v. White⁴⁵ it was said that "if someone has a right he must of necessity have the means to vindicate it and a remedy if he is injured in the enjoyment of it: and indeed, it is a vain thing to imagine a right without a remedy, for want of right and want of remedy are reciprocal." Instead of using the trust device to circumvent S. 143(1) which is so blatantly unjust, why does not Parliament come forward and amend it?

The Mission of Land Consolidation and Registration in Kenya⁴⁶ studied problems in the Adjudication process and made recommendations that a provision be made in the Land Adjudication Act¹⁸ for any person aggrieved by an entry in the final adjudication record to apply to the High Court for its revision "in such manner as may be prescribed." At para. 274 of the Report, the Mission stated "that the words "(other than a first registration)" should be deleted from section 143(1)."

The Mission further considered whether an amendment to S. 143 (1) should be confined to future adjudications or whether it should operate retroactively and so enable any first registration now on the Register to be rectified. It argued that this would perhaps "start a flood of cases and re-open old wounds" but concluded that "unquestionably there are some cases which, if they do not require re-adjustment, at least would benefit from ventilation".

The position today is clarified by the case of Ng'ang'a Munyua v.A - G⁴⁷ where the Court of Appeal for East Africa considered the following facts:

the Appellant and more than one hundred others sued the Attorney-General claiming inter-alia the return of land lost as a result of confiscation by the Colonial Government during the Emergency.

The Judge at first instance dismissed the action holding that the Government was absolved from liability in respect of actions done during the Emergency by virtue of the Relief and Indemnity Ordinance 1956¹². On Appeal, the Court of Appeal for East Africa held that the action could not succeed as it was statute barred by Section 7 of the Limitation of Actions Act⁴⁸.

Former detainees would therefore be unable to start a flood of cases.

It is not to open old wounds that amendment to S. 143 (1) is required. It is for recent cases and for the future. There is no justification for disallowing a rectification of what is known to be wrong and unjust. The official view is that clerical errors do occur but that they are very few and are bona fide and not tainted with fraud. Unhappily, this is not the case, and as this paper has indicated S. 143 (1) of the R.L.A. is in breach of cardinal principles of law and equity as it allows the law to be used as an engine of fraud. It is therefore submitted that the proviso "(other than a first registration)" be deleted from S. 143(1) of the R.L.A. on the same basis as recommended by the Mission of Land Consolidation and Registration.⁴⁶

In the case of Chand v. Govt. for example, it would appear as if the mistake were clearly in Kinnell's favour, and that the culpability of the officials was of a high order. But a closer examination of the problem reveals that the latter is not so simple, justifying perhaps why the Government has made no attempt to amend the section. This paper has indicated that errors in the operation of the land consolidation scheme are not uncommon.

CHAPTER FOURCONCLUSIONS AND RECOMMENDATIONS

The time has now come to bring this argument to a conclusion. The validity of that conclusion can be tested only by the light which it throws upon the problems at issue. This paper has focused on the problems raised by S. 143 (1) of the R.L.A. with an indication that judicial and administrative attitudes are moving towards a circumvention of the section in recognition that its provisions in regard to first registration are repugnant to the principles of law and equity. The question which comes to mind is this: what is the significance of retaining the section if the courts are free to circumvent it by the declaration of constructive trusts?

In the facts of Kimani v. A-G³⁹ for example, it would appear as if the merits were clearly in Kimani's favour, and that the carelessness of the officials was of a high order. But a closer examination of the problem reveals that the matter is not so simple, justifying perhaps why the Government has made no attempts to amend the section. This paper has indicated that errors in the operation of the land consolidation scheme are not uncommon.

It may be argued in favour of S. 143 (1) that to allow the courts to review cases of first registration would probably open the door closed by District Commissioner Kiambu v. R and Others.² Moreover, errors in the demarcation of land holdings by survey officials are quite common, so that many persons gain land and others lose it. Should the Government be responsible in damages to these landowners? Would a decision in favour of liability produce a welter of litigation which the consolidation scheme was designed to prevent? It is submitted that there would not be a flood of litigation. Statistics reveal³⁴ that there are not ~~that~~ many cases of fraud or mistake in first registration and those which exist justify a decision in favour of court review and government liability in appropriate cases.

It has been argued that it is necessary to retain S. 143 (1) to protect the process of tenure reform in areas where it has not already been introduced within the Republic. The success of the reform programme lies in closing the past to enable a sound foundation to be built for the future. First registration establishes a firm legal base - line for subsequent enquires into title. It is no longer necessary to go back into the mists of tradition to decide who paid the original goats for a certain piece of land.

However many individuals may have suffered injustice as a result of a first registration it would seem that first registration must be preserved. Nonetheless, this paper has echoed the recommendations of the Mission of Land Consolidation and Registration⁴⁶ which have been briefly discussed in the last chapter. It is suggested that these recommendations should be put into effect. There must surely be cases which "if they do not require re-adjustment, at least would benefit from ventilation."⁴⁶

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1. Cap. 300 Laws of Kenya
2. See District Commissioner Kiambu v. R. and Others Ex. Parte Ethan Njau (1960) E.A. 109 which interpreted S. 89 (1) of the Native Lands Registration Ordinance, now S. 143 (1) of the R.L.A.
3. See M.P.K. Sorrenson : Land Reform in the Kikuyu Country (O.U.P., Nairobi, 1968) pp. 97 ff.
4. c.f. G.N. 1172/1947, African Grown Coffee Rules and Koinange Mbiyu v. R. 24 (2) K.L.R. 130.
5. For the official explanation see Sessional Paper No. 8 of 1945. See also R. van Zwanenberg : The Agricultural History of Kenya (E.A.P.H., Nairobi, 1972).
6. See M.P.K. Sorrenson : Origins of European Settlement in Kenya (O.U.P., Nairobi, 1968).
7. H.W.O. Okoth - Ogendo, "African Land Tenure Reform" Chap. 5 in J. Heyer and Others (eds) Agricultural Development in Kenya (O.U.P., Nairobi, 1976)
8. L.N. 452/1956.
9. Ordinance No. 28/1938 (now Cap. 288 Laws of Kenya).
10. Ordinance No. 1/1957.
11. Ordinance No. 11/1954.
12. Ordinance No. 36/1956.
13. Kenya Government Report of the Working Party on African Land Tenure in Kenya 1957/58.
14. Ibid at para. 67 (i)
15. A Plan to Intensify the Development of African Agriculture, (Nairobi, Government Printer, 1954)
16. The East African Royal Commission (1953-55) (Her Majesty's Stationary Office, London, 1955) Cmd.9475 pp.323 ff.
17. H.W.O. Okoth - Ogendo, "The Adjudication Process and the Special Rural Development Programme", in I.D.S. Occasional Paper No. 12.

18. See The Land Adjudication Act (Cap. 284 Laws of Kenya) and The Land Consolidation Act (Cap. 283 Laws of Kenya).
19. F. E. Bernard, "East of Mount Kenya - Meru Agriculture in Transition", (University Microfilms 1970) pp. 311-353.
20. Ordinance No. 27/1959 (now Cap. 283 Laws of Kenya).
21. Gibbs v. Messer (1891) A.C. 248.
22. Short title amended by L.N. 589/1960.
23. See Generally A.N. Allot : "Towards a Definition of Absolute Ownership", Journal of African Law Vol. 5 No. 2 and S.R. Simpson: "Towards a Definition of Absolute Ownership", Journal of African Law Vol. 5 No. 3.
24. See: Chesire, G.C. : Modern Law of Real Property (Butterworths, London, 11th Ed.) pp. 100-106.
25. Volume XI Group 8 Laws of Kenya.
26. See Generally P.C. Lloyd: "Sovereignty and Ownership" in Yoruba Land Law (Oxford, London, 1962) pp 62-70.
27. e.g. Hollywood Silver Fox Farm v. Emmett (1936) 2 K.B. 468 and - Bradford Corporation v. Pickles (1895) A.C. 587.
28. C.O.R. No. 17/1964.
29. (1973) E.A. 388.
30. (1972) E.A. 227.
31. S. 3 Judicature Act Cap. 8 Laws of Kenya.
32. (1971) K.H.C.D. No. 16/1971.
33. (1973) K.H.C.D. No. 71/1973.
34. This was the general opinion expressed by various Senior Officers interviewed at the Lands Office in Nairobi.
35. Ordinance No. 56/1960.
36. Kenya House of Representatives Official Reports Vol. 14, 1968 Col. 1992 ff.
37. Record with the Office of the Chief Lands Registrar, Nairobi.
38. See: (1970) 6 E.A.L.J. p. 243.
39. (1969) E.A. 502 (proceedings in the High Court at (1969) E.A. 29.

40. See: Appendix 1.
41. See: Appendix 2.
42. Underhill's Law of Trusts and Trustees 11th Ed. p. 217
restating Rochefoucauld V. Boustead (1897) 1 Ch. 196.
43. See: D.B. Parker and A.R. Mellows : Modern Law of Trusts
3rd Ed. (Sweet & Maxwell, London, 1975) p 25.
44. H.C.C.C. No. 56/1972
45. (1703), 2 L.D. Raym. 938; 92 E.R. 126.
46. J.C.D. Lawrence: Report of the Mission on Land Consolidation
and Registration in Kenya (Government Printer, 1965-66)
47. "The East African Standard", July 23rd, 1974.
48. Cap. 22 Laws of Kenya.

A P P E N D I X I

79696/II/14

Department of Lands,
P.O. Box 30089,
NAIROBI

12th April, 1972

The Secretary,
Law Society of Kenya,
NAIROBI.

The Registrar,
High Court of Kenya,
NAIROBI.

PRACTICE NOTETHE REGISTERED LAND ACT : SECTION 143(1)

The exception in Section 143(1) of the Act:

"Other than a first registration" was as deliberate administrative policy decision in order to:-

- (a) stave off any vexitious litigants and
- (b) to ensure the finality of a registered title,

and these two principles have worked well.

It cannot however, have been the intention of the legislator that the law should be used as an instrument of encouraging fraud. In Central Province especially where land adjudication and consolidation took place during the 1952-1956 state of emergency, when a large number of people were in detention, some cases of fraudulent registration did take place.

Both my predecessor in title (Mr. G.D. Thomas) and myself have held the view that where in the case of a "first registration" the Court (of competent jurisdiction) finds its hands tied by the Section from doing justice in that it cannot order direct rectification of a register by directing the Land Registrar to actually rectify the fraudulent entry, a Court would be well within its powers and within the spirit of the Act to make an Order in Personam directing for instance, A (the registered proprietor tainted with fraud) to transfer the parcel to B. Usually A can be expected to be very uncooperative (e.g. to execute a Transfer) but the Court in this case, upon the application of the plaintiff, should make an alternative order to the effect that should A refuse or decline to execute the Transfer some one else (for instance the Registrar of the Court a D.C. or Land Registrar) is empowered to effect the execution for and on behalf of A.

I have had a series of letters from Advocates in practice concerning the above section involvement cases where a Court was satisfied that a plaintiff cause was just, but because of the exception the Court said it would not help.

• Subject to the views that the Attorney-General's Chambers, and the addresses of this note may wish to make, I am prepared to accept for registration Court Orders in this respect.

(B. C. MURAGE)
CHIEF LAND REGISTRAR

c.c. The Attorney General's Chambers,
Land Registrar (Inspectors)
Land Registrars

A P P E N D I X II

79696/II/18

Department of Lands,
P.O. Box 30089,
NAIROBI.

8th May, 1972

The Secretary,
Law Society of Kenya,
NAIROBIThe Registrar,
High Court of Kenya,
NAIROBIPRACTICE NOTETHE REGISTERED LAND ACT : SECTION 143(1)

You will by now have, no doubt, received my Practice Note, ref. 79696/II/14 dated 12th April, 1972 on the above subject; (a copy is enclosed).

The Attorney-General has agreed with my view expressed in the third paragraph of that Practice Note in the following terms:

"The Attorney-General quite agrees with what you say in your third paragraph about the jurisdiction of the Court to make an order for example - declaring A the Registered proprietor holds lands as a trustee for B and ordering A to execute a transfer in favour of B."

The Attorney-General has, however, expressed the view with which I fully agree, that the process should be taken in two stages, namely:-

- (a) The declaration that A holds the property as a trustee for B including the order in personam to A to Transfer the property to B.
- (b) In default of A obeying the Court Order a second application be made to the Court so that a person other than A be authorised to execute the transfer for and on behalf of A.

It is my hope that the Law Society and The Registrar of the High Court will take the necessary action to make the Practice known to the practising members of the Society and the Bench, respectively.

I have experienced situations where Advocates have written to me or done things which have been the subject of clearance, understanding and/or direction to the Law Society from my office. This can only mean with due respect, that there are some practising members who do not pay attention to the Minutes of the Society.

(B. C. MURAGE)
CHIEF LAND REGISTRAR

Attorney-General's Chambers,
NAIROBI

All Land Registrar (Inspectors)

All Land Registrars

File No. 79718

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