SECTION 120 OF THE REGISTERED LAND ACT
AND ITS APPLICATION IN KANDARA DIVISION
OF MURANG'A DISTRICT.

A RESEARCH ON HISTORICAL, ECONOMIC, SOCIAL-POLITICAL
ORIGIN AND IMPLICATIONS OF SECTION 120 OF THE REGISTERED
LAND ACT (CAP. 300 LAWS OF KENYA).

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However, I am alone responsible for all mistakes and short-comings in the work.
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Before such a law is thrown into the 'dustbins of history' after discovering that it embodies a 'False Start', it needs some analysis. It is analysed with a view to discover proper prescriptions for the problems in the
This dissertation looks at the operation of section 120 of Registered Land Act in Kandara Division of Murang'a District. It is an enquiry of the extent to which the operation of the section has facilitated the success or failure of the Registered Land Act in effecting agricultural development to land in the Former 'African Reserves'.

It is written in appreciation of the fact that, there is good and bad law. That of necessity law operates in society and never in vacuum. That law as an instrument of social engineering can be used to effect social changes. As such good law would be acceptable to the society and thereby bring forth good changes. Conversely, law can fail to bring changes envisaged by its authors especially where it has been based on wrong premises. Such a premise usually emanates from misconception of the needs of the society, their problems and the root causes of those problems. A law embodying cure of such misconceived ills or problems of the society is doomed to failure by the reason of its faulty basis.

Before such a law is thrown into the 'dustbins of history' after discovering that it embodies a 'False Start', it needs some analysis. It is analysed with a view to discover proper prescriptions for the problems in the
society. This entails looking at the society the discarded or inoperative law was meant to serve, then the discernable bases of the law and the law itself. This would be in an endeavor to discern the 'missing link' which would account for its failure.

Such an approach is adopted in this thesis, as far as it relates to the failure of Registered Land Act. The study specialises with the operation of sections of the Act relating to succession. As such chapter one deals with historical, social, economic and political origin of the Act. The aim is to identify what promoted its enactment and what it was aimed at achieving. Chapter two addresses itself to the law the Act meant to replace and the mischief seen in that law by those who advocated the promulgation of the Act. Chapter three looks at the new law and the extent to which it has operated to remove the mischief in the replaced law. Chapter four assesses the position and unhesitantly attempts to give recommendation for a new law, at the same time indicating what form it should take.
CHAPTER ONE
HISTORICAL ORIGIN OF REGISTERED LAND ACT.

The need to trace the present land tenure problems in the history of Kenya land policy need not be over-emphasised. It is in the history that we can appreciate the present rural development problems. In the history we are able to identify the mistakes which were made by the authors of the present Land Policy, and learning through their mistakes, we place ourselves in a position where we are able to avoid similar mistakes in any future plans we devise for rural development. Ghai and Mcauslan supporting such an approach say that -

"Circumstances of the independent Kenya are different from colonial Kenya, but economic problems of agricultural development are very similar and many of these lie rooted in the past".

In giving that history, it is desirable also to spell out the position which appertained before the colonial land policy had set in to effect and alter it.
Before the establishment of colonialism, land in Kikuyu society was not viewed as a commodity capable of being owned, sold and bought by individuals. Land served man for both his material and non-material needs. As such, each individual member of Kikuyu society had free access to land. The only condition enabling one to have that access was for him to belong to Kikuyu society. There were ways in which even people who were not members of the Kikuyu community by virtue of birth could undergo an elaborate ceremony and be regarded as members of a particular family and consequently members of the Kikuyu Community and thereby acquire rights of access to community land. Such people were called 'Ahoi.'

The administration over the use of land, that is, the allocation of land to a particular member of the community and settlement of disputes among the members was done by elders. Disputes mostly in this regard touched a question of who was supposed to be using a particular parcel at a certain time. These elders were held in high esteem by the members as they were the ones versed in moral philosophy of the Community.

The main philosophical view which gave rise and sustained this communal form of land tenure was egalitarianism. The belief that everybody counted equally in society.
That treating land as a commodity capable of being owned individually would lead to enslavement, in that those lucky enough to own this principal means of production would have economic power. As such they would dictate terms on which those who don't have land will be allowed to support their lives. To make it possible for everyone to lead good life individuals were denied a way of treating land as their own.

To increase the land available to the community there was 'githaka' land system'. This was a system whereby expenditious young men moved away from their nuclear family in search of new estates. Such an emigrant established his rights over a chunk of land in face of incoming young men of similar calibre, by an elaborate ceremony of planting lilies around the estimate boundaries of the new estate. He then invited the members of his extended family. On his death, the founded estate evolved into a communal tenure used by members of the family. As a token for his contribution to the extension of tribal land, the family members using the estate called themselves in his name. They referred to themselves as a 'mbari' of him that had founded the estate. It was through this system that the whole of Kiambu was occupied by the Kikuyu.
In Kikuyu society the term family has a wider meaning in that it extends to include cousins, nephews, nieces and aunts. The family was the basic social unit. Several families who could trace a descendancy from a known ancestor who also had managed to acquire a 'githaka' formed a larger unit called 'mbari'.

It is appropriate at this juncture to dismiss Lugard's theory of tenure evolution. Lugard's theory tells us that:

"Conceptions of land tenure are subject to steady evolution side by side with evolution of social progress."

He wants us to take that, Kikuyu land tenure was initially communal, that is, ownership was in the tribe. That due to European civilization, the communal tenure evolved into individual ownership. The foregoing account has shown that a 'mbari' founder acquired initially an individual holding to a 'githaka'. Later the githaka land evolved into a communal holding. As such his theory is not representative of Kikuyu land tenure.

**IMPACT OF COLONIAL LAND POLICY ON KIKUYU LAND TENURE.**

The architects of colonial land policy in Kenya, operated on the view that the African was sub-human and a savage whose land and labour were to be used to serve the real human being; the white man. This contention is supported by speeches of these architects, prominent among them having been Charles Elliot who was Governor of
Kenya from 1900 to 1904. An occasion when he expressed his view on Africans was in 1904 when advocating the removal of Masai from their land. He said:

"Your lordship has opened this protectorate for white colonization and I think it is well that..., we should face the undoubted issues; that whites makes black in a very few moves. There can be no doubt that the Masai and many other tribes must go under".

There were two main aspects of colonial land policy. The first one related to establishment of settler economy. This policy caused alination of Kikuyu land considered suitable for European settlement. Most of the land was acquired under the 1902 Crown Land Ordinance. Section 30 and 31 of the ordinance purposed to control European greed for land. Section 30 declared that, in all dealings with Crown Land, regard was to be had to the needs of natives. Land was not to be leased or sold if it was in actual occupation by natives. Under section 31(1) however the commissioner could grant leases to Europeans of land containing villages or settlements by Africans when Africans ceased to so occupy it.

These two sections did not in reality give any protection. In a community like Kikuyu which used shifting cultivation at one time or another the land needed was capable of being not in actual occupation and thereby
fall under the category of land to be leased or sold to whites by commissioner as per section 31. Also one cannot expect the administration of the two sections to have been done in the interests of the Africans in the face of great demand for land by whites. We also gather from the wording of the sections that Africans were recognized to have only usufructuary rights in land. This is no protection at all to one who is the real owner of land. The 1915 crown land ordinance broadened the meaning of crown land so as to include all lands occupied by Africans such that white settlers were enabled to acquire land occupied by Africans whenever they had need.  

The second aspect of colonial land policy was the need for cheap and dependable labour to work on settler plantations. Africans had to be forced to work. Among measures adopted to induce Africans to leave their tribal societies and hire themselves to whites was through grouping them into reserves. Boundaries of these reserves remained fluid and susceptible to alteration so that at any time land could be further alienated to satisfy European needs. This had the effect of making land scarce in the reserves and incapable of supporting the members of the reserve. This generated the need to supplement income by working in European plantations. The other feature of this policy was the official neglect, indifference and hostility towards development of
agriculture within African sector. This was done on the basis that development of African reserves was inconsistent with the demands of European agricultural economy, African reserves were to be breeding grounds for labour. Young men would emigrate from them and move to whites plantations where they would expand their energies as labourers. After becoming old, they again retire to the reserves.

CONSEQUENCES OF THESE TWO POLICIES.

The first repercussion of these two policies to Kikuyu was to cause widespread landlessness. Alienation of land and creation of the reserves meant that there could be no more functioning of githaka land system. A particular reserve unit was an exclusive preserve for a particular tribe and exclude non Africans and other African tribes alike. This made the idea of fixed ethnic boundaries embedded in land relations of African communities. This caused pressure on land. This in turn undercut the tenurial bases of traditional authority by promoting the emergency of a narrower system of access to land. This eventually led to the emergency of fairly exclusive land units based either on a small family or individuals. This development contributed directly to arising of fragmented holdings and incessant land disputes as families and family members sought to retain rights of access to traditional land.
The decreased supply of land in the African sector unaccompanied by technological advancement caused land deterioration.

THE ORIGIN AND INITIAL ATTEMPTS OF TENURE REFORM.

The years of the second world war show a change of policy towards the fate of African reserves. This change was caused firstly; by slack of demand for African labour in European export-oriented plantation economy which was nearly wrecked as a result of the 1930 great depression, and secondly; the settler economy alone was found to be unable to satisfy the colony's demand for food produce. It was realised that, the African sector was needed to supplement the white sector. It become necessary for the colonial administration to assume wide powers in regulations and directing reserve economic activities. For such a policy to succeed it was necessary to identify what it was that caused low productivity in the reserves.

The first ill identified as causing low productivity was the fact of overpopulation. That there was scarcity of adequate land capable of supporting members of a particular reserve in productive activities. The real cure for that ill was to find other lands adjacent to or far away from such reserves and create new settlement schemes. The reserve most affected was the Kikuyu reserve. Some of the new
areas to be settled included the plains around Taita hills, Chyulu, Kibwezi, Sabaki and Olenguruone. This was still within the framework of dual policy as European lands were not to be touched. This approach failed in relieving pressure in reserves because it was half-hearted. The areas mentioned were inhabitable due to tse-tse fly and wild animals. No efforts were made to provide means of subsistence before the newly settled Africans could harvest their first crops. The result was that the schemes failed. So the administration opted for another approach.

The second approach adopted took the form of the preservation and reconditioning of the reserves. This approach was based on the premise that, the root cause of the ills in the reserves was not the over population and scarcity of land, but was in the mismanagement of productive land. As a cure, a development and reconstructioning authority for rehabilitation of land in form of terracing bush, clearing, strip-cropping, water-furrowing, systematic culling and destruction of unwanted animals in overstocked areas was formed. This approach was to be implemented by a legislation requiring the compulsory command labour. As a result instead of achieving increased food production, there was a decrease. The failure of the approach gave rise to a rethinking.
In the rethinking it was advocated that the principal problem in the reserves was to be found in African land relations. Hence the approach to the problems was to reform the land tenure. They associated communal form of tenure with several inherent evils. That its structure of access to rights over land encouraged fragmentation. That it generates disincentive to large scale production by discouraging large term capital investment. That its inheritance encourages subdivision of land, thereby causing sub-economic parcellation. As a result, the communal tenure was inimical to proper land use and rapid economic development. The cure was to be found in individualization of tenure - so it was thought. Individualization of tenure was associated with several merits. That by its giving individual ownership of land, it converted land into a freely marketable asset capable of being sold and charged to raise capital. That it gives certainly as to who owns what interests in which land, at any particular time.

The reform programme was to be in three stages; adjudication, consolidation and registration. The theory of the programme was that upon adjudication, the rather diffuse nature of customary land rights would disappear and with it the incessant land disputes which had given rise to chronic litigation. The consolidation phase would eliminate excessive fragmentation which had given rise to
sub-economic parcellation. Registration would give individual holders title-deeds to land which would be easily transferable and pledgeable as a security for development credit.

THE EMERGENCY FACTOR AS THE IMMEDIATE CAUSE OF REFORM IN KANDARA.

The 1952 declaration of emergency following the outbreak of Mau-mau afforded an opportunity for implementing reform in Kikuyu land. Officials were armed with wide powers granted by the emergency decree. Villagization gave administration control over the mass of peasantry and provided an opportunity to force through consolidation. Leading African politicians were in detention. Urgency was needed lest the detainees return and wreck the scheme.

In Kikuyuland consolidation was used both as an instrument of reward and punishment. It provided an opportunity for rewarding the loyalists with larger and better holdings. Others like the then District Commissioner for Murang'a Mr. Penny Saw in land consolidation a scheme that would change the social structure as it existed in Kikuyuland. Consolidation would bring into being a middle-class of Kikuyu farmers who would be too busy attached to land to worry about political
agitations for they would have much to loose by reviving mau-mau. "Land reform was to complete the work of emergency; to stabilize a conservative middle class based on loyalists, and since consficated land was to be thrown in the common pool during consolidation, it was also to confirm the landlessness of the rebels"9.
Completion of the reform process in form of adjudication and consolidation was followed by registration of these plots under the Registered land Act. Succession to such a land is provided for in section 120 of the Registered land Act. Inter alia, the section provides that in determining the heirs to such a land, customary law of succession to which the deceased proprietor was subject is the one to be followed by the courts. As such, it is apposite to discuss the customary law of succession applicable to the land of a Kikuyu who dies intestate.

Kikuyu customary law of succession to land is fundamentally patrilineal. On death of a proprietor of land, it will be inherited by his male relatives. There is only one exception to this general rule. A female may be allowed to inherit land whose husband to that female has predeceased her and has not been survived by any adult son. A further condition for her to so succeed is that she elects to stay in the man's home or she is not married to a stranger who is not the deceased's brother. In such a situation she gets a life estate in the deceased's hand. Where the deceased though married is not survived by an adult son and the wife elects not to stay in the matrimonial home, the deceased's land is inherited in the same manner as if he had at no time married.
The land is shared out amongst the deceased's brothers, or in their absence, amongst the immediate male relatives on the patrilineal side.

The fundamental principle in Kikuyu Customary law of succession to land is that every son must inherit a portion of his father's estate. So in absence of some substantial explanation as to the reasons which would make a given son not be so entitled, his entitlement to share in the land is presumed. Reasonable factors which would make a son to be disentitled would mainly entail an instance where the son has already got some land elsewhere in acquisition of which the father substantially assisted to the extent that it would be unfair to the other sons if he is allowed to insist on a share of the family land.

In polygamous households the process of inheritance starts by division of the land amongst the constituent houses. Houses in this context refer to wives in the membership of the polygamous institution of marriage they are so referred to because each married woman has her own separate house. So the use of the term is synonymous with wives. In turn, sons of each house divide amongst themselves the land allocated to their mother. All sons of various houses are entitled to a share of the land. The fact that there happens to be one son in a particular house does not alter the position.
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Sons from the house that is numerically large cannot claim from that house with only one or no son. If one of the co-wives has no son, her share remains with her until she gives it to the son or sons of a co-wife she favours. To such a son, the gift is in addition to the inheritance portion he has on his mother's land.

The custom requires a father to distribute his land to his sons during his lifetime. This particular principle is rigorously followed. It is only in unexpected circumstances a father dies having not distributed his land. Even then, he might have done so by a verbal earmarking such that the subsequent sharing out amongst the heirs will be a mere confirmation and execution of what he had actually done during his lifetime.

In Kikuyu customary law, an oral will enjoys sanctity. However, an oral will cannot be used negatively. It cannot be used to disinherit an entitled heir. Where a father wants to deny a son or a close relative the opportunity of inheriting his land, he leaves a curse forbidding such a heir use of the land. That if he ignores the curse, he would suffer a certain evil. Such a heir may fear to use the land, although he had a portion shared to him during inheritance.
There are customary institutions which are meant to safeguard the rights of heirs in succession, especially where the would be heirs are minors at the time of death of their father. Significant among them is the institution of 'muramati'.

'MURAMATI' - AN INSTITUTION TO SAFEGUARD INTERESTS OF MINORS IN LAND.

The term 'muramati' means one who tenders or administers property on behalf of another. Normally, he is a relative or a son who looks after the property of a deceased with the aim of fulfilling the wishes of the deceased concerning the distribution of his property. To use analogous English concepts, he would be likened to an administrator of deceased's estate. But 'muramati' differs from English administrator in several important respects. In all instances 'muramati' is a son or a close relative of the deceased. He himself oftenly has an interest in the property. This goes to explain why in every case muramati is a person from the deceased's family. As said earlier, the deceased's property only devolved to family male relatives on patrilineal side. So if it is a condition precedent that muramati must have an interest in the property he administers, he has to be a son or a close relative on patrilineal side.

First and foremost, his duties entails looking after the property and especially to see to it that equity is
achieved in distribution of the property amongst the entitled heirs as required by custom. Kenyatta referred to muramati as- "a trustee who acts as a guardian to the young members of his family group."15

To appreciate the importance of muramati's position in land inheritance, a brief sketch of his appointment is called for. In Kikuyu society, a nuclea family consists of the husband, one or several wives and the children. During his lifetime, the husband is the head of the family in all matters. When he dies, the eldest son becomes the head and continues to look after the family property for himself and on behalf of his young brothers. Where there is no adult (circumcised) son at the time of the father's death, one of the brothers of the deceased takes over until one of the sons attains adulthood. The son or the brother who takes over is referred to as muramati.

Traditionally, muramati was also the spiritual head in the family. In that capacity, he represented the family in among others, traditional ceremonies like payment of dowry. He enjoyed considerable respect from those under his care and the society as a whole where he discharged his duties diligently and faithfully. Traditionally, he was subject to social-legal controls emanating from the clan elders. He was supposed not to be autocratic in his
dealings with the property. Where the clan elders were convinced that he used the powers bestowed upon him in a manner detrimental to the best interests of those under his care, he could be removed. In such an event, the elders appointed another muramati. Traditionally, he was a form of trustee. He was in fiduciary relationship with those under his care. He could not benefit from his position. He was only entitled to what had been left to him by the deceased or share equally with his brothers. Sometimes it happened that the other members of the family voluntarily thanked him by making him have a slightly larger share in the estate in appreciation of the manner he had taken care of their interests. Such a move was acceptable.....

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CHAPTER THREE

SECTION 120 OF THE REGISTERED LAND ACT
AND ITS APPLICATION IN KANDARA DIVISION

INTRODUCTION:

In chapter one, we found that, the agricultural officers and the officers of provincial administration attributed to African Law and custom appertaining to land inheritance the quality of being the biggest single factor causing fragmentation to land. We also found out that the programme of reform was first and foremost aimed at preventing fragmentation of land which practice was identified as being inimical to proper land use. As such, the programme of consolidation and individualization of titles to land was viewed as meaningless if the customary law of succession in its traditional form was to continue applying to the Registered land. A method was to be devised to prevent fragmentation which would eventually ensure that if the customary law of succession was to continue applying.

In 1957, a working party was appointed with one of its terms of reference being to examine and recommend a substantive legislation required to provide for succession to registered land, especially to intestate transmissions. Its recommendations on that issue took the form of modifying the customary law. The modifications devised and incorporated in the report
were designed to achieve three aims.\textsuperscript{17}

(a) Prevent fragmentation which would inevitably occur if land is subdivided amongst all the under orthodox customary law.

(b) Avoid having so many co-proprietors on the register that the land ceases to be a negotiable asset and becomes undeveloped.

(c) Ensure that all the heirs under customary law are fairly treated even if they don't receive a share of land. The recommendations were approved and adopted by the government and incorporated as section 120 of Registered land Act (hereinafter referred to as S.120)

\textbf{PROCEDURE OF SUCCESSION UNDER S.120}

The provisions of the section apply to transmissions on death intestate of the proprietor who was at the time of death subject to African customary law relating to succession. The section does not apply to an African proprietor of Registered land who at the time of death had made a valid will under African wills Act.\textsuperscript{18} The section does not also apply to inter-vivos transmissions, for instance where a father distributes his land to his sons during his life-time.
The procedure under the section requires the heirs to notify the death of the registered proprietor to the District Land Registrar where the parcel of land is situated. The Registrar issues them with forms referring the heirs to District Magistrate Court of the area the heirs come from. On receipt of the forms, the District Magistrate Court summons all those named in the forms and any other person who claims inheritance right in the land. Witnesses are called to assist the court in determining the heirs. In so doing, the court is required to follow customary law. The court also determines the share of each heir in the land.

The court which is mostly referred to is the District Magistrate Court III whose personnel will normally be conversant with customary law, of the area. Where the issues are complicated, he often refers the parties to arbitration by their local elders, the chief of the area presiding over such arbitration. Where there is reference of the succession issues to the elders, the recommendations of such elders are submitted to the Magistrate who usually adopts them. After determining the heirs, the court sends to the District Registrar the certificate of succession showing the heirs and their respective share entitlements.
On the receipt of the certificate the Registrar has three courses of action open to him. Where the number of heirs does not exceed five and are willing to be registered as co-owners of the land and as such no sub-division is involved, the Registrar after thirty days registers the transmission. Thirty days is presumably a period to await any appeal against the decision of the Magistrate Court. Where the number of entitled heirs as shown in the certificate exceeds five and are willing to be registered as co-owners, the registrar refers the matter again to the Magistrate Court. He requests him to rectify the certificate by way of reducing the number of those entitled into five or less. This is because the Registrar is forbidden by the Act from registering more than five persons as co-proprietors.\textsuperscript{19}

On return of the certificate to the Magistrate Court, summons are issued to the persons who appear in the certificate. Magistrate carries a rehearing. In the rehearing, he may add the share of any entitled person to the share of any other entitled person or distribute such a share to two or more of the entitled persons. The persons in the certificate are encouraged to enter into agreements for such a distribution of shares. Where
they fail in coming to an agreement, the Magistrate has power to determine the distribution or addition of the share as he thinks fit. However, where he does so, he has to order compensation to the person or persons adversely affected. He also determines the compensation to the persons adversely affected. He has power to order that such compensation be secured by way of charge on the share of the person who benefits by the addition or distribution of the share. The Magistrate Court then sends to the Registrar the rectified certificate whereby the Registrar registers the transmission.

Where the entitled heirs are not willing to be registered as common-proprietors, that is, they want separate title-deeds, meaning that the land is going to be subject to subdivision, the Registrar as per section 6 of the land control Act must refer it to the Division land Control Board of the area the land is situated in. Where the Control Board grants consent for subdivision sought by the heirs, the Registrar registers each of the heirs as the proprietor of his parcel after the subdivision. The Registration takes effect from the date of death of the deceased.
THE LAND CONTROL BOARD AND SUCCESSION TO REGISTERED LAND

Before embarking on the role played by the land control Boards in succession matters, it is necessary to give reasons why in first place there are land Control Boards. This would entail looking at the objectives of the land Control Act. For the present purpose the discussion will be confirmed to the objectives meant to be achieved by the Act in as far as succession to Registered Land is concerned.

The purpose of the Act is inter alia, to Control Fragmentation of economic farms. As such its aims is to that extent similar to that of S.120, except that the Act covers other transanction apart from intestate succession. The Act is meant to be used as a vehicle for maintaining general supervision over dealings in Agricultural Lands and directing those dealings towards attaining the goals of governmental land policy. This is done by the consent mechanism provided for in the Act. By the mechanism all dealings in agricultural land which are inconsistent with government's agricultural land policy can be denied consent thereby prohibiting them. The main governmental land policy has been against subdivision of agricultural land. This policy was spelled out as early as 1963 in K.A.N.U. manifesto in these terms:-
"We cannot afford to fragment *economic* farms which are making a vital contribution to our National Prosperity into *units* producing little more than subsistence".23

by this the government was expressing the policy that in large plantations in Former White Highlands, the land will be left intact even when changing hands. That in the Former African reserves, the government would avoid the consolidated plots from being subdivided. This is the *policy* meant to be achieved by the land control act. Any unapproved transaction falling within the realm of the Act is inoperative. By virtue of section six part b, subdivision due to succession is a transaction falling with the realm of the Act. Therefore *Consent* from the Divisional land Control Board is to be sought by the heirs for any subdivision.

The Kandara Division Land Control Board meets on every Tuesday of the First week in the month. Applications for subdivision must be made in advance. The Board meets once in a month. So where an application is not considered in any particular month, it will be deferred to the following month.
The Board is required to consider the effect the grant or refusal of consent will have on the economic development of land.\(^{24}\) The Board is expected to refuse consent for subdivision in succession matters where such a subdivision will give rise to parcels of land which are agriculturally uneconomical, notwithstanding the fact that the resulting parcels may have subsistence capacity. To the present writer it is doubtful whether the Board can refuse consent on grounds that, the subdivision and subsequent transfer of the parcels would have the effect of vesting one or several land parcels in a person or persons who are unlikely to have the ability to develop the land parcels adequately paying regard to the nature of the land. This writer feels that such considerations only apply to other transactions like buying and selling and transferring land to the buyer which also come before the Board. The Board in such a case enquires into personal capabilities of the purchaser as a ground for granting or refusal of consent as required by the Act.\(^{25}\) The Board considers whether the purchaser has an alternative land or whether he is in a financial position to develop the land. Such considerations cannot have been meant to be applied to succession matters since in most cases the heirs are the sons who are dependants of the deceased and cannot have had another land from which the Board can
refer in concluding as to quality of the farmer the heir is.

As said earlier, where the Board grants consent, the Registrar registers the transmission. Heirs pay the necessary fee which is Shs.100 court fee, Shs. 1,000 survey fee for each boarder necessitated by the subdivision, Shs. 300 deposit for any extra cost that may be incurred by surveyor due to terrain of land parcels, and shs.100 Registrar fee. Where the Board refuses consent, the applicants can appeal within the period of thirty days to provincial land Board. A further appeal can be made to Central Land Board. Otherwise any controlled transaction is void for all purposes unless the Board gives consent.

On refusal of consent for subdivision, the Registrar has other alternatives. He may register all the heirs as proprietors in common or joint proprietors even against the wishes of the heirs provided that no more than five persons are so registered. He may also use his power of adding two or more shares and register one of the heirs. He then assesses the value of the shares so added and orders that the persons adversely affected be paid compensation. He can charge the land to secure the compensation he orders.
The foregoing analysis has only been an endevour to expound the law as in S.120 as a basis of the discussion which follows. This discussion will be an attempt to put the law as analysed above into its practical perspective. The discussion is hoped, will demonstrate a change in emphasis by the functionaries in succession to land, that is, the courts and the Board members. The discussion will also attempt to bring out the distinguishing features between the layout as in S.120 and that obtains under the customary law.

THE EXTENT OF APPLICATION OF SECTION 120 IN KANDARA DIVISION.

The procedure to be followed in succession to Registered land as has been seen is sparked off when the heirs report the fact of death to the land Registrar. This assumes that the heirs will voluntarily report the death. **It is an assumption cropping from an initial fundamental assumption** that the heirs have an urge to acquire a legally recognized title to the proprietor's land and therefore they would want to report the death so that they can register their rights. It also assumes that the heirs are knowledgeable and conversant with the law in issue.
However field research carried out by the present writer revealed that this is not the situation. It was revealed to him that most if not all, of the applications which come before the land Control Board seeking consent for subdivision due to inheritance are those where after the proprietor's death there has arisen some disagreement as to who is entitled to inherit the land, or as to the respective shares of entitled heirs. If there is no disagreement, the heirs proceed to divide the land on ground without resorting to court or registrar, for registration of their rights. That an ordinary peasant farmer is not concerned with the registered title until such a time as he wants to deal with the land, for instance, when he wants a loan from a monetary institution. In such an instance it is necessary that he lodges the title deed with the institution for the change on its payment. Otherwise on death of the proprietor, the relatives who have often been working on the land before the death simply carries on. The new users of the land are not concerned with registered title provided they can continue without any rival claimants in the land coming in the scene.

The interviews also revealed that people are largely ignorant of the law. Where the proprietor is dead and a dispute to inheritance does not escalate as to necessitate resort to official courts, heirs refer the matter to the local elders who do reconciliation and
and adjudication accordingly on conflicting interests over the deceased's land. It is only when the dispute is necessiated to reach official courts that the procedure as laid down is S.120 is involved. As such one can safely say that to a large extent adherence to S.120 is only incidental to a disputable claim of right or share in the deceased's land and is not followed as a need to adhere to the law.

The law as per section 120 requires the entitled heirs who do not get a share of land have their interests evaluated in monetary terms and registered as a charge on the titles of those heirs who get a share of the land. This requirement was based on the assumption that land consolidation would spark off agrarian revolution. Land would be very productive and a lucrative source of income. As such, those heirs who get land would in course of one or two years be able to compensate the heirs who didn't get a share. At the same time it was envisaged that land would not be scarce. Following from these two assumptions it was conceived that a compensated heir would readily get equivalent land elsewhere which he would purchase with the compensation money. Consequently the charges on lands of the getting heirs would be only short-lived and would not thereby affect the ability of the heir
to acquire development loan from financial institutions. That the dispossessing entitled heirs land would not create hatred and animosity between the two groups of heirs since the dispossessed would acquire equivalent or better land elsewhere.

Even if these requirements can possibly be adhered to, there are two main disadvantages in the requirements which are discernable at the outset. One is that, it is likely to give rise to difficulties in the event of the land being sold inorder to recover monies which are outstanding under one or more of the charges inserted by the court or registrar. Secondly, inheriting a parcel of land burdened with charges registered in transmission would mean that these are prior charges which will enjoy privilege over any other subsequent charges. This would discourage financial institutions extending credit to such a land.31

Apart from these two disadvantates of the scheme, there are other social considerations which would make the requirements difficult to comply with. The assumptions which have been identified as the bases of those requirements are non-existent. Consolidation of land in Kandara never sparked off the envisaged 'agrarian revolution'.32
No income is likely to be available to enable a heir who gets land compensate the other heirs who don't. That land is scarce and its price has been inflated to an extent where a dispossessed heir cannot readily purchase an equivalent land using the compensation money. As such to dispossess an entitled heir would cause an anomosity which would not determine readily between the heirs.  

As far as the application of the provisions of the land control Act are concerned, there are three main categories of subdivisions to registered land arising due to inheritance which the Board has to be referred to for grant or refusal of consent. The first one appertains to application for subdivision made by a proprietor during his life-time who intend to subdivide and transfer his land to heirs. The second one is where the proprietor's land needs as a preliminary step to be subdivided amongst the households before it is secondly subdivided amongst the heirs in each household. The third one is that covered by S.120, that is, subdivision after death of a proprietor. Here subdivision is just made once and all claimants are adjudged in one proceeding. In the second category, the proprietor may be dead or alive, but the salient feature in it is that the subdivision is not amongst
all the heirs but only amongst the wives and is done in contemplation of further subdivisions. These three categories could all be found in Kandara division land control Board minutes of October 1978 to February, 1979. It appeared to the writer that the Board never used prior to that month to keep minutes and so he was limited in collecting data from when it started keeping them. The data collected is tabulated in tables A, B and C, each table covering each category.

Table A covers subdivisions of Registered Land which occurred in Kandara during the period above due to inheritance during the life-time of proprietor. Note that these are only the subdivisions applied to controlboard and given consent. Field research showed that this is more and more becoming the prevalent devise of avoiding disputes which would otherwise be contemplated after the proprietor's death. As a matter of practice, these type of applications are readily given consent by the Board. They are regarded favourably as means of encouraging proprietors to bequeth their property during their life-time. However as table A shows, they are the most numerous situations which have effect of subdividing agricultural land to sub-economic units.
Although there is no laid down criteria for determining the size of land unit which is viably an economic unit, the writer feels that three and a half acres can be taken as a reasonable guide. This is taking account of the fact that, far and large, the technology used in agriculture is still crude (panga and hoe). That the type of seeds used are traditional breed and crop-spraying and use of fertilizers is rarely resorted to. That agricultural production is here used to mean producing above subsistence level so as to derive a monetary income from the land unit. As such, three and a half acres is not far from reality for purposes of Kandara at least. Using this guide, table A shows that there were several land units where even before application for subdivision was made to the Board, they were already sub-economical. After the application the Board gave consent for subdivision into two or more parcels. This no doubt means that the Board was sanctioning creation of hopelessly sub-economic units.

Table B represents subdivisions between houses during the same period which were consented to. From the table we gather that although all units are economical before subdivision, they would give rise to sub-economic units after subdivision. The situation will be badly aggravated when subdivision is made amongst the heirs in each house.

Table A.

SUB-DIVISION DUE TO INHERITANCE BEFORE PROPRIETOR's DEATH.

<table>
<thead>
<tr>
<th>LOC. NO.</th>
<th>SITUATED</th>
<th>PLOT NO</th>
<th>AMONGST</th>
<th>PLOT SIZE IN ACRES BEFORE SUB-DIVISION</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Rwegethe</td>
<td>359</td>
<td>2</td>
<td>7</td>
</tr>
<tr>
<td>1</td>
<td>Kigio</td>
<td>346</td>
<td>5</td>
<td>4</td>
</tr>
<tr>
<td>4</td>
<td>Nguthuru</td>
<td>154</td>
<td>2</td>
<td>3.5</td>
</tr>
<tr>
<td>16</td>
<td>Kigio</td>
<td>79</td>
<td>2</td>
<td>9</td>
</tr>
<tr>
<td>16</td>
<td>Kiarutara</td>
<td>312</td>
<td>2</td>
<td>8</td>
</tr>
<tr>
<td>1</td>
<td>Mukarara</td>
<td>326</td>
<td>4</td>
<td>5</td>
</tr>
<tr>
<td>4</td>
<td>Kaguthi</td>
<td>164</td>
<td>3</td>
<td>5.6</td>
</tr>
<tr>
<td>3</td>
<td>Gituro</td>
<td>201</td>
<td>4</td>
<td>5.4</td>
</tr>
<tr>
<td>16</td>
<td>Mbuguti T/193</td>
<td>2</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>16</td>
<td>Kigoro</td>
<td>495</td>
<td>3</td>
<td>3</td>
</tr>
<tr>
<td>16</td>
<td>Mbuguti</td>
<td>452</td>
<td>2</td>
<td>7.8</td>
</tr>
<tr>
<td>16</td>
<td>Kimandi</td>
<td>123</td>
<td>4</td>
<td>5.9</td>
</tr>
<tr>
<td>16</td>
<td>Kigoro</td>
<td>428</td>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td>16</td>
<td>Mbuguti</td>
<td>181</td>
<td>2</td>
<td>6.5</td>
</tr>
<tr>
<td>5</td>
<td>Githunguri</td>
<td>365</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>5</td>
<td>Kabati</td>
<td>190</td>
<td>2</td>
<td>4.6</td>
</tr>
</tbody>
</table>
Table B:

POLYGAMOUS HOUSEHOLDS. CONSENT GIVEN FOR SUBDIVISION BETWEEN THE WIVES.

<table>
<thead>
<tr>
<th>LOC NO.</th>
<th>SITUATED IN</th>
<th>PLOT NO.</th>
<th>DIVIDED AMONGST</th>
<th>BEFORE SUBDIVISION ACREAGE SIZE OF PLOT</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Thuita</td>
<td>200</td>
<td>2</td>
<td>12</td>
</tr>
<tr>
<td>5</td>
<td>Kagunduine</td>
<td>994</td>
<td>2</td>
<td>5.8</td>
</tr>
<tr>
<td>4</td>
<td>Naaro</td>
<td>103</td>
<td>2</td>
<td>3.6</td>
</tr>
<tr>
<td>5</td>
<td>Kabati</td>
<td>289</td>
<td>2</td>
<td>16</td>
</tr>
</tbody>
</table>

Table C:

SUBDIVISION GIVEN CONSENT AMONGST THE HEIRS AFTER PROPRIETOR'S DEATH.

<table>
<thead>
<tr>
<th>LOC. NO</th>
<th>SITUATED IN</th>
<th>PLOT NO.</th>
<th>AMONGST</th>
<th>ACREAGE SIZE BEFORE SUBDIVISION</th>
</tr>
</thead>
<tbody>
<tr>
<td>16</td>
<td>Mwagu</td>
<td>187</td>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td>3</td>
<td>Gituru</td>
<td>57</td>
<td>6</td>
<td>149</td>
</tr>
<tr>
<td>5</td>
<td>Kabati</td>
<td>161</td>
<td>3</td>
<td>2.1</td>
</tr>
<tr>
<td>1</td>
<td>Kigio</td>
<td>183</td>
<td>4</td>
<td>2.2</td>
</tr>
<tr>
<td>4</td>
<td>Gatitu</td>
<td>314</td>
<td>2</td>
<td>0.35</td>
</tr>
</tbody>
</table>
Table C represents subdivision during the same period due to inheritance after death of the proprieter amongst the sons. Clearly it shows there are some subdivisions which were consented to although they would result into sub-economic units. Some were even uneconomical before they were consented to.

The writer in his interviews gathered that the Board members realise that their giving of consent would give rise to subdivisions into sub-economical units. Nevertheless they give it. Their aim, it was gathered, is to satisfy all the heirs and avoid any foreseeable disputes in the deceased’s family. As such, they are more concerned with the fate of heirs who might be disinherited of a piece of land than with the agricultural development of the units. They consider the social consequences which would result if consent to subdivision is refused. This attitude of the Board members may be explained by the fact that majority of them are elderly laymen whose paramount interest is solving social problems in their society. They consider the social aspects of inheritance of land. Most of these aspects relate to the customary law. These social considerations advocate equity in distribution of land of the deceased. To give effect to these considerations results in satisfaction of equity at the expense of economic development of the land. No
wonder then that we see from table C that the Board gave consent for subdivision of parcel No. Loc.4/Gatitu/314 whose acreage was 0.35 acres to give rise to two equal parcels. Its giving of consent went against the spirit of the Registered land Act and Contravened Land Control Act in that while the two Acts encourage economic development of agricultural land, the consent cited gave effect to social considerations inconsistent with the Act.

Further as we found out earlier on the procedure of succession to registered land in both complicated and expensive. This may also be a factor discouraging heirs from invoking the procedure as in §120. Most peasant farmers cannot afford the court fee, registrar's fee, travel costs involved and surveyor's fee and deposits. This is more so where the plot of land in issue is a small unit as one cited above.

The preceding discussion has demonstrated that the land control Board; the institution charged with the responsibility of implementing the government land policy of preventing fragmentation of agricultural land has in practice failed. It has failed due to, inter alia, its emphasising in form of adhering to equitable principles embodied in Kikuyu customary law of inheritance which we have seen are inconsistent with the policy. In the following brief discussion an attempt is made to show that, the other institution, the courts, charged with the same responsibility have also failed by the same token of emphasising and recognizing customary law of inheritance to
There are several cases decided by the Kenyan High Court which go along way to indicate that the courts have applied the customary rules of succession to Registered Land thus augmenting the position taken by the land control Boards.

In the case of Muguthu V. Muguthu the plaintiff was the young brother while the defendant was the elder. The subject of the dispute was a piece of land which the two had inherited from their father. IT WAS THE DEFENDANT WHO WAS REGISTERED THE SOLE PROPRIETOR under S. 27 of Registered Land Act. There was no indication in the register that he held the land upon trust for himself and his young brother. The plaintiff claimed a declaration that the defendant was a trustee of the piece of land for himself and the plaintiff. Court held that it was contrary to Kikuyu customary law for a father during his life time to give away all his land to one son to the exclusion of the other sons. That there was no need to register the defendant as a trustee for he was registered as an owner as the eldest son of the family following Kikuyu customary law with a notion of trust in it. They were to share the land equally.
In the case of MUNGORA WA MATHAI V. MUROTU MUGWERU the plaintiff's father died. The defendant entered into a levirate union (window inheritance) with plaintiff's mother since the deceased was a brother. During the land consolidation the defendant got himself registered as a proprietor of the parcel of land belonging to the plaintiff's deceased father following the customary institution of 'muramati'. The defendant sought to exclude the plaintiff when distributing the land in question. Bennet J. Finding for the plaintiff said that there was a trust in those circumstances and since the plaintiff was of age he could bring it to an end.

In the case of SAMUEL THATA MISCHECK AND OTHERS V. PRISCILLA WAMBUI WINDOW OF MISCHECK AND ANOTHER the plaintiffs were two brothers and two sisters. One of the defendants was the wife of the plaintiffs elder brother and the other was the mother of the plaintiffs. The deceased, the elder brother of the plaintiffs had been the proprietor of land that had originally belonged to their father. The deceased's wife claimed that she was solely entitled to inherit the land in question. The plaintiffs sought a declaration order that the deceased had been registered on behalf of himself and his brothers and sisters. Justice Mulli Finding for plaintiffs said that 'muramati' means a trustee in Kikuyu custom and practice. That the deceased was such a
trustee. The land was to be subdivided amongst the brothers and the deceased's wife.

The salient feature in these three cases is that, the decisions given by the court had effect of causing subdivision to land. The provisions of section 28 of Registered land no doubt were of much help in making it possible for the court to declare trusteeship even when not registered. More importantly however was court's recognition of customary trust.

In some other cases, courts have applied the customary rules of inheritance with some modifications. But these modifications have not been meant to prevent fragmentation. In some instances, it can be argued, the modifications have the effect of aggravating fragmentation. This is true especially in cases where they sanction subdivision of land amongst all the sons in polygamous households irrespective of the house they belong to.

In the matter of ESTATE OF SAMWEL HOPWELL GACHARUMU the high court modified the customary law of inheritance in polygamous household. The deceased in that case was married through customary law though he had purported to go through a statutory marriage with the second wife. The
dispute was as to the shares of heirs in the estate. The public trustee argued that the customary rule requiring the estate to be divided equally amongst the man's houses was unjust and therefore ought not to be followed. Justice Chezoni Z.R. held inter alia that in a situation where a man dies and is survived by windows and children, a portion of estate is first set aside for use by children of tender years irrespective of the house they belong to, while the remaining part is to be divided equally amongst the houses as required by custom. In this matter, one wife had no sons while the other had four sons. 40% of the estate was set aside for the children. The end result was therefore 70% going to the wife with sons and 30% to the sonless wife.

In a recent case in the High Court decided by Justice Miller C.H.E., two lower subordinate courts had applied strictly the customary rule that the estate is to be shared equally amongst the houses irrespective of the number of sons in each house. The high court overruled the decisions of the two courts and substituted its own that, each son is entitled to an equal share of the whole piece of land irrespective of the house he belongs to.
From these decisions, we gather that courts have recognized and applied more or less the Kikuyu customary law of inheritance, the effect of which, we saw is to cause land fragmentation contrary to government agricultural land policy.
CHAPTER FOUR

CONCLUSIONS AND SUGGESTIONS

A: CONCLUSIONS

In chapter one of this work the writer was at pains to bring out the point that, it was the colonial land policy in the form of land alienation and clustering Africans into the reserves that gave rise to all land ills which made the African lands under-productive. The advocates of reform mconceived the root cause of reserve problems when they associated the African land tenure with all the ills causing African lands under productive. The major ill identified with African land tenure was fragmentation. Fragmentation was said to occur especially by following African customary law of succession to land, which allows all sons to have a share of the father's land. So when the reform programme was completed, section 120 was incorporated in the Registered Land Act specifically to prevent African customary rules of succession form wrecking the reform programme.
In chapter three, we found that, in succession to the Registered land, customary rules of inheritance continue to determine the heirs. After the determination, subdivision of land proceeds ignoring the provisions of the Registered Land Act and the spirit of land control Act. As such the Registered Land Act has failed to uphold the cordinal object of the whole reform programme which was to prevent fragmentation. This failure is a major flaw in the legal system.

Agricultural development cannot make a country-wide headway if the land continues to be broken up into minute portions. Fragmentation of land is no doubt anathema to the improvement of agricultural production. A such any reformative efforts in the area of succession where these flaws in the legal system have principally arisen are welcome if they can provide some solution to these flaws.

SUGGESTIONS:

It was in realisation of these flaws that the late President appointed a commission in 1867 to "consider
the existing law on succession to property ----
and make recommendations for a new existing law on
the subject comprising customary law-----"
The commission's report indicate to us the basis of its
recommendations as far as it relates to succession to
agricultural land when they report that-
"we thought that any new law of succession should
be so framed as to assist the economic advancement of
Kenya. In particular, it should be so designed
as to help the implentation of land consolidation
and registration programme, and prevent the uneconomic
subdivision of land holdings". 40
The recommendations of the commission were in 1972 enacted
as the law of succession Act. 41 We then have to critically
assess the extent the relevant provisions of the succession
Act would prevent uneconomic subdivision and fragmentation
of land holdings when it comes into operation.

The ninth schedule to the act amends section 120
of Registered Land Act. Section two of the succession Act
provides that 'the provisions of the act shall constitute
the law of Kenya in respect of and shall have universal
application to all cases of intestate or testamentary
succession'. The effect of these two is to exclude the
application of customary law of succession. As such the commission must have equated disapplication of customary law with eradication of fragmentation tendencies of that law.

Under section thrity-five of the law of succession Act, the surviving spouse is given power to distribute the estate of the deceased to all the children. Under section 40 of the Act, where an intestate married more than once under any system of law permitting polygamy, his estate will in the first instance be divided amongst the houses according to the number of children in each house.

The above cited provisions of the Act will no doubt have effect of subdividing land. It was seen in chapter three that, it is in adherance to customary rules of succession requiring the land to be distributed to all sons, and the other one requiring initial subdivision amongst the houses in polygamous households which have made fragmentation to continue unchecked. So despite the disapplication of customary law of succession, the fragmentation of land will no doubt continue since the two main rules of custom which cause fragmentation have been incorporated in the Act. Subdivision may also arise due to freedom of testament given under section five of the Act. The section gives a testator power to declare that succession
to his estate shall be governed by any law he chooses. Following the section one can declare that his property shall devolve according to customary law. As such, all the evils associated with the customary law of succession would befall the land.

It would therefore appear that although the commission recognized the need to tackle the problem of land fragmentation its recommendations as contained in the law of succession Act do not make sufficient provisions for eventual eradication of the problem. The position after the commencement of the Act may thus not be different from what it is now.

FIEDNER gives suggestions as to how a system of inheritance could be devised which he claims would be realistic and would receive popular acceptance while at the same time maintains a viable land tenure structure in interests of development. He suggest that there should be greater efforts to prevent the subdivisions of larger land holdings which can contribute more to agricultural development. He is of the view that control over these larger holdings would be easy since the owners would be
well known to administrators of the law and any intended subdivision would be quickly known by them. That heirs to larger holdings would be in a better position to compensate their dispossessed brothers. That finance should be made available to them in guise of development loan where heir-compensation is short of compensation money. That the dispossessed heirs would be better educated in any case and will therefore find less difficult in finding alternative employment and in buying land. He is of the view that subdivision of the smaller marginal land holdings should not be prevented as they are bound to be subdivided anyway.

This writer is of the view that preventing subdivision of larger holdings which are clearly in the minority while ignoring the fate of majority small holders is tantamount to advocating the widening of the gap between the majority poor and minority rich. It is forcing prosperity on the large holders while ignoring the deteriorating productivity of small holder plots.
Fiedner bases the working of his system on administrators without heeding to the need that— "law must be able to enforce itself, that is receive the respect of the law consumers. It is relies on being enforced by any agent, its chances of being law in action remains meagre though it may remain good law in books". Equally erroneous are his assumptions as to the education, financial solvency and alternative employment opportunities of the heirs from larger holdings.

In the last analyses Fiedner's suggestions are only a mere refinements of the system established under S. 120 of Registered Land Act. His suggestions are aimed at masking segregative advancement he conceives of rural financial oligarchy having ties with administrators and urban financial capital owners. His suggestions when looked in historical perspective ties up with the colonial administrators' view of land consolidation as a scheme to create and perpetuate rural based conservative landed gentry to act as buffer stock between plantation oligarchy based of former white highlands and the landless.

Ultimately one must concede that the answer to the problems arising out of customary law of succession does not lie in suggestions like those made by the law of succession commission nor in those of bourgeois scholars like Fiedner. The trend of events as was seen in chapter
three call for a complete reassessment of the whole system of land law in Kenya including the law relating to land tenure and land use.

Such reassessment not only involves legal issues, but more importantly, economic and political considerations. As MCAuslan is at pains to remind us—there is a feeling that many of the problems connected with land are not legal problems at all. They are economic or political problems and must be treated as such.45 So when we are trying to answer the question—"How and where can one find the difficult path between an over-conservative and timid insistence on tradition and diversity and an over-radical and unrealistic insistence on modernization and unity,"46 we must realise that, law does not operate in vacuum but in a social economic, political and even cultural context. It can therefore be properly said that a law should partake of the very essence of the people, their custom and values, and create condition best suited for general development to take place. Emphatically, the economic feasibility arguments should not sway the government to the extent of disregardi the social - political aspects of reform.
In light of the above considerations the land tenure has to be based rather on refined communalism than on individualism. This writer submits that it should take the form of Tanzanian land tenure. Its main tenets are inter alia, the rejection of individual title and vesting freeholds in the state. Individuals are only allowed restricted interests over the land. Communalization of the bulk of the land through village settlements. The control over the use of land in various settlements is affected through cooperative societies or by the commissioner of village settlement. The individual member is granted a derivative right over land but this does not mean abolition of communal interest in the land. A person succeeding to such a right need not be the one entitled according to customary law. He must be approved by the commissioner of settlement. Membership to the settlement insures against any landlessness for it is the duty of the commissioner to afford everyone reasonable needs. Availability of land coupled with absence of individual ownership minimizes occurrence of land fragmentation.

The present writer submits that so long as the Kenyan society remains what it is, peoples’ attitudes about good life will continue to be influenced by their cultures which obtain in rural areas where the great
majority continue to live for great part of their lives. These cultural considerations which embody egalitarian philosophy have manifested themselves in their inheritance principles which emphasise equity in distribution of land. It was seen that, it is when these customary principles are applied to individualistic capitalism oriented type of tenure that fragmentation crops up and defeats even the formally established control mechanisms from arresting it. It is with this realisation that communal land tenure refined in Tanzanian model is recommended, for it partakes of the very essence of a Kenyan African.

11. Ibid.
13. Ibid.
14. Ibid.
FOOT NOTES

1. Public law and political change in Kenya pp. 79
3. Supra.
5. Lugard. The dual mandate, pp. 280
7. No. 21 of 1902.
11. Ibid.
13. Ibid.
14. Ibid.
22. Section 122(2) of Registered Land Act.
25. S. 9(1) (b)
27. S. 13.
28. S. 9(1) (c).

30. The writer carried interviews on 16th and 17th of February, 1979 in Kandara Division. The First interviewed was the Kandara Division land Registrar. He has acted as the Secretary of Kandara Land Board for the last four years. The second interviewed was a sub-chief of the area and also a member of the Kandara Division land Board. The interviews were oral and they took the nature of a dialogue on problems of succession to land and the deliberations of Kandara Land Control Board. They were very co-operative in sharing their vast experience with the writer.

31. This would in effect mean that the title deed ceases to be no longer an asset which can be pledged. No development credit would be forthcoming. This goes against the very object.

32. See Okoth Ogendo's assessment of the reform programme. He shows that, it did not achieve such a revolution. That even today land in former native reserves are a means of subsistence.

33. See Homan's contention that this may be the main reason that the provisions of S.120 are not followed. opp. citation, pp. 50-52.

34. Interview with the Kandara division land control Board member and the Registrar who is the Secretary of the Board.
35. Kenya High Court digest (K.H.C.D.)
   No. 17 of 1971
   No. 56 of 1972

37. Unreported civil case
   No. 1400 of 1973

38. High Court of Kenya Miscellaneous case
   No. 139 of 1974


40. Paragraph 15 of commission's report.

41. No. 14 of 1972

42. Section 5(1) of cap. 169.

43. Some legal aspects of land reform in Kenya.
   (Mimeo graphic paper E.A.I.S.R. Conference
   proceedings in Kampala).

44. Kato 1.1. Methodology of law reform. In G.F.A.
   Sawyer ed.

45. MCAuslan - Control of land and agricultural
   development.

46. Law reform in Kenya.
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