

THE SWYNNERTON PLAN AND THE CUSTOMARY TRUST  
HOLDING.

Dissertation submitted in partial fulfilment of  
the Requirements for the LL.B. Degree, University  
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By

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Nairobi

April 1984

Dedicated to all those Kenyans who  
have been rendered landless in their  
own land by the capitalist concept of  
Private and individual ownership of  
land.

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## ACKNOWLEDGEMENTS

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TABLE OF CASES

Alan Kiama V Mathunya

D.C. of Kiambu and others Ex Parte Ethan Njau

Esiroyo V Esiroyo and another

Francis Munene Muthuita V Milka Wainoe Muthuita

Mtoro Bin Mwamba V The A.G.

Mwangi Muguthu V Maina Muguthu

Mungora Wamathai V Muroti Mugweru

Re Southern Rhodesia

Samuel Thata Misheck and Others V Priscilla Wambui

Sela Obiero V Opiyo and Others

Stanley Kahahu V The A.G.

Thuku Mbuthia V Kaburu Kimondo

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INTRODUCTION

Land, through the history of man, has been a very important and special resource seeing as it is the ultimate basis of all human existence. This was especially so in African communities where man's relationship to land was almost sacred. Kenyatta says of the Gikuyu people that in studying them 'it is necessary to take into consideration land tenure as the most important factor in the Social, political, religious and economic life of the tribe.'<sup>1</sup>

This statement holds for the larger majority of African precolonial communities.

Land, being such a basic organisation of any community. This is because a community's socio-economic organisation and its legal incidents are primarily determined by the system through which that society shares and its limited resources.

Thus ultimately the system through which land is held in any community will determine the socio-economic organisation that holds in that community. Land tenure cannot be divorced from socio-economic organisation and development.

It is within this kind of framework that we intend to tackle the subject of this dissertation which as the title suggests deals with what came to be known as 'The Swynnerton plan' and its impact on the institution



of the customary Trust holding. The plan was drawn up by the colonial Assistant Secretary of Agriculture in 1955 advocating for the revolutionalization of Africans customary system of land holding and its replacement with an English type of tenure.

The plan was adopted and immediately affected in some areas and which process continues even today. The institution of the customary Trust holding which was meant to ensure that the Africans belief in equitable inheritance of ones property by his issue had become especially important by this time since land in the reserves into which Africans had been put by the colonialists was becoming limited. This dissertation looks at the effect which the carrying out of the plan had on this institution.

Constant reference to the Gikuyu community of central Kenya will have to be made in this dissertation because of two reasons. One is that the plan was essentially drawn up to deal with the Mau Mau on slaught which had broken up due to the accute land problem in this area and secondly because itsis the community which the writer is most conversant with. But it is not meant to be the central community being studied.

In a wider perspective we also intend this dissertation to show this plan and its adoption and subsequent effects on customary institution in its correct historical and

socio-economic perspective. Thus this was not just an isolated experiment in colonialism but was part of the colonial governments overall strategy to entrench in Africa their concepts of a good life which is embodied in the spirit of Laissez faire capitalism and whose basis is the individualization and private ownership of property. It was a desperate bid to thwart African Nationalism and to prepare Kenya for a continuation of the process of imperialism after independence.

This dissertation shall be tackled in four chapters which shall be laid out as follows:-

#### Chapter I

This will mainly deal with customary land tenure during the post colonial and the colonial era with special emphasis on the customary trust holding and its role in matters of Succession.

#### Chapter II

This will attempt to place the Swynneton plan in its right historical context culminating in the enactment of the Registered land Act. }

#### Chapter III

This will mainly deal with the clash that came about as a result of this imposition of English tenure on an essentially communal one existing in the African Areas.



Chapter IV

This will be the concluding chapter where the whole problem will be summarized in perspective and various ways through which the problem could be solved suggested.

CHAPTER I

African precolonial societies existed on a basically subsistence economy. Land therefore was the basis of all production.<sup>1</sup> (12) The system through which land was held therefore reflected their importance of land to the existence of the community. Infact in most communities land was not merely a factor of production but was such a basic resource that the relationship between the land and the people was almost sacred. Professor Munoru referring to the Kikuyu in a statement that however holds good for most African communities said

" In most tribes there was a legendary association with the land. According to the Kikuyu land was not only owned by the living but also by the dead. The tribe was trustee of the deceased and so it would be infringing on the rights of the deceased if the land was sold.<sup>2</sup> (13)

From this it can be readily appreciated that the concept of private and individual ownership of the land was incompatible with this view of an overall societal basis of ownership of land.

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Thus the basis of ownership to land in African communities was generally communal. This aspect of property relations permeated all areas of African life because it reflected the African's idea of a good life and their philosophy towards human existence.<sup>3</sup> (14)

Nyerere says of this that...

"To us Africans land was always recognized as belonging to the community. Each individual within our society had a right to the use of land because otherwise he could not earn a living ....



But the Africans right to land was simply the right to use it; he had no other right to it nor did it occur to him to try to claim any! (15)

Nyerere here brings out the fact that it was necessary for every member of the community to be able to lay claim or some form of interest over some land because land was the basis of all life. And being the basis of all life it was imperative that the only way the community could claim to be taking care of it's own members was through the system of a communal ownership of land; where no land exclusively belonged to one person although individuals could claim certain rights over certain pieces of land. Thus the holding of land could be said to be both communal and also individual. Communal in the respect that " the individuals rights are dependent upon his social relationships, upon his membership of some group with a definite cultural idiom and social organization of it's own... " (16) and also individual to the extent that particular people have at any one moment, definite rights to participate in the use and to share the produce of particular pieces of ground. (17)

This generally land relationships in most communities were quite complex because the rights of the individual and of the group in which that individual belonged of co-existed within the same social context? (18)

This seems to have been the only system of land holding which gave effect to the overall view or philosophy of life of the Africans in which communal sharing of all

social goods seems to have been the central factor. Thus this idea of a communal holding allowing every member of the community, no matter what his status in life to have access to land seems to have held sway everywhere in Africa before colonialism. A judge in a Nigerian case could therefore very correctly state that

" Land in the native land law belongs to the community, the village or family and never to the individual. All members have equal rights to the land. In every case the chief or headman of the community or village or head of the family has charge of the land and in loose made of speech is called the owner. He is to some extent in the position of a trustee and as such holds the land for the use of the community or family." (19)

And of the Buganda Gluckman says.

" No one "owned" land in Buganda. A peasant occupied land which his wives cultivated. A chief exercised authority over peasants who occupied the land within his jurisdiction... In both systems there was control over land." (20)

Ofcourse the British colonialists had their own ulterior motives in recognizing this vital African institution as they did. As Fimbo and James argue many of the judges during the colonial period took the view that African jurisprudence does not recognize absolute ownership of land in general and individual ownership in particular when the issue of governments to expropriate land occupied by Africans arose. (21)

Thus in 1953 in the Tanzanian case of Mtoro Bin Mwamba V The Attorney General (22) an appellant who applied for first registration as a fee simple owner was denied his claim because he had based it on customary law which it was held did not know of individual ownership of land.



Another English judge in the Re Southern Rhodesia<sup>12</sup> case said of African land Rights "it would be idle to impute such people some shadow of the rights known to our law and then transmute it into the substance of transferrable rights of property as we know them".

And in the Kenya case of Stanley Kahahu V The Attorney General<sup>13</sup> it was said that under the Gikuyu githaka system occupiers of land had certain rights in respect of cultivation which rights "do not exist among members of a tribe as attaching to one man against another."

But even with their ulterior motives the actual recognition by the colonialists of the communal basis of African land holding systems was proof of the fact that basic differences existed between their system and the Africans.

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Thus the communal system, was perceived by the Africans as the best means of organizing society so that no one section of the community was so superior to the others by means of owning all or almost all the land available and then using this position to subjugate or dictate terms to others.<sup>14</sup>

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The process that was to fundamentally change this peaceful and organized system of sharing social goods was the advent of colonialism.<sup>15</sup>

It has been argued convincingly that the main objectives behind the acquisition of Kenya as a protectorate were economic.<sup>16</sup> That was to provide the British with new

source of raw materials and markets for the surplus goods produced because of the boom in production after the industrial revolution and that the agriculture practised here would produce enough agricultural goods for the markets in England.<sup>17</sup> There was thus the need to control land acquisition and utilization by the colonists so as to achieve these briefly stated aims.<sup>18</sup> The legal process through which land theft was legitimized is discussed in the next chapter.

Suffice it to say that British jurisprudence developed to meet the needs of the Empire which included this alienation of African lands.

~~The~~ first device that the colonialists used was the application of English concepts of land tenure to situations that they found in Africa without a clear realization that land tenure systems are creations of modes of production obtaining in any society<sup>19</sup> and therefore where modes of production are as different as they were between the invading colonialists and the African societies systems of land tenure are bound to be also that different and cannot of necessity be explained in the same terms without some discrepancies.

But the colonialists with aim of alienating Africans land freely used terms found in English jurisprudence to explain what was essentially a communal system of land holding.<sup>20</sup>

One of the most popular explanations to situations the colonialists could not understand was that land in most



African communities was owned by whoever seemed to be the person in control of a community in terms of Administration. Such a person would be called the 'chief' of that community and was then dealt with as the owner of the communities land.<sup>21</sup> This was desirable because the chief who was found to own that land could easily be coerced into signing a treaty ceding his territory to the protection of Her Majesties government which in English jurisprudence of the time was perfectly legal.<sup>22</sup>

This theory was ofcourse in direct contradiction to the real situation obtaining in Africa in that chiefs where they existed never owned land in the English sense that radical title vested in him. Their control over community land under his jurisdiction never gave him the power to dispose off or acquire land according to his own capricious will.<sup>23</sup> His control only extendend as far as for example chairing the arbitrating body in case of a land dispute involving his subjects. That is his power was mainly administrative as opposed to control.

Motherpiece boy  
keep it up!  
Good explanation

This theory becomes completely unworkable in situations where a community like the Kikuyu did not have any one person who could be recognized as a chief. Amongst the Kikuyu where the basic institution of land holding was the clan, administrative control over land was vested in a group of Elders whose main task was usually to deal

with disputes arising out of land problems as between the clans themselves or between individuals within the clan.<sup>24</sup>

But the British easily got around such a hurdle by simply creating not only the post of chief where it did not exist but even by appointing a person who they felt they could work with to achieve their own aims.<sup>25</sup>

This theory then allowed the chiefs to sign treaties with British representatives so the Queen<sup>26</sup> which treaties usually ended African control over their own lands ceding it wholly to the colonialists.<sup>27</sup>

After methods of Alienating African lands from them were used, systems of administration which would make colonialism work the way it was meant to had to be devised. The British were also not to be found wanting in this respect and one of their chief architects of colonial administration was the one who came up with what they thought was a novel system that would ensure peaceful British rule over her colonies. This was Sir Fredrick D. Lugard who in his book published in 1921<sup>28</sup> argued for a two tier system of government in all colonies.

This was because the colonies had to serve the metropolitan country by supplying it with raw materials produced by the colonialists, coupled with the unwillingness of the colonial government to interfere, except where necessary with the " set up of African



communities as they found them.<sup>29</sup> This was ofcourse a policy forced upon the colonial government by the real economics of the situation.

Interferring with local institutions en masse would ofcourse have been a very expensive project for them in terms of administration and civil upheaval whilst the central government at home was not prepared to continue subsidizing the colonies; they had to support themselves financially.

The 'Dual Mandate' facilitated this very well. \* 9'

It was this approach that led to the dual system of land law in Kenya. The settlers produced cash crops with their system of land Tenure being basically controlled by English land law the substance of which was found in the Indian Transfer of Property Act. The Africans were organized into reserves.

The 1938 Native Lands Trust Ordinance<sup>30</sup> among others gave effect to this policy.

It was in pursuance of this dualist policy that led to the creation of reserves in the 1930s. That 1938 Native Lands Trust Ordinance clearly demarcated Native reserves vesting them in the Native Lands Trust Board.<sup>31</sup>

The colonial legal philosophy behind the reserves policy will be discussed in the next chapter but we can observe here that the creation of reserves involved mass movements of indigenous Africans from their ancestral Lands into the areas demarcated for them. Most of the

areas they had to leave were highly populated because of their farming potential and ofcourse these were the areas which the colonialists desired most.

The policy therefore caused the movement of large African populations into areas they had never been before.

But within the "Native" reserves themselves the Africans found it hard to adapt to new ecological conditions.<sup>32</sup>

The major impact of the strict demarcation of boundaries was the restriction of the amount of land that a community<sup>\*</sup> could hold or could expand to. Hitherto because of the availability of usable land expansion to new areas was the answer to growth in population. But now they were restricted because they could not move out of their reserves especially seeing as the areas were legally demarcated.

This restriction was especially felt by the <sup>or</sup>pastoralists who needed large areas to graze their stock without any adverse effects on their grazing lands. With these restrictions, previously unknown effects such as chronic soil erosion became definite problems.<sup>33</sup>

For the agriculturalists new phenomena previously unknown in African land relations began appearing.

Because of <sup>f</sup>population pressure within the reserves land became a very limited commodity. Thus a class of landless people started emerging who could now only support themselves by offering their labour for sale to the colonial farmers.



Methods of land use also had to change seeing as widespread shifting cultivation was no possible.<sup>34</sup>

But the most remarkable development amongst the agriculturalists was the emergence of new concepts like pieces of land held strictly on an individual or family basis. This was brought about by the fact that there was not enough land in the reserves and land being such an important resource in the lives of the people those who had small pieces that they cultivated and could therefore claim special rights to individualized them, and made them permanently their own so as to be ensured of having land anytime in the future. This was a new concept in customary land tenure and it displayed how basically African socio-economic institutions had been disrupted by the colonialists.

It was this development that led the colonialists to argue that the concept of individual ownership had emerged amongst the Africans<sup>35</sup> ↑

The other interesting effect on customary land holdings that came about as a result of the reserves policy was the fragmentation of land into smaller and smaller pieces under individual control.<sup>36</sup>

The problem arose because in the absence of the concept of outright sale of land in customary land law then the only method through which the greatest number of people gained access to some land was through inheritance.

As argued earlier in this chapter most African

communities had the same approach towards land tenure and this also applied to the system of property inheritance.

As Kenyatta graphically put it, in most African societies

" When a man has many sons he is no more alone, his interests are interwoven with those of his children and since they are flesh of his flesh, bone of his bones, he shares his land and all his property with them. He could not sell his land without consulting them ....<sup>37</sup>" <sup>(38)</sup>

This was the rule in most if not all African communities.

Thus male sons had a legal right to inherit their fathers property which in most cases comprised only of land and perhaps some livestock. This was so strictly followed that even an English writer could observe that...

" All man's heirs are entitled to a share in the land...

The owner of land cannot ....leave it away from the heirs and even his apportionment of the immovable property might not be upheld if it were **flagrantly** contrary to native law and custom."<sup>38</sup>

Therefore since land was such an important asset in

African communities the system of its inheritance

was tied to the land tenure obtaining in these

communities.<sup>39</sup> If we take the Kikuyu as an example we

shall find that the basic unit of land holding was the

family with the head of the family that is the father,

exercising control over the family land. This family

land ofcourse was held under a wider holding which was

the clan.

Most Kikuyu families like in most African communities

were polygamous with each wife cultivating her own piece



of land within the family land which products she used to support her house. Upon the death of the father the land was dividend equally amongst the sons of every house: Thus every wife dividend her land to her sons who were all entitled to inherit a piece of land.<sup>40</sup> *~!*

This system assured that every member of every family got access to some land which he could use to continue the process of life. *\**

It was this division and sub-division of land during inheritance that led to overfragmentation since the land was limited. This scarcity of land made inheritance become even more important because it was the only through *way* which one could acquire some family land. This can not ofcourse be divorced from the development we noted earlier of a movement from communal control of land to a more individualized or rather a family based control over particualr pieces of land. Obviously inheritance becomes more importante in a situation. — Where ownership property is more individually based.

But situations arose where the father of a family died before he could divide up the land between his sons<sup>41</sup> or even if he had given some of his sons their portions some

In such situations as mentioned above a person was usually appointed to administer the deceased's property on his behalf seeing on the woman were considered incapable of handling property for purposes of succession.

Ofcourse this was only necessary in situations where family land had not been dividend up amongst all those who were entitled to that land.

Amongst the Kikuyu the person chosen to administer the deceased's property and whose position is analogous to that of a trustee in English law was called a Muramati.<sup>42</sup>

He was the person who administered " and distributed the estate according to the wishes of the deceased or where there were no expressed wishes then in accordance with custom."<sup>43</sup>

At the level of the family then this is the person we refer to here as the customary trust holder. But he was not necessarily an outsider. In cases where the father died leaving the first born son in the family as a responsible man with a wife and a house of his own the father could leave him in charge of the family property to take care of other interests of his younger brothers in accordance with custom and the supervision of the clan elders. Attempts to swindle brothers were even perhaps unthinkable if not impossible to carry out. Where the fathers died without having the chance to appoint a Muramati the clan elders met and chose one



person. The Muramati was strictly a trustee and was not therefore meant to benefit from his position.<sup>44</sup> 35

In the light of Kenyatta's quotation above<sup>45</sup> on the liability of fathers to their sons in land succession matters and the whole African philosophy towards land one could argue that the African father was also a trustee for his sons in the land. This was because it was as a matter of law and not will that the sons were entitled to inherit their father's land and there were rights their father could not deprive them of. The sons in their turn held this property in trust for their sons and for future generations. Munoru argues that infact the whole tribe was a trustee for future generations.<sup>46</sup> 26 But it is the position of the father and the Muramati as customary trustee that interests us. But as noted earlier succession to any form of property only becomes important where the property is privately owned. That is why the institution of the customary trust holder emerged so strongly and became so important within the reserves because here land was limited and individualism was manifesting itself.

It was so important in this respect because it ensured that the basic principle in customary land tenure was upheld. This was the principle that every member of the community was entitled to access to some of the communities land. The institution helped in the maintenance of this principle in that it made sure that after the demise of the principal controller of

family property the process of division of the family property took place in accordance with customary law.

Such was the importance of the Customary Trust holding that any reform of customary land tenure that could not take into account the existence and role of this institution was bound to lead to problems in any situation that arose where one person had to hold land on trust for another for whatever reasons.



CHAPTER II

As argued in the first chapter the main reasons behind colonialism, were economic. The Industrial revolution in Europe had caused the production of masses of surplus goods which needed a lot of tropical goods as raw materials especially since the former colonies in the America's where such goods could be so easily found were now long independent.

East Africa was especially important in this respect because of its high farming potential. This became even more important after the building of the railway from Mombasa to the shores of Lake Victoria where it reached in 1902.<sup>1</sup> The policy was formulated that the railway had to support itself and the only way through which this could be achieved was by opening up the areas through which the railway passed for farming by emigrant whites.<sup>2</sup> This of course meant that Kenya was to be opened up for white farming. Thus as a colony Kenya was to serve as a source of raw materials and also as a foreign market for surplus goods so as to make the railway pay.

Because of its high farming potential that people like Elliot recognized and the urgency for settlement so as to have the railway supporting itself must have made the need to acquire land in Kenya quite urgent.

But to the English title to land can only be secure if backed by the law of the land.<sup>3</sup> Law was therefore to

play a very important role in the alienation of African lands and their acquisition by the colonialists.<sup>4</sup>

This discussion of this alienation must therefore be seen in the light of the colonialists "obsession to legalize things."<sup>5</sup>

Some settlers had started arriving in what is present day Kenya, even before the declaration of protectorate status in 1897. But by then the question of how to acquire land legally had not been dealt with since the protectorate status under English colonial jurisprudence did not entitle the protectors to the land of the protectorate.<sup>6</sup>

The only legal acquisition done in this period was the extension of the Indian land Acquisition Act of 1897 to the protectorate and by subsequently passing the 1898 East African (Acquisition of Lands) Order in Council vesting any such land acquired under the Act in the Commissioner of the protectorate in trust for the Crown.<sup>7</sup> This legal mechanism was used to acquire lands within one mile radius of the railway route "subject to any provable rights of ownership".<sup>8</sup>

So in 1899 the Law officers of the crown in a legal opinion to the Foreign Office abolished this jurisprudential difference between protectorates and colonies as far as land acquisition was concerned declaring that the crown had powers of disposition "over waste and unoccupied land" where there was no



settled form of government.<sup>9</sup> British colonial jurisprudence was obviously quite flexible at this time and could be changed to fit the exigencies of the moment as the above change in definitions shows.

But the European settlers who had already arrived in the protectorate were asking for a clear policy towards land acquisition especially as regarded the security of their title to land.<sup>10</sup> Their requests seemed to have been responded to by passing the East African ( Lands) Order in Council in <sup>land</sup> 1901 which defined crown lands as all public lands within the protectorate " which for the time being are subject to the control of Her Majestys by virtue of any treaty, convention, Agreement,..." Then in 1902 the Crown Lands Ordinance<sup>11</sup> gave the commissin powers to see freeholds to settlers of areas not exceeding 10,000 acres.<sup>12</sup> Africans rights to land were seen only as usufructuary and therefore any land not in actual occupation by the Africans could be carved out by any colonialist for himself.<sup>13</sup> In some areas this land in carved out by the colonialists included within it African settlements and such a problem was dealt with by compensation after which the Africans were considered as mere squatters without any claims over the land.<sup>14</sup> A lot of land was granted to the settlers under this system.

With the introduction of settler farming also came the introduction of English land laws to the protectorate



since the colonialists could only operate under the law they knew i.e. English law. This was facilitated *by the 1897 in East African Order in Council which* extended the application of the Indian Transfer of property Act to the protectorate.<sup>15</sup>

Thus straight from the beginning dualism was inevitable. This was because Africans were still guided by their own customary law which policy fitted well with the doctrine of the "Dual Mandate as expounded by Lord Lugard."<sup>16</sup>

But the colonial settlers continued agitating for a title that was completely free from state interference. They argued that the 1902 Ordinance was not acceptable to them not only because it restricted their title in such areas as land usage and disposition but mainly because they saw it's reference to African land rights as encumbrances good even against a freeholder as repugnant to their idea of sanctity of title.<sup>17</sup> This was obviously in keeping with their ideology of laizzes faire capitalism which the colonialists were out to import.

To extinguish this problem of African Land rights the settlers started suggesting that Africans should be put in reserves.<sup>18</sup> And because of growing settler opposition to the 1902 Ordinance the 1915 Crown Lands Ordinance was passed.<sup>19</sup> This Ordinance<sup>20</sup> was to be the most important to the colonialists in that it ended up giving them the "most favourable property system" available.<sup>21</sup>



The Ordinance declared all land in the protectorate to be crown land and therefore completely subject to the Governors powers of disposal and also provided for the proclamation as reserves of any crown land

" required for the use and support of the members of the native tribes" of the protectorate.<sup>22</sup> This was only but the beginning of the reserve policy for Africans.

The effect of the 1915 Crown Lands Ordinance on African land rights became very clear after the case of Isaka Wainaina V Murito Indagara.<sup>23</sup> In this case the plaintiff claimed that the defendant had trespassed on his land. It was held that the plaintiff had no right to such a claim because the effect of the Ordinance in 1915 and the Declaration of colony status in 1920 was to extinguish all African rights to land and to make all African " tenants at will" of the crown.

But African land rights, if they could still be called rights, were still to deteriorate further with the full implementation of the reserve policy. Even before the legal institutionalization of the colonial policy reserves for Africans had been created before using other legal arrangements.

Treaties, like the Masai treaties of 1904 and 1911 restricting them to Laikipia and Narok districts respectively, was one such method. Another method would be declaring an area a ' closed Districts' under the Outlying Districts Ordinance<sup>24</sup> and then restrict



movement through that district.

As stated earlier the settlers had been requesting for the creation of reserves for Africans since the early 1900s. It seems the main reason why they wanted the Africans put in reserves was the fact that this would remove the Africans from the lands that they coveted and put them in some definite areas.<sup>25</sup> But the colonialists tried to explain the reasons behind the creation of reserves behind such noble sounding ideas such as that they would provide " an absolute guarantee " that the natives, will, so long as they desire it remain in an undisturbed and exclusive possession of areas set aside for them"<sup>26</sup>

But then the real situation was such that it was actually the Africans who needed protection against encroachment onto their lands by the land hungry settlers.

This duplicity in explanations of colonial policy was a common feature through colonialism.<sup>27</sup>

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It was also at this time that we note the appearance on the African scene of organized political action. This is evidenced by the formation in 1921 of Harry Thuku's Young Kikuyu Association and the Young Kavirondo Association.<sup>28</sup>

Their persistent pestering of the colonial government especially on the question of the appropriated lands must have led to the formation of various commissions to



inquire into the land question and give definite proposals on how to solve the problems arising from it.<sup>29</sup>

The first important one was the Hilton Young commission appointed in 1929.<sup>30</sup> It was a result of the recommendations that came out of this commission that led to the appointment of another commission in 1932.<sup>31</sup> This was the Kenya land commission that was headed by Sir Morris Carter. This commission recommended a clear demarcation of reserve boundaries both for the settlers and for the Africans.<sup>32</sup>

The colonial legislature had in 1930 passed the Native Lands Trust Ordinance<sup>33</sup> which established native tribal reserves and formed a Native Lands Trust Board under whose control the reserves were placed.

But to give effect to the recommendations of the Kenya Land Commission the Native Lands Trust Ordinance<sup>34</sup> was enacted in 1938 demarcating native reserves and vesting them in a Native Lands Trust Board established by the Kenya (Native Areas) Order in Council of 1939.

The Crown Lands (Amendment) Ordinance<sup>35</sup> was also enacted in 1938 setting out the boundaries of the Highlands for the settlers and securing them by the Kenya (Highlands) Orders in Council which stated that they could only be altered by Royal Assent.<sup>36</sup>

Since two different systems of law were to apply in these

two different areas one can say that 1939 was the highest point in which dualism in Kenya's land law reached.

The colonialists had argued that the reserves would make African land rights a lot more secure.<sup>37</sup> But in essence the entrenchment of this policy helped their position a lot especially in the creation of labour due to the problems existing in the reserves.

As noted in chapter one, one of the most drastic results of the reserves policy was the clear emergence of an individually based claim to certain pieces of land.

Branney says that individualization of tenure was already taking place especially in the central province "because of population pressure."<sup>38</sup> An informed committee headed by Lord Hailey also noted that "the degree to which individuals have been able to establish rights distinct from the rights of the community" was a new phenomenon<sup>39</sup>.

The report noted that this was as a result of a variety of causes. Amongst the important causes it noted were population pressure, introduction of permanent Agriculture and permanent crops, economic development and associations with the conditions on which lands are held by Europeans.<sup>40</sup>

Amongst all these causes it seems the most relevant one for the Kenyan situation was population pressure. This is because the enclosure of expanding communities into



delimited areas must have increased pressure on the land available. Added to this was the fact that privileged Africans were "abusing their position in order to acquire for themselves large "estates" at the expense of the more helpless"...<sup>41</sup> Africans

Kamau Kuria in tracing this development say that

" It would appear that the first stage in change (to Individual tenure) in customary land tenure is that the group that holds land becomes smaller and this group, the clan, asserts it "owns" land by virtue of either first occupation or because it was the land where their ancestors lived. Then the land owning groups becomes smaller - I.E. to the extended family - Then finally to the individual."<sup>42</sup>

And as noted by one English writer, in Africa, "... all man's heirs are entitled to a share in the land..."<sup>43</sup> of the deceased.

These heirs in most communities amounted to all the sons of the deceased. In the reserves this ofcourse meant dividing up a man's pieces of land into smaller pieces amongst his sons. This then led directly to great fragmentation.<sup>44</sup> Fragmentation and continuous cultivation coupled with overgrazing which led to soil erosion all led to deteriorating methods of land use.

At the same time the settlers were taking advantage of the landlessness caused by the lack of land in the reserves by offering such people jobs as resident labourers in the settlers estates. The Resident Native (squatters) Ordinance<sup>45</sup> provided for a publicly supervised contract

on the basis of the African working on the settlers farm for a certain **period** of the year in return for which he and family could live on the settler farm having their own area to cultivate.

In 1925 a Resident Natives Ordinance<sup>46</sup> made it a criminal offence for a labourer to fail to carry out his duties while another Resident labourers Ordinance<sup>47</sup> sought to restrict the amount of stock kept by the labourers.<sup>48</sup>

But by 1944 there was a drive to increase the number of days a labourer is supposed to work and to decrease his stock and acreage and the policy was to generally decrease the number of resident labourers by repatriating them back to the reserves.<sup>49</sup>

*Jungus  
are beasts!*

While African workers in the settler reserves were suffering under these slave like conditions their counterparts in the urban areas were, also going through hard times.

Low urban wage rates, a steep rise in cost of living and poor housing conditions all caused an increase in the "number of people who were extremely dissatisfied."<sup>50</sup>

But the colonialists chose to diagonalize the problem of bad land as a result of " the growing inability of the traditional agricultural systems to cope with increasing population pressure."<sup>51</sup> But instead of even dealing with basic problem of land tenure the colonialist administration thought that the main solution to the problem was a "massive programme of bench terracing, carried out by communal labour"<sup>52</sup> which labour was greatly resented by

the Africans.

Such incidents as the Olunguruone incident in 1942 where landless African squatters who had been settled at Olunguruone refused to accept the harsh farming conditions imposed on them. The rules of occupation at Olunguruone provided for a restriction on the number of stock kept, number of trees cut and prohibition on subletting and sub-division amongst other conditions.<sup>53</sup> When the African refused to accept these conditions they were forcibly removed from the area, their crops and huts burnt and some deported to detention camps and the others to already full reserve areas.<sup>54</sup> Such incidents only increased the already increasing tensions between the colonialists and the Africans especially over the land issue.

And in other spheres tensions were already increasing. Because of the poor working conditions the Africans started organizing themselves into trade unions which became militant movements for Africans to express their griveances against colonial rule.<sup>55</sup>

In education and in religion the Africans expressed their discontent by forming their own indepedent schools and churches and by their opposition to restrictions on female circumcision.<sup>56</sup>

Centralized political organisation for Africans began earnestly in 1946 with the formation of the Kenya African Union which was for all intents and purposes a national



party.<sup>57</sup> The Union organized ways and means of getting the griveances of the Africans known to the colonial government but while it was bent on bringing to an end colonialism in Kenya the colonial government was not willing to compromise even on such basic questions as the breakdown of racial barriers in land ownership.<sup>58</sup>

In land ownership, institutionalized apartheid showed itself clearly. The Europeans had appropriated for themselves the highlands which were part of the best lands in the country. Then through certain legal instruments seen above they had reserved these areas for their exclusive use and in this they did not seem prepared to back down. This must have been in accordance with the **dream** of the colonialists that Kenya would be a 'white man's country' for ever.<sup>59</sup> *trash!*

The creation of legally determined reserves for both Africans and Europeans and the persistent refusal of the colonialists to deal with the question of African ownership to land were meant to entrench this idea of a white man's country.

But history was to prove them wrong.<sup>60</sup> *feel* Because of the mass expropriation of a people's land and the intrasigency of the colonial government in dealing with genuine African griveances the situation reached where the African could take no more. This was especially so in the central province where most of the population, which was predominantly an agricultural population "a crisis was approaching due to an increasing congestion of population

and the excessive cultivation of eroding land".<sup>61</sup>

The Kenya African Union increased political action but the colonial government reacted to this by retaliatory action against the leaders and restricting political action amongst the African population.<sup>62</sup>

Now the Kenya African Union was a legal organisation *(a toothless dog)* whose aim was to achieve some national independence through constitutional and peaceful means."<sup>63</sup> But it seems some sections of the African society saw this as unworkable and they took arms to expel the colonialists from the land they had stolen and to gain independence for the Africans.<sup>64</sup> Oathing a traditional pledge of commitment and secrecy was utilized as a binding force for the members of this covert movement.<sup>65</sup> This was the Mau Mau movement which by 1950 had made such an impact on the local political scene that the colonial government was forced to declare it an illegal society and prosecute some of its members caught in the oathing process.<sup>66</sup>

But it seems this action merely forced the Mau Mau to go underground and in 1950-51 spread like wild fire especially in the Central Province and Nairobi to the alarm of the colonialists.<sup>67</sup> ~~Because of the sudden increase in~~ violence against the settlers in the rural areas and its declaration of an initially extremely effective guerilla war, it became a movement which the colonialists could not ignore. What gave it great strength was the fact that

the larger majority of the community either actively or passively supported the movement. Only the colonial chiefs and other collaborators who had benefited from colonialism joined the colonialists in fighting the Mau Mau.<sup>68</sup> *no more*

The situation got so out of hand for the colonialists that on the 20th of October 1952 they were forced to declare a state of emergency in Kenya and to arrest the leaders of the Kenya African Union amongst others.<sup>69</sup> But the impact of the whole movement was such that the colonialists were forced to completely reconsider their approach to the crucial question of land tenure for the African population.

As mentioned earlier the colonial government had considered the formation of the Native Lands Trust Board as the final solution to the question of African title to the land.

By this, radical title to African land was vested in the Board and within these reserves African customary law applied. But it was African customary land law in evolution since certain socio-economic factors had led to certain changes such as the development of some form of individual tenure as noted above.

But even with such a development it could still be said that



" by 1952 opinion was still far from regarding the consolidation of all ... land, followed by the issue of titles to all landowners as a practicable step."<sup>70</sup>

Thus as late as the early 1950<sup>s</sup> official colonial policy still regarded the answer to the question of title to African lands as lying in the concept of communal tenure which they held on to.<sup>71</sup> But the momentum of the Mau Mau movement and the ensuing inevitability of a change in power relations was to change all this.<sup>72</sup>

It seems the British colonialists were aware for a long time that independence for the African peoples was an inevitability. In fact one British colonial secretary though ofcourse speaking without any urgency had said in 1943 that they were "pledged to guide colonial peoples along the road to self government within the British empire."<sup>73</sup>

Thus though they had accepted decolonization as inevitable they thought this would come at their own pace giving them time to arrange that independence "within the British Empire." It must have seemed to the colonialists in Kenya that the Mau Mau was out to force them out.

Drastic measures were therefore instituted not only to deal with the Mau Mau but also with the question

that had caused the break out of the Mau Mau  
i.e The question of African Land.


Even after the declaration of the Emergency in 1952  
the Mau Mau movement still continued to gain strength  
and the colonial government soon realized that the  
war could not be won on the military front alone.<sup>74</sup>

Basic and definite changes in the structure of land  
ownership amongst the Africans and other political  
concessions would have to be made.

But this was to be done in a way that would  
ensure that it fitted in the role that Kenya's  
independent economy was envisaged i.e. a laissez faire  
capital economy.

The changes would have to come up with a tenure  
where economic individualism would be the guiding  
light.<sup>75</sup>

The East African Royal Commission appointed in 1953  
under the chairmanship of Sir Hugh Dow was the first  
report that officially sanctioned the revolutionalization  
of African land tenure.<sup>76</sup>



The commission advocated a breakdown in racial barriers to land ownership and the promotion of a tenure based on individual as opposed to a communal ownership of land.<sup>77</sup> It enumerated what the commissioners saw as the advantage of this type of tenure chief amongst them being the availability of credit facilities to Africans.<sup>78</sup> But it also recognized that though there would be a subsequent rise in the value of land this development would also cause landless.<sup>79</sup> But above all it is strongly recommended that the colonial government "must create conditions which facilitate the emergency of a responsible African middle class able to meet other races on equal terms"<sup>80</sup>

These recommendations were concretized and made practicable by what came to be known as "THE SWYNNERTON PLAN." This was a report entitled "A Plan to Intensify the Development of African Agriculture in Kenya" drawn up by the colonial Assistant of Director of Agriculture Mr. R.J.M. Swynnerton. The plan took about three months to draw up and came out before the end of 1955.

The plan that Swynnerton came up with was to completely revolutionize African land tenure and to completely change the cause of Kenyan land law which changes continue. upto today.



Amongst his most important recommendations was the one on the introduction of title based on individual ownership of land. He said on this;

"Sound Agricultural development is dependent on a system of farming whose production will support his family ..... He (the African) must be provided with such security of tenure through an indefeasible title as will encourage him to invest his labour and profits into the development of his farm and as will enable him to offer it as security against such financial credits as he may wish to secure from such sources as may be open to him".<sup>81</sup>

Of course the kind of tenure that existed in the African reserves was such that one could not be extended credit facilities on the strength of his claim to any piece of land. This was noted by the Royal Commission which had said that financial credit to Africans was not denied on a racial basis but because of lack of collateral security.<sup>82</sup>

But Swynnerton also dealt with other agricultural problems recommending the introduction of cash crops for all races and the creation of marketing and credit facilities for everybody in the agricultural community. He also recognized that "In the long term the greatest gain from the participation of the African community in running its own agricultural industries will be a politically contented and stable community."<sup>83</sup>

On the question of fragmentation he said that "Immediately and before inheritance has a chance of creating fragmentation conditions must be created to

ensure that sub-division does not take place below an economic level.<sup>84</sup>

He was also quite clear that as result of this revolution in African land holding system "able and energetic or rich Africans will be able to acquire more land and bad or poor farmers less, creating a landed and a landless class"<sup>85</sup> But this, he said was "a normal step in the evolution of a country."<sup>86</sup>

For quite sometime before Swynnerton various colonial administrators had recognized and recommended land consolidation as one effective way of dealing with the Mau Mau movement.<sup>87</sup> Others had recognized that it would have the effect of creating a solid middle class Kikuyu population anchored to the land who has too much to lose by reviving the Mau Mau in another form.<sup>88</sup>

Thus one of the primary aims of the plan and what subsequently followed from it was to cool down the political anguish over land "which had wrecked such havoc in Kenya."<sup>89</sup>

The assumption made by Swynnerton was that any problems that might arise as a result of the whole programme such as landlessness would be able to solve themselves out through for example the demand for wage employment in the developed farms.

But still "the timely arrival of the plan may be attributed to the Mau Mau emergency"<sup>90</sup> which forced the

colonialists to realize that independence for Kenya was unavoidable. Not to be outdone the colonialists had to implement frantic steps not only to stem the tide of Nationalism but to make sure that independence when it came would be "within the British empire."<sup>91</sup>

This was to be aided by the creation of a stable and contented middle class which in collusion with the loyalists and their sons was to help in the transformation from colonialism to independence and ensure the continuation of British imperial role in Kenya. Says Sorenson "the new landed gentry, like the country squires of England, would become a bulwark of conservatism....."<sup>92</sup>

After Swynnerton's plan came out the process of adjudication, consolidation and Registration was accelerated in areas where Mau Mau was in operation.<sup>93</sup> By 1955 various administrators in the Central Province had already introduced it without any official legal backing. A good example was the Kiambu District Commissioner who had already introduced it in Chief Magugu's Komothai location him being one of the most loyalist chiefs in the district.<sup>94</sup> Already in 1954 the forfeiture of lands ordinance<sup>95</sup> had been passed primarily providing for the acquisition of lands belonging to Mau Mau.

But Mau Mau activity was still in the increase and by late 1954 the colonial government was forced to declare villagization for the whole of the central province.<sup>96</sup>



This forced the people off the land they had been living in into enclosed and guarded villages. This not only broke the supply lines of the Mau Mau in the forests therefore weakening them considerably but also provided ideal conditions for the carrying out of Swynnerton's plan.

The plan was given legal sanction by the passing in 1956 of the Native Lands Tenure Rules<sup>97</sup> which were made under the 1938 Native Lands Trust Ordinance.<sup>98</sup> The rules merely provided a framework for the ongoing process of consolidation and registration, and failed to clarify what content of rights the registered owner had or even what the position of customary law was especially since the Native Lands Trust Ordinance stated that African customary law was to apply to African lands.

The Rules were passed and declared immediately applicable to the whole of the Central Province. In adjudication a committee for each declared unit was to ascertain rights for each individual as per customary law. These rights were to be recorded in a Record of Existing Rights and all those with complaints were given 30 days to inspect the record and appeal to the arbitration Board. After this there was no appeals allowed about the adjudication process.<sup>99</sup>

This was followed by consolidation where a democation<sup>at</sup> officer with a committee consolidated all fragments of the rights holders into one piece and gave a certificate specifying the name, number of holding and any other

details. These were then all recorded in a register from which one was again allowed to inspect and appeal within 30 days in case of inaccuracy or incompetence of the register.<sup>100</sup>

This briefly was to be the process as laid out by the Rules.

In the same year that the rules were passed a conference was held in Arusha on African Land Tenure in East and Central Africa. The conference whilst noting that a communal tenure ensured that everybody had access to land<sup>101</sup> went on to sanction the introduction of individual title for Africans though a landless class was bound to emerge as a result of this. This landlessness would however be dealt with by increased wealth from the land which would lead to increased employment on the land for paid labourers.<sup>102</sup>

But the conference also warned that where the position of rights holders amounted to that of guardian or administrator only "nothing should be done to give these authorities the impression that they have any proprietary rights in the land under their charge ..."<sup>103</sup>

The conference also called for comprehensive legislation to cover the whole programme.

But comprehensive legislation in Kenya was only to come after a working party on African Land Tenure that was appointed in 1957 reported in 1958.<sup>104</sup> The working party was to consider the recommendation of the Royal

Commission of 1955 and the Arusha Conference of the proceedings year in its deliberations.<sup>105</sup> The Report came out in 1958 and included in its appendix a draft of the Native Lands Registration Bill. The Report recommended that Registered land was to remain in the Native lands but title would vest in the registered owner thereby removing the land completely from the regime of the Native Lands Trust Ordinance.<sup>106</sup> The Registration Bill itself provided the substantive law that was to apply to such registered land now that it had been registered and out of the ambit of customary land law. Amongst other detailed recommendations it reported on the issue of succession that this should be left to be guided by customary law of the Registered land whilst at the same time safeguarding against overfragmentation.<sup>107</sup>

Thus land law in the African areas was in essence to be revolutionalized and in place of the indigenus customary law of the land was to be instituted a regime of law which had actually evolved in British socio-economic conditions of laissez-Faire capitalism. This was of course quite in keeping with the earlier on mentioned aims of continuing to keep Kenya under British imperialism even after independence.

The Native Lands Registration Ordinance<sup>108</sup> enacted in 1959 was to give legal sanction to the recommendations of the Working Party. This ordinance was to replace the 1956 Tenure Rules whilst validating all the Registers



made under them.<sup>109</sup> The Ordinance introduced a new system of Registration conferring a freehold title on the registered owner<sup>110</sup> and extinguishing all customary rights or interests over that land.<sup>111</sup> First registration even if fraudulently obtained was not to be rectified.<sup>112</sup> And perhaps to limit co-ownership and therefore fragmentation, no piece could be registered as being owned by more than five people. In brief this was the statute that was to legalize the change over for African Land from African customary land law to English Land law.

The Native Lands Registration Ordinance of 1959 was afterwards renamed the Kenya Land Registration (special Areas) Ordinance.<sup>113</sup> Then in 1963 in the first six months of self independence the Registration parts of this Ordinance and the substantive law causing such registered land was enacted to become the Registered Land Act<sup>114</sup> which till today governs all land registered under it in Kenya.

So we can see how the break out of the Mau Mau, which was a result of the intransigence of the colonialists in dealing with the Africans on issues of their stolen land and others forced them to revolutionize African Land law and guide it on the path they wished it would take after independence. This is because the Registered Land Act is a direct development from the plan that Swynnerton laid out for the "development of African Agriculture".

CHAPTER III

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As we have seen in the last chapter the Registered Land Act<sup>1</sup> is a direct consequence of the land Reform process instigated by Swynnerton's systematic proposals. But as a statute the Registered Land Act (hereafter referred to as the RLA) was drafted by an unofficial committee in 1961 which took into special consideration the security and proof of title by the farmers and the creation of favourable conditions for easy transfer of interests in the land.<sup>2</sup> But this committee itself had based its draft bill on a similar bill contained in a report in Nigeria entitled "Report of a Working Party on Registration of Ownership of Lands in Lagos" which was published in 1960.<sup>3</sup>

Tracing the history of this report Simpson tells us<sup>4</sup> that itself was based on 1959 Kenya's Native Land Registration Ordinance.<sup>5</sup> And this ordinance had been drafted by the 1957 Working Party on African Land Tenure basing its bill on a similar ordinance in the Sudan entitled land Settlement and Registration Ordinance of 1952.<sup>6</sup> Simpson further tells us that in drafting the RLA at least four<sup>7</sup> other foreign statutes were referred to extensively.

Thus the RLA is a hybrid of various foreign statutes brought in to fit Kenya's circumstances. And since most countries whose laws were considered in drawing up the RLA were British colonies in which English Land law applied we can safely deduce that the RLA is a Kenyan



codification of English land law as appertains to Registration of land and the substantive law governing such land.

It was the Naive Land Registration Ordinance of 1959 whose title was ammended to become the Land Registration (Special Areas) Ordinance<sup>8</sup> which was later renamed the Registered Land Act in 1963 in the first six month of independence.

The process whose final step was the registration of a piece of land in the register<sup>9</sup> had three major stages.<sup>10</sup> ~~First~~ there was the adjudication process intended to establish precisely what interest each had in what land. Then there was the consolidation process, mainly meant to eliminate fragmentation by bringing together all pieces owned by one person to make one piece. And finally Registration was meant to confirm the above process rendering the registered person the secured owner of that piece of land.<sup>11</sup>

Upon Registration various definite rights accrue to the registered proprietor. And section 4 of the RLA provides that no other law other than that in the Act shall apply to registered Land. And in this way all the customary law that was guiding the People's relations with their land was abrogated and in it's place put the Act.

Most of the rights that accrue to the registered owner flow from the fact that he is the absolute owner. And



Section 27(a) of the RIA confers upon the absolute owner the rights to deal exclusively with that registered piece of land.

Section 27(a) Reads "Subject to provisions of this Act-

- (a) The Registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all privileges, belonging to or appertenant thereto;

After establishing that the registered person is the absolute owner or proprietor of the registered land section 28 of the same Act reinforces this by providing 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 this Act and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto free from all other interests and claims whatsoever,..."<sup>12</sup>

When a proviso to the section states that nothing in the section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.

Thus the registered proprietor holds all the rights pertaining to that piece of land even of use and disposal subject to the sovereign rights still retained by the government over all the land in the country.

In African customary land law trusts over land exist from the level of the whole community which is viewed

as holding land on trust for the unborn to the level where the head of the family holds on trust for his issue; as we saw in chapter one.

The effect of the RLA as interpreted by some decisions discussed below was to abolish this customary holding.

This was because only the proviso to Section 28 mentioned above and Section 126(1) which state that any person acquiring land in a "fiduciary Capacity" has to be registered as a trustee seem to provide some form of protection for people whose land is held by a trustee.

Thus upon registration the registered proprietor acquires what is known under the Torrens system (on which the RLA is based) as an indefensible title. This concept of indefensibility of title was well described in the New Zealand case of ALLAN FREDRICK FRAZER V.D.H

WALKER AND OTHERS<sup>14</sup> as

" a convenient description of the immunity from attack by adverse claim to the land or interest in respect of which a registered proprietor enjoys."

"This conception" the judge continued " is central in the system of registration. It does not involve that the registered proprietor is protected against any claim whatever; .....

But as a registered proprietor and while he remains such, no adverse claim (except as specifically admitted) may be brought against him."<sup>15</sup>

This freedom from any adverse claims is thus central to conferring upon the RLA's registered person the absolute proprietorship of that land. Therefore to the bona fide

purchaser for valuable consideration the absolute proprietor, when if he may have an impeachable title, passes an unimpeachable title.<sup>16</sup>

The proviso to Section 28 and Section 126(1) of the RLA bring out the other aspect of the concept of indefeasibility of title in that it is " confined to the protection of the registered proprietor from adverse interests paramount or having priority and existing at the time of his becoming registered and do not deprive of his rights anyone for whom the registered proprietor has by his own contract or act become a trustee ..."<sup>17</sup> An example of people whose rights indefeasibility should not defeat are of course those who the RLA absolute proprietor may be holding in trust for such as his family.

The registered proprietor however owns alone and individually. This individualism is a key element.

In fact this point is well illustrated by Simpson when he states


" In Kenya however, the strict principles of adjudication were not adhered to in the 1959 legislation and no form of group ownership was allowed and therefore registration was at this time synonymous with individualization"<sup>18</sup>

This policy of individualization of tenure was first put forward strongly by the East African Royal Commission on land and population which argued that the policy concerning the tenure and disposition of land ..

" Should aim at the individualization of land ownership and at a large degree of mobility in the



transfer and disposition of land which ... will enable access to land for its economic use"<sup>19</sup>

Indefesibility of title greatly enhanced this objective of easy transfer of land since as we have seen above the bona fide purchaser for value would in most cases even get a better title than the absolute proprietor he has <sup>purchased</sup> ~~prurchased~~ the land from since his would be free from any fetters. 

One of the great disadvantages that registration was meant to do away with was what the commissioners saw as a lack of secure title order customary law.<sup>20</sup> They reasoned that the cause of non-extension of financial credit to Africans was not on a racial basis but because of lack of collateral security on the part of the Africans.<sup>21</sup> Registration would give the registered proprietor a title which he then would be able to use in obtaining credit for agricultural and other development. Security of title would also encourage long term capital investment in the registered land.

Consolidation was itself meant to eliminate fragmentation "a factor that greatly reduced returns to labour and time in customary land use."<sup>22</sup>

Again Simpson sums up the case for the land Registration in areas where where customary law applied as follows.↘

"Not only will it stimulate and facilitate a market in land rights... but also, it will enable the market to be organized and controlled when it begins to develop on it's own as it rapidly does when land begins to acquire an economic value."<sup>23</sup>

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Thus Registration was meant to cure the problem of fragmentation and to increase participation in the land market by other people through the provision of a state guaranteed title.

One of the Key recommendations of the 1957 Working Party on African Land Tenure<sup>24</sup> was that the first Registration of a piece of land once finalized should not be alterable and should therefore be final.

" The advantages of making first registration final and absolute far outweigh any advantage that might result from allowing original adjudication to be challenged;<sup>25</sup> the Working Party argued.

Various arguments for this recommendation were given, the main ones being that to open first registration to challenge would endanger the whole process of adjudication, consolidation and registration. The move was also meant to benefit the African in that it would relieve him of the crippling burden of payment for law suits in which first registration was being challenged.<sup>26</sup>

But it is submitted that these reasons ignore the real politics behind the decision to make first registration non-rectifiable. The main reason was actually of a political nature in that it was meant to exclude some people from the land thereby achieving one of the main political reasons behind the process of registration which was to use it as a punitive measure against those who were considered as subversive elements by the colonial



government i.e. the Mau Mau.<sup>27</sup>

This is especially so in respect to the second reason given above in that the colonial legislature had already passed the African Courts (suspension of Suits) Ordinance<sup>28</sup> under which all suits concerning land were frozen in areas that had been declared adjudication areas.

The provision on non-rectification of first registration together with the Forfeiture of Lands Ordinance was<sup>29</sup> to help achieve the punitive aspect of land registration because the loyalists who supported the colonial government to protect their interests would have a chance to register the lands of detained persons as their own which registration would not be challengeable. And through the ordinance the government would be able to compulsarily acquire the lands of even the rank file of the Mau Mau and reward the loyalist with it.<sup>30</sup>

As we are to see below this provision brought more problems than it actually solved. The provision which first appeared as section 89(1)(a) of the Native Lands Registration Ordinance<sup>31</sup> was at this time meant to ensure that the action of the administration was guaranteed once it entered the register.<sup>32</sup> It now appears as section 143(1) of the RLA. ✓

Native Lands

The provision was first interpreted in the case of The D.C. of Kiambu VR and Others Ex Parte Ethan Njau.<sup>33</sup>

In this case one Munge had been sold some land by



Njau's clan. The adjudicating committee recognized the rights of both and during demarcation they both got plots half a mile apart. But Munge appealed to the adjudicating committee and to the District Commissioner unsuccessfully. He filed an application for the order of Mandamus which the supreme court issued ordering a rectification in favour of Njau holding that the original alteration was *ultra vires* the Native Land Tenure Rules which were in force then. The Crown appealed against this decision. It was while the appeal was pending in the Court of Appeal that the Native Lands Registration Ordinance came into force with its Section 89(1)(a) making first registration non-rectifiable. Using this section the Appeal Court reversed the decision of the supreme court holding that the section expressly precluded any alteration of a first registration. This decision slammed the door tight against any further attempt at rectification of a first registration and was to remain a precedent against any such appeals.

But when the indigenous people were registering their lands they "saw the person in whose name the land was registered as one used to facilitate formalities and documentation"<sup>34</sup>.

Furthermore the adjudication and consolidation process itself was not very accurate<sup>35</sup>. The main problem arose because of basically erroneous assumptions by the advocates of registration that it was possible to equate rights over land recognized by customary law with the rights

that the RLA was to confer on the registered proprietor.<sup>36</sup>

One of the causes of the conflict that was to manifest itself later was caused by the policy of the colonial government itself. This arose because of the insistence of the authorities that fragmentation had to end and that they should only encourage the registration of 'economic' holding.<sup>37</sup> Sorrenson records that it was the policy of the registration officials to encourage various rights holders, especially those related to each other to join up their various plots and get the plots registered under one person as an 'economic unit'.<sup>38</sup>

This in effect extinguished all other claims on that particular piece of land to the benefit of the registered person since he acquired an indefeasible title upon registration.

But the greater failure in the registration process was the failure to protect family interests in land.<sup>39</sup> As we saw in chapter I the African customary trust existed in all sectors of the community. That was at the family, clan and even tribal levels in that the tribe was also seen as holding land in trust for the yet unborn.

It was however at the family level that the main problem arose. It happened mainly because most of the people who were affected by it did not understand the full implications of Registration.<sup>40</sup> In almost all situations family land would be registered under the name of the head of the family or any **other** person in charge of the



family at the time of registration. The adjudicating officers would not generally object to this because they encouraged the registration of one person as the proprietor of every one piece of land.<sup>41</sup> They were ignorant of the fact that this registration may well have the effect of extinguishing the rights of the other members of the family.<sup>42</sup>

Among the first court decisions dealing with such a problem was the case of Thuku Mbutia V Kaburu Kimondo.<sup>43</sup>

In this case the appellant was a registered proprietor of a piece of land from which he wanted to eject the respondent. The respondent was the widow of the appellant's deceased son. Before the death of the son the appellant had not clearly demarcated the land belonging to him.

But relying on Kikuyu customary law, order which the son (and therefore even his wife ) was automatically entitled to part of his fathers land, the widow had planted some coffee on a part of the land. The appellant had first brought a suit seeking a declaration that the respondent was a trespasser. But the court of first instance ruled against him. However on appeal Ainley C.J. held that the appellant, being the one who the land was registered under, was the absolute proprietor and was therefore entitled to eject the respondent from the land because this made her a trespasser. It was also further held that the widow was not entitled to any compensation for the coffee she had planted since under the doctrine of quic quid plantatu solo solo Cedit the coffee was part



of the appellants land.

It is submitted here that this interpretation of the RLA was given in ignorance of what socio-economic implications it would have in African land relations. The second important case that had similar effects was Sela Obiero V Opiyo and Others.<sup>44</sup> Here a farmer had died leaving a widow who in 1968 had registered as the absolute proprietor of the disputed piece of land and who was the plaintiff in the case. The defedants were sons of the deceased man by another wife. The plaintiff claimed that the defedants were traspassers. She wanted damages for trespass and a perpetual injunction restraining the defedants from any such further trespass. The defedants based their defence on their customary law right to their father's land and also claimed that the plaintiff had gotten herself registered frandulently. In rejecting the arguments of the defedants Mr. Justice Bennet said

" I'm not satisfied on the evidence that the defedants had ny rights under customary law, but even if they had these rights would have been extinguished when the plaintiff became the registered proprietor. Section 28 of the Registered land Act confess upon a registered proprietor a title free from all other interests and claims whatsoever subject to the beases, charges and encumbarances shown in the register and such overriding interests as are not required to be noted on the land cerificate and according to the evidence... The plaintiff's title is free of encumbarances. Rights arising under customary law are not overriding interests. Had the legislature intendednd that the rights of a registered proprietor were to be subject to the rights of any person nothing would have been easier than for it to say so. In my judgement the defedants have ceased to have any rights over the desputed land if indeed they were ever entitled to any interest in it when, the plaintiff became the registered proprietor."<sup>45</sup>



On the basis of this argument he granted a perpetual injunction restraining the defedants, their wives, agents or servants from ever tresspassing on the land and relied on section 143(1) of the RLA to refuse rec rectification of the register.

We quoted Bennet J in extense to show what effect a basic misunderstanding of African land relations coupled with an extremely strict interpretation of the RLA had on the defedants who were clearly, entitle to rights over the land which under customary law their father held in trust for them and could not therefore alienate from them.

The judgement is even more repulsive when one considers that under African customary law wives, even after their husbands died never owned the land as such but only held a life interest over such land. Infact in most cases the first born of the deceased, if he was of age could be appointed trustee of his father's property even when the wife was still alive. This issue is discussed in the final pages of chapter one.

Obiero V Opiyo was then followed in Esiroyo v Esiroyo and another<sup>46</sup> where the plaintiff had twenty acres of land registered under his name. He had allocated ten of these to his sons but the transaction had not been noted on the register. He however later quarreled with his sons and he seems to have been so angered that he bought an action for trespass against his sons. He

He requested for an injunction restraining them from continuing such trespass. Following Obiero V Opiyo Kneller J. held that customary land rights are extinguished upon registration of land and that even though the sons had occupational rights under customary law these rights did not amount to an overriding interests as defined in section 30 of the RLA. In this way the sons were disinherited.

These cases manifest the grave injustice meted out to potential beneficiaries of the customary Trust holding. This arose due to the ignorance of the socio-economic role that this institution played in African land relations most probably because those delivering the judgements were foreigners who could not appreciate such institutions which were so deeply in the African philosophy of property relation.<sup>47</sup>

But it is intriguing to note that at the time when Obiero V Opiyo and Esifoyo V Esiroyo were being decided another High court judge had decided in 1971 a case that had contrary effects to the above two cases and was mere in accordance with what the justice of the situation demanded.<sup>48</sup>

This was in the case of Mwangi Muguthu V Maina Muguthu. In this case the plaintiff who was a younger brother of the defedant wanted a declaration of a trust in his favour and an order for registration for his piece of



land. The defedant had been registered as the proprietor to the land that their father had left for them and it was part of this land that the plaintiff claimed.

Madan J (as he then was) ordering in favour of the plaintiff decided correctly that in Kikuyu customary law the father never gave land to one son to the exclusion of all others and therefore there was no need to register a trust because the first son was so registered as owner in accordance with Kikuyu customary law under which he was only a trustee. He thus held by the consent of everyone concerned. The judge also said that the RLA had to be construed within the context of African land rights. Section 143(1), he said, does not preclude registration of a trust if it could be proved.

Here the judge seems to have been giving effect to the fact noted above that indefesibility of the registered proprietors title does not necessarily extend to deprive of their rights such people as the plaintiff in this case since in getting himself registered the defedant must obviously have been aware of that he was holding land in trust for his younger brother.

Then in the same year that Esiroyo V Esiroyo was decided another High Court judge delivered judgement in the case of Mungora Wamathai V Muroti Mugweru<sup>49</sup> that was in effect contrary to Esiroy V Esiroyo.

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In this case which was unreported, a man had married a widow who had a son and some land left by her deceased husband. During registration the man got himself registered on behalf of the son. He then later sought to exclude the son from matters of distribution of land relying on his registration. The son sought a declaration that the man held on trust for him and the trust should be brought to an end. In holding for the Bennet J. said

" 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 making, a constructive trustee."

A Constructive trust has been defined as a formula

"though which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, Equity converts him into a trustee."<sup>50</sup>

And it's this principle that Bennet J used to do justice in the above case.

Then in 1973 in the case of Samuel Thata Mishek and others V Prscilla Wambui<sup>51</sup> Muli J. (as he then was) affirmed the existence of a trust in a case where a mother was claiming absolute proprietorship to the detriment of her children who wanted a trust declared in their favour. The judge said that registration of titles was a creation of the law and one must therefore examine very carefully the circumstances



surrounding each case as well as customary law surrounding the registration of title to determine whether a trust was envisaged.

This one case where the judge in interpreting the RLA took into account the actual socio-economic setting within which registration takes place.

But even this case, which was unreported does not seem to have settled the issue conclusively. In an Appeal Court decision in 1978 the three presiding judges all declared a trust in favour of the claimants to the detriment of the registered proprietor but they all arrived at that conclusion through different arguments.

This was in the case of Alan Kiama V Mathunya and others<sup>52)</sup>

Here the appellant who was the registered proprietor had acquired the land for valuable consideration from another person who had gotten himself registered as absolute proprietor to land that had been clan land. In the High Court Muli J. (as he then was) had found a resulting trust in favour of the clan and therefore the appellant held subject to this trust. The respondents (the clan) had argued that the appellant had obtained his title fraudulently since the first person had secretly registered the clan land as his and then transferred it to the appellant.

In the Court of Appeal law J.A. while stating the "customary rights of possession, occupation and cultivation ... are without relevance to registered land"

went on to find that the first proprietor had held the land in trust for the clan and therefore a constructive trust was imposed on the appellant because of dealing with this land and that the respondents interests in the land were overriding interests. Potter J.A. found that a resulting trust arose and that there was an overriding interest created by the trust under section 30(g) of the RLA since the respondents had a right of occupation to the land. In right of that occupation, he said, the respondents are collectively the beneficial owners of the suit land under the trust. Madan J.A rejected the idea of a resulting trust saying that rather than declare a resulting trust it was better to look at it from the point that the right was transferred subject to the respondents existing rights which rights amounted to an overriding interest under section 30(g) of the RLA.

One interesting point to note from this Appeal Court decision is that both Madan J.A. and Law J.A. expressly agree with the decision in Esiroyo V Esiroyo that registration explicitly extinguishes all customary rights over land.

But perhaps the fact that the courts will now in all such situations declare a trust is settled by the 1982 Appeal Court decision in the case of FRANCIS MUNENE s/o PAUL MUTHUITA V MILKA MAINOE w/o MUTHUITA.<sup>53</sup>

In this case a mother and her two younger sons sought a declaration for a trust in their favour against her



first born son who had been registered as proprietor during registration after his father's death. The registered son claimed absolute proprietorship and that since no such trust had been registered then there was no trust. The trial magistrate found for the registered son holding that the rights of an absolute proprietor could not be defeated except by interests shown on the register or by overriding interests detailed in section 30. On appeal to the High Court the judge overuled this decision holding that the registered son was registered as proprietor of the suit land as trustee for himself and the three appellants. In the Appeal Court this decision was upheld. Potter J.A. argued on the basis of the proviso to section 28 and section 126(1), which provides for registration 'as trustee' for one who held land as so, to declare a trust in favour of the respondents and a subdivision of the land.

A scrutiny of these authorities shows that we have moved from the position of Thuku Mbutia, Obiero and Esiroiyo where the courts refused to tamper with the indefesibility of title the RLA absolute proprietor to a position where one can say that the courts will now declare a customary trust holding in all such situations where it exists. This is tantamount to recognizing of the title of the RLA absolute proprietor is always subject to the customary trust holdong since almost all such absolute proprietors are essentially so;

i.e. Customary trustees. -

This is because as one writer clearly puts it

" Registration does not abolish or extinguish customary land rights ... These rights merely take a different form in that the proprietor becomes the trustee even where he would not have been appointed a trustee under customary law." <sup>54</sup>



CHAPTER IV

In this paper we have tried to show basically what the effect of Swynnerton's systematic recommendations and their adoption has been on the institution we call the customary trust holding.

We have seen that Swynnerton's proposals were not an accident but were made necessary by certain historical factors that called for a clear re-evaluation of what role the African rural farmer was to play in the future Kenyan economy as envisaged by the colonists.<sup>1</sup>

Swynnerton's plan was of course carried out with a lot of speed and vigour and speed especially in the central province where the emergency, villagization and the detention of large numbers of people provided ideal conditions for such a programme.<sup>2</sup> But because of haste and certain other fundamental misconceptions we shall see below the programme was bound to have problems in the future. The enactment of such ordinances as the

Bear testimony to

the fact that even the colonists realized in certain aspects.

But what concerns us in this paper directly was the problem that we saw erupted in such cases as Thuku Mbuthia V Kaburu Kimondo<sup>4</sup> Obiero V Opiyo and Esiroyo V Esiroyo<sup>6</sup> where people who under customary law were

entitled to certain definite rights to land were denied these rights because the registration programme was supposed to extinguish customary rights over land.

It is submitted here that the basic reason behind the injustice caused by the above cases was as a result of a misconception as to what registration really is. One could not put it better than one writer on this issue who has said

" Since then the process of replacing customary land tenure entails working with customary law .... all that the registration, and sections 27 and 28 of the registered land Act do is merely to record people's right under their respective customary tenures...." <sup>7</sup>

Thus "Registration does not abolish or extinguish customary land rights... These rights merely take a different form in that the proprietor becomes the trustee even where he would not have tenure." <sup>8</sup>

The colonial authorities in deciding how the adjudication process was to go and what quantum of rights were to be conferred on the registered owner seem to have assumed that it's possible to discover an exact equivalent between customary land rights and the rights which were to be recognized by the Registered Land Act<sup>9</sup>. But from what we have seen the Registered Land Act does not explicitly recognize that institution of the customary trust whose primary objective was to ensure that every member of the community got access to the communities land.



Adjudication and Registration therefore seem to have had the effect of conferring upon some people greater rights than they had over the land whilst denying others rights that are theirs under the law. Thus the above mentioned cases can even be said to have been decided in ignorance of constitutional provisions and especially section 75 which protects the private property of individuals against compulsory acquisition seeing as the rights of those who were not registered amounted to property rights.<sup>10</sup>

It has then been left to the courts to circumvent strict statutory interpretation of the Registered Land Act in an effort to do justice to situations where to strictly follow it would lead to injustice. This is manifested by such decisions as Muguthu V Muguthu,<sup>11</sup> M. Wamathai V M. Mugweru<sup>12</sup> and Alan Kiama V Mathunya<sup>13</sup> all discussed in Chapter 3.

In all these cases however there is no explicitly set rule of law that the customary trust holding is recognized by the judiciary. In fact Alan Kiama V Mathunya which is an appeal court decision seems to have confused the issue further because though on the facts of that case a customary trust was recognized and upheld, the justices seemed to be unanimous that Sela Obiero and Esiroyo were correctly decided. Thus even today the position as regards the customary trust has not been finally solved either judicially or statutorily.

However various ways of dealing with this problem could be suggested here. Infact the Chief Land Registrar in 1972 seems to have recognized the injustice being caused by this situation and in April of that year he sent a Practice Note to the Kenya Law Society and to the Registrar of the High Court suggesting a way of dealing with the problem.<sup>11</sup> He first acknowledged that in the central province where registration had taken place when many people were still in detention many cases of fradulent registration took place and that Section 143(1) of the Registered land Act was being used to condone such fraud since it provided that no rectification could be made of a first registration. He therefore suggested that where the court found itself tied by the section from doing justice, it would be "within the spirit of the Act to make an order in personam" directing that the registered proprietor transfer the parcel to the rightful claimant and if he declines, the transfer be executed by the land Registrar.<sup>12</sup> This practice note seems to have been accepted by the Altorney General who suggested that this process should take two stages. The first would be a declaration that the registered proprietor holds the property as a trustee for the rightful claimant including the order in personam That the registered proprietor transfer the property to the rightful claimant. The second stage would be if the registered proprietor refused to obey the order



to transfer the property to claimant could make another application that the order be executed by another person other than the registered proprietor.<sup>13</sup>

We should note here that these practice notes were not at all intended to be an amendment to the Act but suggested means by which the fraud being condoned by the Act could be mitigated. It was in fact an implicit and almost extra-judicial recognition of the existence of the customary trust but without going full length to declare that it exists. But perhaps a better way of declaring the trust in such situation would be to utilize more the proviso to section 28 of the Act which state that registration shall not be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.

The above quoted practice notes however do show that the highest authorities knew about the problem and its magnitude and ramifications. But the reason why the lawmakers shy away from amending the Act to end such fraud being committed in its name can only be traced to the fact that large areas of the country are still yet to go through the process of Registration of titles. An amendment especially to Section 143(1) had even been suggested by the Mission of land consolidation and Registration<sup>14</sup> which recommended that the words "(other than a first Registration)" be deleted thus making even a first registration rectifiable.

So what is perhaps presently needed is such an ammendment to section 143(1) as recommended by the mission and an addition in the statute clearly and explicitly declaring that the customary trust holder should always be treated as so even when he is registered as an absolute proprietor.

After making these recommendations we believe it is also within the scope of this paper to briefly look at what effect the whole land reform programme that started with Swynnerton's plan has had on Kenya's land law.

As we have seen in the previous chapter the land Reform programme had two major aims though actually connected.

The first one could be said to have been purely political in that it aimed at the creation of a responsible African middle class able to meet other races at an equal level. The second one which was to aid in the first one was to aid in the imporvement of African agriculture through the provision of credit facilities to those who held title to registered land. The security of title was seen as an incentive to encourage permanent development of land and cash crop farming.

Thus what the land reform programmed was doing was preparing Kenya for the neo-colonial role that it



was to play in the future. To quote one writer

"The thrust of colonial policy in Kenya after 1948 was the consolidation of economic interests with the colony through systematic diffusion of political nationalism and the incorporation of Africans into a colonial mode of production relations"<sup>15</sup>

This was to be done as far as land was concerned through the breakdown of racial barriers in land ownership. The writer continues to explain

" For what was at stake lay far beyond the interests of the settler elite alone. commercial and industrial concerns representing powerful international conglomerates had become extremely entrenched. Within the Kenyan economy. Pre-empire action was clearly called for so as to force internal linkages that would ensure the survival of the economic system rather than that of any particular group of economic actors."

Thus what the land reform programme did was to aid the development of the colonial capitalist mode of production in Kenya even after independence.

Private ownership of land and such doctrines as indefeasibility of title (as discussed in chapter 3) which greatly facilitated the growth of a land market are all geared at the creation of a capitalist oriented economy. And their success in this cannot be underestimated.

Evils such as landlessness which were foreseen even by Swynnerton himself are supposed to be dealt with through the creation of a labour market by those who own land. Already statistics tell that there are over million<sup>17</sup> landless people in Kenya. And the landlessness

is increasing in all those areas where registration has been done.

The writers own experience in his home area has shown that due to the fact that every father who is registered as a land owner has to divide up his land amongst all his sons the average of land per person is decreasing daily. The theory of 'economic sized' parcels of land that was encouraged during registration has had to be discarded simply because every body who has a family has to own land and land control Boards which are supposed to check uneconomic subdivisions have had to everlook this as far as subdivision of family land is concerned. As this subdivision continues more and more people are going to be ejected out of the land since a point will have to be reached where no further subdivisions are possible.

Meanwhile other Kenyans who are 'luckier' are registered owners of thousands of acres of land which some of them are holding merely for speculative purposes since it is unutilized land.

This issue of mass landlessness amidst private ownership of masses of land that has been encouraged by the enactment and operations of the Registered Land Act and other land statures is a situation that definetly needs to be seriously looked into before it becomes a political explosive issue.



FOOTNOTES      CHAPTER I

1. See generally MBITI, African Religions and philosophy; Heinemann London 1969 and BIEBUYCK D (Ed); African Agrarian System, OVP London 1963
2. C.G.S. MUNORU; The concept of customary sale today; Journal of Denning law Society Vol. No 14 pg 28.
3. G.K. KURIA, The Role of Customary land tenure Rural development; Mimeo
4. J.K. NYERERE; Ujamaa - The basis of African socialism quoted by G.M. FIMBO, East African law renew, vol,6 pg 216
5. WILSON Land Rights of Individuals among the Nyakyusa; 1938 pg39
6. Ibid
7. T.O. ELIAS; Nigerian Land Law. Sweet and Maxwell 1971 4th Ed. pg 73
8. Tijani VSecretary of Southern Nigeria (1921) 2 A.C. 399 at 404
9. MAX CLUCKMAN; Ideas in Borotse Jurisprudence, Manchester, 1069 pg 109
10. FIMBO AND JAMES; Customary Land Law of Tanzania, East African Literature Bureau, 1973 pg 7
11. (1953)2 TLR 327 (C.A.)
12. (1919) A.C 211
13. (1938-39)29 KLR 5 at pg 8

- 25  
14. NJUGUNA C KAMAU; The effects of Land Registration on Kikuyu customary land Tenure with particular reference to Ngenda Location of Gatundu Division, Kiambu District LL.B Dissertation 1978 pg 7
- 26  
15. R. VAN. ZWANEBERG. The Land Question in Kenya from the 19th century to the present day. A paper presented to the 3rd International Congress of Africanists, Addis Ababa 1973 esp pg 4. Also G.K. Kuria, opp. at
16. This argument is well put by OKITH OGENDO: The political Economy of land law - An Essay in the legal organisation of Underdevelopment in Kenya 1895-1974 JSD. Thesis Yale University pg 1-10
17. OKITH OGENDO: Ibid
18. Ibid
19. G.K. KURIA; Supra.
20. OKOTH OGENDO; Property Theory and land use analysis; paper for the Institute for Development Studies University of Nairobi pg 10
- 27  
21. MAX GLUCKMAN; Supra pg 76
22. OKOTH OGENDO; Property Theory ... Supra pg 11 and F.D
- "LUGARD The Dual Mandate in English Tropical Africa" William Blackwood and Sons 1021 pg 15



- 23<sup>28</sup> OKOTH OGENDO; Property, Theory Supra and  
MAX GLUCKMAN Supra.
- 24<sup>29</sup> JOMO KENYATTA; Facing Mount Kenya, London 1961 generally.
25. For example the appointment of Chief Kinyanjui in  
Dagorreti to be the "Paramount chief of the Kikuyu."
26. The 1940 Foreign jurisdiction Act of England  
allowed any servant acting on behalf of the Queen  
to acquire land through sale, treaty, agreement,  
conquest or capitulation.
27. Examples of these are the Maasai Agreements of 1902  
and 1904 agued between the Queens representatives  
and the maasai collaborators. LUGARD says that  
"it mattered not that tribal chiefs had  
no power to dispose off communal rights"  
because the treaties were still being  
"produced by the cartload.". Dual  
Mandate supra pg 15.
- SIR F.D. LUGARD The Dual Mandate in British Tropical  
Africa, William Blackwood and Sons.  
1921 see Esp. Chapter 3
29. RUDI W. JAMES; Land Reform in Developing Countries"  
E.A.L.R. vol 9(2) pg 1
30. Ordinance No 29 of 1938
31. See H.P. GHAI and G. McAUSLAN. Public Law and  
Political change in Kenya, O.V.P. 1970 from pg 91.  
The legal process and incidents of the whole reserves  
policy will be discussed in the next chapter.
32. OKOTH OGENDO; The political economy of land law...  
supra pg 150



33. Ibid;
34. M.P.K. SORRENSON; Land Reform in the Kikuyu Country,  
O.V.P. 1967 pgs 34-40
35. OKOTH OGENDO; Supra pg 157
36. See Report of The Working Party on The Administration  
of The Native Lands 1960 pg 3 when it is argued that  
the process of consolidation and Registration is  
only a confirmation of the individual ownership that  
already existed.
- <sup>30</sup>  
37. For example one colonial secretary for Agriculture  
gave the following statistics as an example of the  
extent of fragmentation. In Nyeri District in a 1950  
census one man could hold an average of 12 different  
fields, 9 of them under cultivation and with each piece  
varying in size from 0.035 to 0.6 acres. See R.O.  
HENNINGS; Some Trends and Problems of African land  
Tenure in Kenya (1952) 4 Journal of African  
Administration pg 122.
- <sup>31</sup>  
38. JOMO. KENYATTA; Opp. at/
39. F.D. HOMAN; Inheritance in Kenya Native Land Units  
1958 Journal of African Administration pg 131
- <sup>32</sup>  
40. MUTURI R.W; The Impact of the Registered Land  
Act in Kikuyu customary law with  
special reference to the law of  
Inheritance LL.B. Dissertation 1980
41. For a further exposition on the Kikuyu siciol  
arrangements and its reference to land see JOMO  
KENYATTA



Opp. cit generally and especially Chapter 3 on land Tenure

42.<sup>34</sup> It shall be noted here that inheritance of a fathers property only refers to the sons seeing as the daughters, were not considered as having the capacity to control land for themselves, 'their' land being considered to be in their future husband homes. Probably because of the institution of polygamy it was rare to find a woman who could not get a husband.

43.<sup>34</sup> See JOMO KENYATTA opp. at. pg 32 and also MUKUNYA I.E.K. The Concept of Muramati. Legal Device For protecting subsidiary Interests Under the Registered Land Act, 1963 LL.B. Dissertation 1977.

44.<sup>35</sup> MUKUNYA I.E.K. Supra

45. For a more detailed exposition on the Muramati see MUKUNYA'S dissertation Ibid:

46.<sup>36</sup> See Footnote 38 and also Footnote 37 on this point.

47. C.G.S. MUNORU see Footnote 2

## FOOTNOTES CHAPTER II

1. CHARLES MILLER; The Lunatic Express; An entertainment in Imperialism; Futura publication Ltd 1977 pg 439
2. SIR CHARLES ELLIOT, Commissioner for the East African Protectorate 1901-04 was one of the greatest proponents of this policy, see M.P.K.  
SORRENSON; Origins of European Settlement Kenya O.V.P. Nairobi 1968 esp. pg 27 and also CHARLES MILLER, Ibid pg 467-468
3. OKOTH OGENDO: The political Economy of Land law- an Essay In The Legal Organisation Underdevelopment In Kenya (1895-1974) J.S.D. Thesis Yale University pg 15.
4. Ibid
5. Ibid.
6. M.P.K. SORRENSON; Supra pg 50-51
7. Y.P. GHAI and J.P.W.B. MCAUSLAN; Public Law and Political change in Kenya, O.V.P. 1970 pg 25
8. OKOTH OGENDO; Supra pg 10
9. SORRENSON; supra pg 51 also GHAI and MCAUSLAN, supra pg 26 and also OKITH OGENDO, supra pg 47
10. OKOTH OGENDO; supra pg 52
11. No 21 of 1902
12. S. 10
13. Section 30 and 31



14. M.P.K. SORRENSON; Land Reform In the Kikuyu country  
Nairobi 1967 pg 18.
15. OKOTH OGENDO; Supra pg 67
16. SIR F.D. LUGARD; The Dual Mandate in British  
Tropical Africa, William Blackwood and Sons, 1921  
esp chapters 10 and 11. This doctrine provided that  
African communities were to be onled through indirect  
rule which meant the non-disruption of African  
institutions where they did not thwart colonialist  
policies and aims. In Kenya the policy showed  
itself clearly in the tolerance of the colonialists  
with African customary land tenure side by side with  
their English tenure and the continued usage of  
this policy until the exigencies of the moment  
forced a change.
17. OKOTH OGENDO; Supra pg 75
18. In 1909 the new Governor of the ptotectorate urged  
that Africans could best be protected by  
putting them reserves where their own  
tenure would prevail and their security  
guaranteed. Reported in I. BANNEY;  
Towards The Systematic individualization  
of African Land Tenure 1959 vol 11 J.A.A.  
pg 208
19. OKOTH OGENDO, SUPRA
20. No 12 of 1915
21. OKOTH OGENDO supra pg 110
22. Sections 54 and 86 23:(1922-23) 9 K.L.R. 102
24. No 25 of 1902

25. OKOTH OGENDO Supra pg 128
26. M.P.K. SORRENSON; Origins of European Settlement in Kenya; O.V. P. Nairobi 1968 pg 210
27. See generally GHAI AND MCAUSLAN; Supra, pgs 79-124
28. SORRENSON M.P.K. Supra pg 292
29. MP.K. SORRENSON; Land Reform in The Kikuyu country; O.V.P. Nairobi, 1967 pg 21
30. Report of The Hilton Young Commission on closer Union and Native Policy in East African 1029, Government Printers. 1929
31. GHAI and MCAUSLAN, Supra pg 91
32. See Generally Report of The Kenya Land Commission 1934, Government Printers 1934 and GHAI MCAUSLAN, Ibid, pg 85
33. No 9 of 1930
34. No 28 of 1938
35. No 27 of 1938
36. GHAI and McaUSLAN Supra.
37. See MP.K. SORRENSON; Origins ...Supra pg 181 where Ainsworth is quoted as urging reserves so as to protect the Kikuyu from European encroachment and L. BRANEY; Quoting P Giround the governer in 1909 advocating the same kind of argument in the articale Towards the systematic individualization of African Land Tenure 1959 vol, 11JAA pg 208
38. L BRANEY; Ibid. pg 212
39. Report of an Informal Committee under the Chairmanship of Lord Hailey on Native Land Tenure in Africa pg 10.



40. Ibid, pg 10-11
41. ARTHUR PHILLIPS; Report on Native Tribunals, 1945  
par. 285
42. GIBSON KAMAU KURIA: The role of customary Land Tenure  
in Rural development in Kenya; Paper for Seminar on  
law and Rural Development, Kisumu, pg 61
43. F.D. HOMAN; Inheritance in the Kenya Native Land  
Units; 1958 vol 10 JAA pg 131
44. For data on fragmentation see R.O. HENNEY the then  
colonial Secretary for Agriculture who in 1952 reported  
one person in Nyeri could own 12 different fields  
ranging in size from 0.015 acres to 0.6 acres.  
Some Trends and Problems of African land Tenure  
in Kenya; 1952 vol 4 JAA pg 122
45. No 33 of 1918
46. No 5 of 1925
47. No 30 of 1937
48. GHAI and McAUSLAN, supra, pg 95
49. Ibid; pg 121
50. D.P. SINGH: Mau Mau: A case study of Kenyan Nationalism  
African Quarterly vol 8 No 1 pg 8 14
51. B.K. HERZ; Demographic pressure and economic change:  
The case of Kenya Land Reforms: Ph.D. Thesis, Yale
52. SORRENSON; Land Reforms, supra pg 75
53. Ibid; pg 83
54. Ibid.
55. Ibid pg 85-86
56. Ibid pg 87-88

57. MAINA KINYATI; Mau Mau: The Peak of African Political Organisation in Colonial Kenya. Paper for the department of History, Kenyatta University College 1977 pg 5-6 and SORRENSON, Ibid pg 89
58. SORRENSON, Ibid pg 90
59. Sir CHARLES ELIOT was one of the major proponents of this theory of Kenya becoming a 'white mans country' In his book The East African Protectorate (published 1945) he says " The interior of the protectorate is a white Man's country... it's mere hypocrisy not to admit that white interests must be paramount and thath the main object of our policy and legislation should be to find a white colony." pg 103
60. See Generally MAINA KINYATI, Supra.
61. SORRENSON; Supra pg 74
62. Ibid pg 95
63. MAINA KINYATI, Supra, pg 8
64. Generally and F. MAJDALANY, State of Emergency: The fall story of Mau Mau 1962 generally.
65. MAINA KINYATI, Ibid pg 8
66. SORRENSON; supra, pg 92
67. For a whole and clearer picture of the Mau Mau land nd Freedom movement see: MAINA KINYATTI and MADJALANY both supra; J.M. KARIUKI; Mau Mau Detainee, London 1963
68. Ibid.
69. MAINA KINYATTI, Ibid
70. SORRENSON; Land Reform..., supra pg 70
71. For Example a sub committee of the Kenya African Affairs commission recommended the issue of a Special



71. For Example a sub committee of the Kenya African Affairs commission recommended the issue of a Special title 'iddurf yo cooperate groups' and clearly emphasized that they were not advocating the issue of individual titles. See land Titles in Native Units: A Report by a Sub-Committee of the Kenya African Affairs Commission; 1950 vol2 J.A.A. pg 10
72. SORRENSON; Counter Revolution to Mau Mau - Land consolidation in Kikuyu land 1952-1960, East African Institute of social Research conference papers 1963
73. Mr. Oliver Stanley as quoted by R. Oliver and A. A. Atmore in AFRICA SINCE 1800; Cambridge University Press 1967 pg 220
74. F. MADJALANY; Supra, pg 150
75. SORRENSON M.P.K. Land Reform ... Supra pg 184
76. See Report of The East African Royal Commission 1953-1955 Government Printers 1955
77. Ibid; esp. para 351
78. Ibid para. 349
79. Ibid para 355
80. Ibid para. 358
81. A plan To Intensify The Development of African Agriculture in Kenya: 2nd Impression, Government Printers, Nairobi, 1955 pg 9
82. Supra para 347
83. Ibid, Footnote 81 pg 8
84. Ibid; pg 9

85. Ibid; pg 10
86. Ibid.
87. A Forthall(Non Muranga D.C. Mr. J. Pinney is quoted as having urged for consolidation because it it would present ano opportunity of rewarding loyalists by giving them more land-ofcourse from land siezed from detained Mau Mau.  
M.P.K. SORRENSON; Counter Revolution to Mau Mau ....  
supra pg 9
88. Mr. C.M. Johnson, special commissioner for Central Province as quoted by SORRENSON, Supra pg 1
89. ANN PATTERSON MUNRO; The Land tenure Revolution In Kenya 1954-1959, legal and Political Implications M.A. Thesis, Columbia University.pg 6
90. Ibid, pg 10
91. See Footnote 73
92. SORRENSON, Land Reform ..., supra pg 118
93. SORRENSON; Counter Revolution to Mau Mau ...  
generally.
94. Ibid pg 10
95. Ordinance No 11 of 1954.
96. SORRENSON; Land Reform ...supra pg 110
97. Kenya Proclamations, Rules and Regulations 1956  
pg 648-656 L.N. No 452 of 1956
98. No 28 of 1938
99. SORRENSON; Land Reform ... supra pgs 132-133
100. Ibid



101. Conference on African Land Tenure in East and Central Africa in Arusha 1956. Report in Special supplement to the Journal of African Administration 1956  
Introductory point No 7
102. Ibid par. 59
103. Ibid par 37
104. See Report of The Working Party on African Land Tenure 1957-58 Government Printers 1058
105. Ibid; pgs 1-2
106. Ibid
107. Ibid pg 29
108. No 27 of 1959
109. S 2(1) of the Ordinance
110. S. 37
111. S. 38
112. S. 88 and 89
113. The Then Cap. 283
114. Cap. 300, Laws of Kenya

### CHAPTER III

1. Cap. 300; Laws of Kenya
2. SIMPSON S.R. Land Law and Registration;  
Cambridge University Press, Cambridge 1976 1st.  
Edition pg 147
3. Ibid.
4. Ibid
5. No 27 of 1959
6. SIMPSON, Supra pg 146
7. These are the Tanganyika Land Registration  
Ordinance of 1953, The Victoria Transfer of Land  
Act of 1954, The Singapore Land Titles Ordinance  
of 1956 and The British Guiana Land Registry  
Ordinance of 1959. Simpson pg 450
8. By Legal Notice No 589/1960
9. Established by S. 10 RLA
10. There was a fourth stage, demarcation, which  
came in between consolidation and Registration  
and was the Physical laying out or measurement  
of one's amount of land on the ground.
11. M.P.K. SORRENSON; Land Reform in The Kikuyu  
Country. O.V.P. 1967, 1st Ed esp. pages 133-134  
and also; OKOTH OGENDO.  
The Adjudication process and The Special Rural  
Development Programme. I.D.S. paper No 227 pg 1.
12. Section 28(a) then makes all this subject to any  
leases, encumbrances and the conditions or



restrictions and also what are called 'overriding interests' declared in Section 30 RLA as not requiring notification on the register.

13. P.K. KARIUKI: An Analysis of S. 143(1) of the Registered Land Act LL. B. Dissertation, 1977 pg 25
14. (1967) IAC 569
15. at page 580
16. S.K. DAS; The Torrens System in Malaya; Malaya Law Journal Limited, Singapore, 1963 at pg 45
17. Ibid; pg 166
18. SIMPSON; Supra pg 233
19. Report of the East African Royal Commission on Land Population 1953-55, Government Printers 1955 par.39
20. Ibid Par.351
21. Ibid par. 13
22. OKOTH OGENDO; Supra pg 1
23. SIMPSON, Supra pg 170
24. See Kenya Government Report of the working Party on African Land Tenure 1957-58, Government Printers 1958
25. Ibid par. 67(1)
26. P.K. KARIUKI, Supra pg 5
27. Ibid pg 7 See also SORRENSON M.P.K. Land Reform... pg 203 and also SORRENSON, Counter Revolution to Mau Mau Land Consolidation in Kikuyu Land 1952-1960; East African Institute of Social Research Conference Papers 1963, generally.

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28. Ordinance No 1 of 1957
29. Ordinance No 11 of 1954
30. See generally: ANN PATTERSON MUNRO, The Land Tenure Revolution in Kenya 1954-1959: Legal and Political implications; M.A. Thesis, Columbia University: And SORRENSON M.P.K. Counter Revolution to Mau Mau; Supra
31. No 27 of 1959
32. P.K. KARIUKI, Supra pg 10
33. 1960 E.A. 109.
34. P.L. SIMANI; Comments on the development of the Customary Trust in Kenya LL.B. Dissertation 1981 pg4
35. For a further exposition on the inaccuracies of the Adjudication and consolidation process see: SORRENSON, Land Reform ... Supra esp. chapter 7.
36. SIMON COLDHAM; The effect of Registration of title upon Customary Land Rights in Kenya, (1978) 22 journal of African law pg 98
37. SORRENSON, Land Reform ... Supra pg 214
38. Ibid pg 177
39. COLDHAM S. Supra esp. pg 99
40. See Footnote 31
41. HOMAN F.C. Consolidation -Enclosure and Registration of Title in Kenya; Journal of Local Administration Overseas. (1962) 1 pg 10
42. COLDHAM, Supra, pg 99
43. 1964 Court of Review Reports C.C. No 17 of 1964
44. 1972 E.A. 227



45. Ibid at pg 228
46. 1973 E.A. 388
47. See chapter 1 of this dissertation especially pages 2 and 12
48. 1972 Kenya High Court Digest 16
49. Unreported, High Court of Kenya at Nyeri, Civil Case No 56 of 1972.
50. SNELL'S PRINCIPLES OF EQUITY; Sweet and Maxwell, London 1973 27th Ed. pg 185 Quoting Cardozo J in Beatty V Guggeinheim Exploration C. 225 N.Y. 380 at pg 386(1919)
51. Unreported, High Court of Kenya, Civil Case No 1400 of 1973
52. Unreported, Appeal Court of Kenya, Civil Appeal No 42 of 1978
53. Unreported, Appeal Court of Kenya Civil Appeal No 12 of 1982
54. GIBSON KAMAU KURIA; The Role of Customary Land Tenure in Rural Development in Kenya: Mimes. pg 334

## CONCLUSION

1. See Chapter 11 generally
2. See Generally SORRENSON M.P.K; Counts Revolution to Mau Mau - Land Consolidation in Kikuyu Land 1952-1960; East African Institute of Social Research Conference Papers. To describe the situation Sorrenson says that the colonists decided to carry out their programme with such speed so that they can "Strike when the iron is hot"
3. Ordinance No        of
4. 1964 Court of Review Reports C.C. No 17 of 1964
5. 1972 E.A. 227
6. 1973 E.A. 388
7. GIBSON KAMAU KURIA; The Role of Customary Land Tenure in Rural Development; Mimeo; pg 334
8. Ibid.
9. SIMON COLDHAM, The effect of Registration of Title upon Customary Land Rights in Kenya 22 J.A.L. pg 98
10. GIBSON KAMAU KURIA Supra.
11. P.K. KARIUKI; An Analysis of Section 143(1) of the Registered Land Act. LL.B Dissertation 1977. The Practice Note appears in full in Appendix 4
12. Ibid
13. Ibid; Appendix 11
14. Report of The Mission on Land consolidation and Registration in Kenya; Government Printers 1965-66 par. 274



15. OKOTH OGENDO: The Political economy of Land Law-An essay in the Legal Organisation of Underdevelopment in Kenya 1895-1974: J.S.D.  
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17. THE NON ALIGNED COUNTRIES published by Harvey and Jones, London, 1982. pg 310

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