THE IMPACT OF LAND
ADJUDICATION ON LAND
DISTRIBUTION IN MERU.
A REVOLUTION IN LAND TENURE?

I am grateful to the entire staff of the
Land Titles Registry, without whose co-operation,
co-operation and contribution this work would not have
been possible. Special thanks to my supervisor,
Mr. Mith-Ogendo of the faculty of Law; and to my
sister, Mrs. Roseline K. Kinoti, who not only
financed my research but transformed my hand-writing
into this form. Not to forget those old men and
women in Meru who allowed me to interview them.

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GIDEON K. MEENYE

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Gideon K. Neenye

Nairobi, 1979.
ABBREVIATIONS:

O.U.P. = Oxford University Press.

U.O.N. = University of Nairobi.


J.A. Ad. = Journal of African Administration.

I.D.S. = Institute of Development Studies.

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THE IMPACT OF LAND ADJUDICATION
ON LAND DISTRIBUTION IN MERU. A
REVOLUTION IN LAND TENURE?

CHAPTER ONE:

HISTORICAL BACKGROUND. CUSTOMARY
LAND LAW AMONG THE MERU.
Individual or Group Ownership?

CHAPTER TWO:

LAND ADJUDICATION.

1. Policy Considerations in Land Reform in
   Kenya. A Punitive Action?

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Is Group Title a solution?
The Impact of Land Adjudication on Land Distribution in Buru: A Revolution in Land Theory

INTRODUCTION AND METHODOLOGY

This is an attempt to discover and ascertain the extent to which the process of Land Adjudication took into account the customary Land Law in Buru. It focuses its attention mainly on the socio-economic consequences of land adjudication exercise in Buru in general and Nyaki Location in particular.

The study also aims to bring out the conflicts and contradictions inherent in the attitudes of many Western Scholars in their approach to and treatment of the question of Landholding in pre-colonial Africa.

The study will also emphasize the isolation of Buru District as an administrative unit. This will make it easier to understand, appreciate, assess and integrate the impact of external factors on the organic evolution of Land Law among the Buru when the Colonial Government decided to impose a crash-programme of Land Reform on the hitherto isolated community.

Tenure systems represent the relations of men in society with that essential and often scarce commodity, Land. Land tenure systems vary from community to community. This is accounted for by the historical development of each political grouping and the consequent variation of legal and institutional structures in different polities. Focusing our study on this premise we shall show that the treatment of African customary Land Tenures by Western Scholars, with Buru as a case in point, was to a large extent wrong and misinformed.
Having shown the traditional landholding among the Ngun we shall proceed to show how land adjudication was carried out there and that although the exercise was supposed to be done in concurrence with the relevant customary law this was largely ignored.

The study will then examine the distributional impact following an adjudication. This will emphasise the consequences experienced when the socio-economic balance, hitherto maintained through well organised, regularised and strict socio-economic structure, control and organisation over land, was disturbed.

The study will conclude by offering general suggestions and recommendations as to what should have been and could be done to ameliorate the problems following in the wake of adjudication.

The methodology of this study is twofold. The nature and scope of the topic makes it imperative that there be carried out extensive and intensive interrogations from Ngun elders, leaders and proprietors. This would enable a proper understanding of Ngun communal land acquisition and traditional concept of tenure which would enable us to properly categorise the impact of land tenure and land reform as embodied in statute law today.

Secondly, there is book research - the literature which is to affirm or otherwise the consistence of the interrogations carried out in the field. The book research will also provide the information as to the objectives of land reform, how these objectives were tried in the field, how they came about and how they are embodied in statute and case law today.

The author was reluctant to rely on book research in the determination of Ngun customary land law. There is very scanty literature on the subject. It was not until the middle of this
20th century that researchers enquired into the traditional land tenure in the area. Secondly, the available literature was gathered by strangers, most of whom were Colonial settlers and agricultural officers and there is suspicion, supported by evidence, that the facts presented by these scholars were distorted to suit their own aims, inter alia, to disclaim any "natives" claims over land. Also, as strangers and pink-eyed, their informations, the local inhabitants, regarded them with suspicion and they withheld proper information. This may well account for the inconsistencies in their account of traditional land tenure systems in Africa.

There are many illustrations to support the view that the colonial Government was determined to disclaim any African claims over land and subsequently its researchers inevitably conformed to this policy.

Finally, reform will be one of the features of the new Before Programme as I shall generally because of the lack of legitimacy of current titles in the area of the African population and also one of the failure of the Government to affect following reforms.

CHAPTER V will conclude the discussion on attempt to show the essential consequences of the main exercise of land reform through adjudication and registration of titles. It will examine the impact of the exercise as studied in present state law and judicial pronouncements. Remedies and suggestions on how to correct the current land law of land reform will be made.
SUMMARY CONTENTS:

For the purposes of this study the subject will be treated in four Chapters as follows:

CHAPTER ONE: will be largely a descriptual account of Meru customary land tenure; its historical evolution and its stage of development up to the advent and penetration of Colonization in Meru. This empirical study will attempt to expose readers to the largely organic evolution and endogenous landholding among the Meru.

CHAPTER TWO: will give an account of and reasons for the emergence of land reform in Kenya and its objectives. Secondly, it will examine the exercise of land adjudication in Meru with illustrations from Nyaki Location.

CHAPTER THREE: will open with a statement as to who owns what interests in what land today in Nyaki Location and what this means in the context of Kenya Property Law. The merits and demerits of distribution of land after adjudication will be examined vis-à-vis Meru customary land tenure.

Passing reference will be made on the failure of the Land Reform Programme in Kenya generally because of the lack of legitimacy of present title in the eyes of the African population and also due to the failure of the Government to effect follow-up reforms.

CHAPTER FOUR: will conclude the discussion and attempt to show the sumtotal consequences of the whole exercise of land reform through adjudication and registration of title. It will summarise the impact of the exercise as embodied in present statute law and judicial pronouncement. Recommendations and suggestions as to how to surmount the consequences of land reform will be made.
CHAPTER ONE.
HISTORICAL BACKGROUND.
CUSTOMARY LAW AND HERU SOCIOLOGY
Individual or Group Organisations?

Introduction

The Heru are a Bantu people living on the eastern slopes of Mt. Kilimanjaro in Heru District, Eastern Province, Kenya. The Heru country stretches from Tana River in the South to the Gikuyu Hills in the North and from Tana River in the East to Nzoio River in the North-West.

Students of Kilaya Social Institutions such as Kayatta², Imbert³, Middleto⁴, and Mariki⁵ imply that the "Kilaya Tribe" is composed of the "Kilaya proper", the Heru and the Baha. Here the word "tribe" is at best confusing and has been loosely used and turns out to have no specific meaning as it refers to no specific unit. One may argue that if there is Kilaya proper then the other groups are not Kilaya but Heru and Baha, respectively. That the Heru are linguistically, territorially and socially different from the Kilaya is borne out by the literature available on the subject⁶ and also by the Heru Myth of Migration. It is beyond the scope of this study to go into details about the origins of the Heru. In any case it was officially acknowledged in 1996 that the three units were different when the Heru were separated to form a separate land unit⁷.

Both historians and administrators have recognise, and as is evidenced in the Heru Myth of Migration, that there are six major linguistic divisions in Heru—Bantu, Shorah, Tigaia, Chuka, Klikho and Igolë. The blurred distinctions between the Heru and the Kilaya has always been and still continues to be exploited by politics. It has played a big role in the Mobilization of Political Movements. This is a serious handicap
to a systematised study of institutional structure in Meru if not careful not to be influenced by the Kiluyu myth. The present author's definition of the Meru people will include all the traditional inhabitants of the present whole administrative unit. The other myths will be ignored as they constitute the actual germ of politics in Meru which is outside the scope of this study.

The myth of origin of the Meru is yet to be confirmed through archaeological and scientific research. The story goes that they used to live in captivity at a place called NWAA (or MIRU BUKUNDA) with the Kiluyu, Kikuyu and Turkana. Some historians have disagreed with this and argue that the Kikuyu and the Turkana migrated not from the Coast but from the Heart of Africa.

However, the Meru, Kiluyu, Kikuyu and Kamba share similar myths of migration. Both the Meru and the Kiluyu have been included in the Shumuya Dispersal which is supposed to have taken place somewhere near Malindi on the Kenya Coast. Mclenans (Supra) agree with both Prof. Scudder and Prof. Aukme on the origins of the Eastern Bantu people.

After many years of slavery in Ilala under the Egunu Ilana (a red-clothed people, probably the Kala) the Meru escaped and later dispersed at Kigano in Tharaka dividing into six major groups to settle in their present home lands. By the time of European contact the Mauki group had expanded on the lower slopes of Mt. Kenya and were clearing bushes around the present Meru town in Tharaka and Mathioya. The political organisation of the Meru is to be understood through two perspectives - the external relationship with the surrounding agricultural, nomadic and trading communities and the internal structure moulded on the geographical setting of the Meru which divides the country into separate ridges demarcated from each other.
reflected by deep river gorges. Secondly it is also influenced by the manner in which the Meru settled.

Any polity’s political structure is designed to preserve internal stability and external interest against outside forces. The political system obtaining at any given period can be seen as a conscious, or even unconscious, attempt to cope with and regulate problems raised by intra- and extra societal environments. Myths do not exist in a vacuum. They have a purpose to fulfil in every society. The myth of the Meru is that there were three clans and when Sanderberg tries to equate the Meru political structure with that found among the Embu and the Kikuyu this does not fit with the myth of the Meru because the Myth had a particular function to play — the promotions of social convivialness in certain grouping.

Having settled and the former distinctions becoming insignificant the next political development was the evolution of two Moieties (NTUKI) as a pointer to intra-tribal warfare. This placed strain on the political organisation and necessitated realignment, hence the evolution of Kiamo or Council of Elders. The ultimate political power came to be vested on the Council of Elders, especially on an Inner Circle of the Kiamo called the NJURI NCHEKE. But there was no bureaucracy as such. This institution disintegrated with the infiltration of Colonial Rule.

The aim of this study, however, is not to go into politics of colonisation but to briefly outline the political structure and relate it to the mode of production. The economic mainstay of the Meru is both crop and animal agriculture. Even before the advent of colonisation, it is
planting, harvesting, crop rotation and admission of strangers in the territory. Political sovereignty was "no more than an umbrella under which existed infinitely varied private and group titles to land."

Once a group found vacant and suitable land usually near a river, a village was established. The MTHAKA(Warriors) would mount a raiding expedition in the adjacent areas to drive out the Gumba and Mwoko.

The area thus acquired became Public land—land which was used for public purposes in which the community had equal rights. Each household was entitled to some backyard parcel on which to plant bananas, yams and arrow roots. Therefore, when Western Scholars talk of communal land they would confine themselves to such land surrounding the village. Here communal land refers to community of control and not of user. Investigations revealed that if one ceased to belong to the village he relinquished all claims on his parcel which the Elders distributed to the other villagers.

But even in such a case no distinction is drawn between ownership and territorial sovereignty. Meru property jurisprudence recognises that land, meaning MUTHETU or soil, itself is incapable of ownership. One may own a MUNDA or farm. Land is there of its own accord, cannot be created or made to disappear. MUNDA refers to interests that one may have over MUTHETU. The improvements that one has made do not entitle one to assert ownership over the soil. Soil belongs to MURUNGU(GOD). English property jurists attempt to classify rights in land not by their grouping but by their type. This leads to a distinction between rights of ownership and rights of sovereignty. If this were used to try to ascertain rights of the individual vis-à-vis the group, the distinction becomes blurred in what have
been called "Primitive Societies" because land had not acquired any monetary value. But the distinction may be accepted "not because it can fairly be made but because the idea of ownership, taken from English concepts and language, has been accepted in Africa and it is important that we and they, should be clear as to what it connotes." Today, ownership is developing not only as the individual claims a more exclusive use of his land but also as he appreciates a wider range of uses to which it may be put, and an increasing number of methods of transferring his rights.

Once the village and immediate areas were secured and their safety ensured Explorations for areas suitable for the staple crops and grazing areas would be mounted. Once the area was earmarked every grown-up would be expected to participate in the clearing of the bushes and trees. Clearing may take anything from weeks to months depending on how much area was to be cleared and the technology used. On completion of the clearing the elders would supervise the carving up and sharing of parcels to the households. The sharing may not have been to the exact mathematical precision of the survey chain but generally each head of a household got a share equivalent to the amount his house had put into the communal clearing. He would later sub-divide his share among his wives. Such communally acquired land was called "NGUETOYA MURIGA."

Another method of acquiring a MURIGA was invented by hunters. Hunting usually was communal. After the hunt, the communal game was divided up among the community. However, each hunter had the right to make fires with which to mark out boundaries of his or her parcel. It would be more appropriate to talk of the allottees as having ownership of his parcel(s). After the sharing only the allottee had say over his parcel, to use or not to use it, except in the case of alienation to a stranger, which was a mere political check. Such land was ultimately the property of the allottee. He had
plemery rights of user and disposal, of unlimited duration, within the clan. The actual enjoyment of such land was not by the clan together but rather by families and individuals on separate and distinct parcels.

Other "public" lands included grazing areas, salt licks, circumcision groves and playgrounds. Cattle were kept outside the village. However, a few head might be kept in the village to provide fresh milk. After harvest the animals were allowed into the fields to feed on the stubble and add manure. They were too few to constitute an erosion threat. Society prohibited against erection of buildings in the Communal GUATO as this would spoil the pattern of settlement in village clusters. However, makeshift huts were put up when the crops were ripe, to house the sentries who guarded the crops against wild animals and birds.

As stated above the Meru settled with a keen land hunger. They were also adventurous. After the village had been established men usually went out in search of land for future settlement. Unlike the communal exercise just discussed above this time they did not go in groups of more than three. Usually they took goats with them which would be used to purchase land from the Dorobos. Land also bought was the property of the buyer and was known as MOBURAGO.

Another method of acquiring a MOBURAGO was invented by hunters. In their search for honey in the forests, usually in pairs, hunters would decide to annex land for future settlement. By digging hoes and marking trees one could claim hundreds of acres of forest land. This was called "MOBURAGO YA RURINDI NA MUNANI." a description of the method used - rubbing two dry sticks together to make fire with which to mark out boundaries.

of land to which access and use were guaranteed to every clanman. However, even in these communal lands a distinction is drawn between alienated and unalienated lands.
If one of the hunters died in the course of the adventure his partner was not obligated to report that they had annexed any land. Hence the evolution of the concept of Mburago ya Maathi Uti O (Mburago of an absentee hunter). This became a very useful method of pressing claims for land during the land adjudication exercise. No one could challenge the validity of such title.

Mburagoos remained unused until Mid-20th Century when populations increased and necessitated departure from the traditional cluster settlement pattern. Unlike the Ngwato

As we pointed out above, Meru property law, just like the owner of a Mburago could dispose of his land in any manner, English property law, recognizes that land one land is inalienable even to a stranger. If one left the village and established a home on his Mburago, he effectively abandoned any claims he had in the village and on Ngwato lands. The village could multiply in numbers and become a clan. Even

Each of these descriptions is used in the process of sharpshook with the Ngwato system

A person could also purchase land from clansmen through the system of land ownership and holding together. The operation of land ownership, leading to individual ownership, may be traced in every civilization known to history.

It is admitted that communal ownership is not incompatible with ownership by individuals of similar or lesser interests in land. Nor is it peculiar to African systems of law.

Group ownership is in contrast to what are part

Another kinman by being given land. This was called Nyamu.

Compensation for death could be made in land. If for a son such land was called Kiguraro, and if a daughter, Nenki.

Two points emerge from the pattern of land tenure among the Meru. Firstly, there was the communal ownership of land to which access and use were guaranteed to every clansman. However, even in these communal lands a distinction is drawn between alienated and unalienated lands.
The latter were preserved for the future generations and could not be alienated without leave of the community. Secondly, there was the system of individual ownership of land, whose expanse and extent were determined by the ability of individuals. These latter lands were at the disposal of the individual owner, with the communal land the society interfered in arranging the uses to which land may be put, crop rotation, bush-firing, harvesting, planting. This manifestation of societal involvement in land use would properly be described as form tenure.

As we pointed out above, Meru property law, just like English property law, recognises that land qua land is incapable of ownership, only interests can be held in land. "The interests in land can be likened to a bundle of sticks not all of the same length or thickness. All sticks .... can be owned by one man or separate sticks can be owned by separate persons. Two or more people can own one stick or the owner can be a group of persons."

Each of these descriptions can be used to one or more of the systems of land ownership and holding among the Meru. Processes of natural evolution leading to individual ownership may be traced in every civilization known to history. It is submitted that communal ownership is not incompatible with ownership by individuals of similar or lesser interests in land. Nor is it peculiar to African systems of law. Group ownership "is an umbrella beneath which are particular and exclusive interests of individuals in portions of land occupied by them" - interests which are as comprehensive as the fee simple Estate of English Law.

One should not commence a study of customary land law of an area by looking for people whom one may describe as owners least one should find owners in fee simple, for this
tenure, which was first conceived in the feudal period and persists until today, cannot exist in African Customary Law. But this does not mean that customary tenures may not exist which may have many features with ancient or modern English tenures. One must analyse customary law as it exists and "not to attempt to fit into it tenural categories which have been developed in other continents at other ages."

The main theme that has been neglected in this field is whether development in African property law has been systematic and endogenous. The present writer is of the view that, from the foregoing, development of the Meru property law was an endogenous, organic process. But this can only be clearly understood after a due examination of the impact of colonialism of land use and administration has been made in the following chapters.

Foot Notes to Chapter 1:

1. Mboroki J.G.: Community Relations Between the North-
   and Frank Bernard,
   Dissertation B.A. 1972 U.O.N.


3. A.C. Lambert: Kikuyu Social and Political Institutions


   1953.
8. Supra.
9. The development of these divisions is ably discussed by both Muthamia, and Mboroki, Op. Cit. and Meru is divided into so many administrative divisions today. require special terminology? (1965)
12. Of course, even the absolute proprietor is subject to social welfare legislation and compulsory acquisition, the public health Acts and Aviation Acts to name but a few.

17. NJERU, NJIRU AND NTUUNE.


22. Supra.


26. Of course even the absolute proprietor is subject to social welfare legislation and compulsory acquisition, the public Health Acts and Aviation Acts to name but a few.

27. (1921) A.C. 399 at P. 408.

28. Supra.


31. Interview with Mr. Mutwota (aged over 80 years).

32. All the old men interviewed concurred on this.

33. Supra.
34. These methods are ably discussed in an unpublished article written by this writer entitled AN ATTEMPT TO DISCOVER AND ASCERTAIN CUSTOMARY LAND LAW AMONG THE MERU. LL. B. 11 Research Paper (Land Law) 1978, U.O.N.

35. Of course ecology of the soil determined what crops one may grow and as Frank Bernard, Op. Cit.; has argued Meru country is divided into ecological zones and belts.


In order to establish a settler economy, acquisition and ownership of land were crucial. Title to land in the European sense was a critical tool in the exploitation of natural resources preferred by land. The early colonists in Kenya did not give first hand in land matters. The imperial authorities in London did not think much of the then East African Protectorate. However, in 1897 new Land Regulations were formulated for the settlers, giving the Governor power to sell freeholds in land within the Sultan’s dominion. Outside this area, the regulations espoused grant of certificates of occupancy originally for 21 years, later extended to 99 years. These regulations were totally unacceptable to the settlers, one of whom described them as “the most idiotic land law ever seen; he saw in his right name’s would ever think of taking up land on such conditions.”
CHAPTER TWO

Policy Considerations in Land Reform in Kenya.

A Punitive Action?

It has repeatedly been argued that African land tenure constitutes serious constraints to agricultural development. Consequently throughout much of Africa attempts have been made to "reform" these systems in such a way as to remove what were seen as their fundamental deficiencies. Kenya provides a good example of this exercise.

The establishment of colonial economy in Kenya placed upon African society demands that were to dislocate tenure arrangements and lead to serious deterioration of land use in the African areas. Large tracts of land were annexed which were considered suitable for European settlement, and there was needed a continuous supply of cheap labour for European farms. The European type of plantation agriculture was seen as the only viable venture.

In order to establish a settler economy, acquisition and ownership of land were crucial. Title to land in the European sense was a critical tool in the exploitation of natural resources preferred by land. The early colonists in Kenya did not at first have a free hand in land matters. The Imperial authorities in London did not think much of the then East African Protectorate. However, in 1897 some land Regulations were promulgated for the "peace, order and good government", giving the Commissioner power to sell freeholds in land within the Sultan's dominion. Outside this area, the regulations empowered grant of certificates of occupancy originally for 21 years, later extended to 99 years. These regulations were totally unacceptable to the settlers, one of whom described them as "the most idiotic land laws ever seen; No man in his right senses would ever think of taking up land on such conditions".
This movement was consolidated into some 24 units called

Title to land could only be acquired through sales by the
local indigenous people. This was a problem for the adminis-
tration who, in order to attract settlers, were anxious to
offer them the best possible terms.

The Imperial Government was urged to accept title to
"waste" (physically unoccupied) land by virtue of its protection
over the area. It was assumed that territorial political
sovereignty conferred title to land. It was further argued that
Africans "owned" land only in terms of occupational rights and
as such it followed that unoccupied land reverted to the
had territorial sovereignty. These views were adopted by the Imperial
Government and incorporated into the 1901 East Africa Lands
Order in Council and subsequently the Crown Lands Ordinance, in
1902, conferring on the Commissioner power to dispose of all "waste"
and "unoccupied" lands on such terms and conditions as he might
think fit, subject only to such directions as the Secretary of the
State might give. These ethnic boundaries badly disturbed the
soul. These developments gave local administrators wide discretion
in matters of land disposition within the Protectorate. The
phrase "Public lands" was vague and left them power to determine on
very dubious basis, what "waste and unoccupied lands" were. In
practice it was decided that no native had any individual
title to land and that land was the Common Wealth of the People.

This set the stage for the indiscriminate expropriation of
land in the hinterland. Where the indigenous peoples had strong
Social and Military Organizations, such as among the Massai,
diplomacy was used to make land available to the settlers. Further
the settlers assured security for their land by demanding,
and the administration agreeing, that the Africans be grouped into
Native Reserves far-removed from areas suitable for European
settlement. Climbing rates of population, as elsewhere in the
African areas, were already producing high densities in the
homestead zone. On the Lower slopes of Mount Kenya density...
This movement was consolidated into some 24 units called 'Native Units', the administration of which was placed in the Government-controlled Native Lands Trust Board. The Board was supposed to administer the lands in such a way as to effect all customary law rights and to ensure that no such lands passed to Indians and other Non-Europeans. The boundaries were liable to be changed at any time according to the needs of the European settlers until they were guaranteed by the Kenya (Native Areas) Order in Council, 1939. But this was done in such a way that ethnic boundaries of each unit were fixed to exclude not only Non-Africans but also other African tribes. Any expansion had to be within the confines of the unit. The creation of the 'Reserves' and their consolidation, provided a good opportunity for the organization of the labour market and control of African activity through both legislative and administrative measures. This coupled with the taxation policy and restriction of development of African areas generated labour in and of itself.

The idea of fixed ethnic boundaries badly disturbed the equilibrium between patterns of land use, availability of land use, availability of land and technology - a balance which had previously been maintained through shifting cultivation or nomadic pastoralism. This led to rapid depletion of soil potential due to fragmentation, overstocking and erosion. There was an equally rapid disintegration of the social institutions relating to land use and control leading to Mass exodus in search of paid employment. African areas were totally neglected until the administration was rudely awakened by the world-wide depression of the 1930's and the demands for self-sufficiency in cereal and other crops when official attitude changed towards encouraging African agriculture, through a scheme of credit provision and curbing speculation in land.

In Meru Climbing rates of population, as elsewhere in the African areas, were already producing high densities in the homestead zone. On the Lower slopes of Mount Kenya densities of
was made available for the project for 10 years, to the African
Camps Utilisation and Settlement Board. There also failed, up to 800 people per square mile had occurred. In Tignia,
densities were between 300 and 500. Concentrations such as these are not "ipso facto" cause for concern. But they were compounded by a breakdown of the traditional system of inheritance and barriers to diffusion of settlement to other regions. More and more people in each family required productive land, and this led to increased fragmentation requiring, in turn, higher inputs of labour per unit of cultivated land. In some areas the plots were so small that people were no longer able to grow sufficient food. At the same time, traditional checks on soil depletion were abandoned, fallow periods decreased and trees were removed at unprecedented rates. However, Mauwa's overcrowding was not as hopeless as among the neighbouring Mauwa. The District was possessed of large areas of essentially "empty" lands of good agricultural potential.

The first strategy adopted in the African areas was to try to relieve pressure by finding new land within the "Reserves" area, for the settlement and resettlement of landless people. The African settlement Board, a subsidiary of the Central Settlement Board, manned by "British Officers experienced in particular problems affecting African settlement and primitive agricultural practices", was set up in 1945 to coordinate and execute the unnecessary actions. In Mauwa it was attempted in the Giaki-Gaitu, Mitunguu and Ruiri Schemes. It was a failure. Not much land was involved to make much difference to the existing pressure on land within the "Reserves".

Thereafter, emphasis on settlement was abandoned in favour of reconditioning and preserving land under the newly formed African Lands Development Board (ALDEV) to the so-called "Betterment Schemes", aimed at fighting mismanagement of land. £ 4 million
was made available for the project for 10 years, to the African Lands Utilization and Settlement Board. These also failed.\textsuperscript{22}

Following the failure of the settlement and betterment programmes it was 'discovered' that "the principle problematic factor in African Land relations was tenure" and that if this was reformed a solution would be found. The colonists argued that African land tenure was communal in nature, was a constraint on proper land use and development, encourages fragmentation, led to endless disputes, inhibited capital investment and proper husbandly was impossible. Hence, it was recommended that African land tenure should be overhauled and replaced with an alternative tenure pattern based on consolidated and individually registered holdings. The advantages of the latter were highly exaggerated.\textsuperscript{22}

The foregoing economic considerations existed side by side with political goals. Kenya's political movements, which had started in the 1920's, centred on the grievance of land shortage arising out of European expropriation of the best lands, rapid population growth and consequent land pressure. In the post-2nd World War years these political movements broadened their support, forcing the question of African Political participation into the conscience of the Colonial Administrators.\textsuperscript{23} When their aspirations were blocked by the settler Minority tensions led to the Mau Mau revolt in 1952. The Colonial Government responded by declaring a State of Emergency all over the Country and imprisoning prominent African Politicians.\textsuperscript{24}

Although the core of this movement for political self-determination was in Kikuyuland it soon spread to Meru and Embu and because of the ethничal ties between them the British implicated them. Especially in Meru, presence of white settlers in Timau and Nanyuki necessitated reprisals and Meru's resistance was not effectively eliminated until four or five years after the Kikuyu resistance had subsided.\textsuperscript{25}

The Mau Mau not only shocked a lethagic and poorly financed
administration into shaping a new design for agricultural production, but also provided the Administration with an opportunity to punish the nationalists and reward the Loyalists.26

The Sogenston Plan was the basic document for this design... The document attempted to lay foundations for "Modern" agricultural systems throughout Kenya. All facets of production were considered, from land ownership to marketing, but it saw the key to agricultural reform as individualization of land tenure and the introduction of cash crops. It also thought that consolidation of individual holdings would facilitate proper farm planning.27

Thus, the policy considerations in land reform, and as will be emphasised further in Chapter three, was both economically and politically motivated. The political pay-offs became evident during the Mau Mau when it was realized that individualization of holdings could create "a Solid Middle Class Population anchored to the land who has too much to lose by reviving Mau Mau". The declaration of Mau Mau provided the opportunity for forcing the reform through and by 1956 a large part of the Emergency Districts had been consolidated. As security improved this was abandoned for a more broader political objective, the creation of a stable peasantry.

To ensure expulsion of possession the African Courts (Suspension of Land Titles) Ordinance, 1937 was passed to bar all litigation in areas to which the 1936 Rules applied.28 The Ordinance was originally meant to stay proceedings for three years but when re-amended with the 1950 Rules it had the effect of closing all avenues to the Courts for the dispossessed peasants.

The full process of tenure reform set out by the 1936 Rules involved three distinct stages. The first is the ascertainment (examination of group rights amounting to ownership over fragments of land within a given area). Then followed the aggregation of these fragments into single units (CONSOLIDATION). Finally, the fragments
Adjudication in the Field in Nyeki.

A Revolution in Land Holding.

Minister: The thesis of this Chapter, and indeed of the whole paper, is that so far as the nyeki were concerned adjudication and consolidation of land did no more than confirm what was already recognized under customary law in as far as the Mvurungo Act lands were concerned. However, in the Nwato lands it gave people opportunity to press for individual parcels in which the case it can be said to have revolutionized tenure. It may also be seen to have revolutionized tenure in the sense that the traditional structure of access to land was concerned. We shall examine these in detail, elections, in Nyeki Location, for up to the time of the formulation of the Gwynerton plan tenure reform had no legislative basis and the field officers feared that their work would be undone later. A Working Party was appointed to recommend a corpus of substantive legislation. Pending its recommendations interim legislation was passed to set out the principles and procedures of land reform and block any litigation that might interfere with the process. Thus, in 1956 there were passed the Native Land Tenure Rules, and to ensure quietude of possession the African Courts (Suspension of Land Suits) Ordinance, 1957 was passed to bar all litigation in areas to which the 1956 Rules applied. The Ordinance was originally meant to stay proceedings for three years but when read with the 1956 Rules it had the effect of closing all avenues to the Courts for the dispossessed peasants. The full process of tenure reform set out by the 1956 Rules involved three distinct stages. The first is the ascertainment of individual or group rights amounting to ownership over fragments of land within a given area (ADJUDICATION). Then followed the aggregation of these fragments into single units (CONSOLIDATION). Finally, the fragments
are entered into a statutory register (REGISTRATION).

On the question of adjudication it was left to the relevant
Minister to convince himself that private right holding existed
in an area before declaring it an adjudication section. The 1959
Registration Ordinance changed this requiring him to do so only
at the request of local authorities. The 1963 Land Adjudication
Act restored this Ministerial initiative. On being declared an
adjudication section all land suits are suspended unless with
the leave of the Adjudication Officer.32

Following the application of the relevant legislation an
Adjudication Officer is appointed who then issues notices to the
residents in the area about the declaration. In Nyaki Location,
for reasons which are discussed below, land reform was carried out
under the adjudication-consolidation procedure except for Kithoka
and Staki. Such notices are generally published in Public meetings
at which the nature and specifications as to time of process are
explained. He then appoints the adjudication personnel and an
adjudication committee from among the residents of the area.33
Provision is also made for an Arbitration Board consisting of at
least five persons chosen by the Provincial Commissioner from a
panel between 6 and 25 selected by him. The personnel also
comprise of the Demarcation Officers who decide on boundaries
between different parcels and laying roads of access. There are
the Recording Officers to adjudicate individual or group claims
and prepare the Adjudication Register. The survey Officers carry
out such survey work as may be necessary including the preparation
of the Demarcation Map showing all the parcels within the section.
The Adjudication Committee decides, according to recognized
customary law, any issues referred to it by the demarcation or
recording officer. It also advises the Adjudication Officer (head
of the personnel) upon any questions of customary law, and is supposed

.../26
registration provisions of the 1959 Registration Ordinance were repeated and re-enacted in the Registered Land Act, 1963, which now provides the basic substantive registration law for all land formerly under customary law as in Naru. The 1959 Registration Ordinance, later re-named the Land Adjudication Act, was re-named the Land Consolidation Act 1968 when the land Adjudication Act was passed to deal with those areas in which consolidation is not appropriate. The 1968 Act also provides for the adjudication of group rights and interests as well as individual interests, thus enabling operation of group ranching schemes under the Land (Group Representatives) Act.

In accepting the idea of consolidation Naru was somewhat behind other districts in Central and Eastern Kenya. Emergency measures during the Mau Mau such as villagisation had not been widely imposed on the Naru. Therefore, unlike Kikuyu regions, most of the rural population was still dispersed all over the landscape at the end of the "emergency". With some justification, the administration looked upon consolidation as a formidable task and there was some reluctance to get the programme started.

Individual ownership of different parcels of land, the planting of coffee trees by many farmers in their homestead plots caused problems. With understandable disinclination these coffee farmers resisted the idea of surrendering their coffee or transplanting it to new plots. Also the zonal traditional system of agriculture and the perceptions underlying it caused many problems. Families in the homestead zone were unwilling to move from the pleasant altitude to less ideal lower or higher regions. For all these reasons consolidation in Naru got off to a very slow start.

Once funds were available the administration decided to concentrate efforts around Naru town (the area with which we are concerned) and Chogoria. Besides having neither enough funds nor personnel these two areas had good reasons for being chosen. In both areas, population and land pressure were high, fragmentation of holdings was extreme, and levels of efficiency in the traditional system were rapidly deteriorating. Another reason was the high probability
that the programme would be accepted by the people who were supposed to have become modernized due to the establishment of Missionary and administrative posts there since 1908. Such acceptance was essential because the decision to initiate consolidation rested entirely with the local adjudication committees, theoretically, were independent of Government, headmen and chiefs. Their decision was seen as the cornerstone of the entire programme.

The administration made consultations and arrangements with the headmen and the clergy to sell the idea of consolidation to the people. The consent of the people was especially difficult to get initially because of the threats of uprooting and transplanting coffee and other valuable trees. Since each household, except in these areas where adjudication and consolidation was done, was to be given one consolidated parcel equivalent, more or less, in size to all his parcells in the area, arrangements were made for those not wishing to uproot to continue using and developing their crops on their original farm until the new trees planted now trees for the original owner in his new land, cared for them until after the first harvest when they would exchange with these arrangements the areas around Meru Town, that is Kanga, Pahanini, Kiteria, Igoki, Thura, Nkebuna, Chugu and Munithu opted to consolidate their plots. Once an area opted to consolidate, adjudication sections were declared and deemed units of adjudication.

Nyski location was eventually divided into the following adjudication sections:— Chugu, Munithu, Thura, Nkebuna and Pahanini (to which consolidation was done) and Kithoka/Mwanika, Siaki and Kibuirine to which the 1968 Land Adjudication Act applied. It may also be noted that, as pointed out earlier, Siaki was one of the fateful settlement schemes of 1945. The 'settlers' in this scheme through family arrangements had continued to hold land in their original areas to which they came back after the failure of the scheme.

When the area, including Kibuirine, was declared an Adjudication Section on 5/7/1957, the other areas of the location had already been declared and since the settlers had been drawn only from the location this meant that they held land in two places simultaneously. In
these schemes parcels are larger than in the rest of the Location ranging from 8 acres and the people have tended to sell their original plots in the traditional homes and settled permanently in the schemes as farming methods improve and their cotton crop considerably raises their incomes. The dates for declaration of units in the other areas of the Location are not available but due to their closer proximity to Maru Town the people had accepted the idea earlier between November, 1956 and May, 1957.

After declaration of units adjudication was commenced in earnest. Although there were hostilities as some rightholders changed plots the exercise eventually bore fruit. The adjudication committees generally harmonized the people and did their work fairly well although they were not immune to favouritism and sometimes outright corruption. Making the decision to accept land reform and to actually implement the decision were two different matters. Implementation from start to finish was "an excruciatingly arduous task and slow process". Even in ideal situations, the consolidation process is arduous task, complex and involves a period of four years per section at least. Five years since inception went by before any section began to reach the final stages when the Adjudication Registers could be declared completed. As a proportion of the total programme to 1969 consolidation was less than half finished. Even as late as 1970 the process was still continuing in the Location. But subsequently the many months of surveying and demarcation began to pay dividends and the Records of Existing Rights (R.E.R.) for the adjudication sections were completed:

<table>
<thead>
<tr>
<th>Section</th>
<th>R.E.R. Publication</th>
<th>Finality</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chugu</td>
<td>18/12/1964</td>
<td>13/7/1965</td>
</tr>
<tr>
<td>Gisiki I</td>
<td>26/6/1965</td>
<td>10/2/1967</td>
</tr>
<tr>
<td>Kithoke</td>
<td>7/5/1966</td>
<td>6/6/1967</td>
</tr>
<tr>
<td>Thuura</td>
<td>13/10/1968</td>
<td>19/8/1970</td>
</tr>
<tr>
<td>Munithu</td>
<td>13/7/1966</td>
<td>27/6/1969</td>
</tr>
<tr>
<td>Gisiki II</td>
<td></td>
<td>6/5/1970</td>
</tr>
<tr>
<td>Kibuurine</td>
<td></td>
<td>6/5/1970</td>
</tr>
<tr>
<td>Mwanika</td>
<td>24/5/1973</td>
<td>18/2/1974</td>
</tr>
<tr>
<td>Nkabune</td>
<td>29/11/1963</td>
<td>28/1/1964</td>
</tr>
</tbody>
</table>
FOOT NOTES TO CHAPTER II.

1. E.g. see SPIEGEL: Land Tenure Policies; 1941.
3. See Ong'okh-Ogendo, Ibid.
4. Francis Hall. See Hall Papers quoted in SORRENSON.
6. Henceforth designated as 'Crown Landa'.
9. Hence the so-called Maasai Agreements-cum-Treaties of 1904 and 1911 by which their leaders agreed that 11,200 Maasai be moved on masses, together with a 2 million cattle and goats, to vacate the Rift Valley for 48 European Settlers. Res 1 1 2, 1979.
15. Frank Bernard, Ibid.

32. Legal Notice No. 516 of 1956, Embu

33. Legal Notice No. 517 of 1956, Nyeri

34. See Annual Report of the Agricultural Extension Officer, 1955.

35. It is interesting to note that the proprietors of land in this area have tended to hold their original land.

30. Ordinance No. 1 of 1957.

31. This is inapplicable to the areas to which the 1958 Land Adjudication Act applies.

32. See Appendix I, Declaration of an Adjudication Section, Sample of notice.

33. The Christian Religion influenced choice of the committee. People tended to equate Christianity with honesty.

To their surprise these 'honest brothers' cheated them and grabbed for themselves as much land as possible.

For example, in Chugu sublocation out of the entire adjudication committee only one was a non-Christian and each of them has no less than 9 acres (to even 15) in an area where the majority of the people have between 1 and 3 acres.

34. Ordinance No. 27 of 1959.

35. Ordinance No. 28 of 1959.


38. Act No. 36 of 1958. This letter Act does not introduce any new tenure form as such, but makes it possible for proprietors in common to organize a framework for the administration of the use of land so adjudicated.

39. See Chapter I generally.

CHAPTER THREE

DISTRIBUTIONAL IMPACT OF LAND ADJUDICATION.

Who owns what interests in what land today?

Having discussed the process of Land Adjudication (and Consolidation), the present Chapter will seek to examine the present distribution of land, with some emphasis on the alteration of the structure of access. It will also try to answer the question whether the outcome of the adjudication exercise was a required result.

Nyaki Location, lying adjacent to and East of Mboi Town, occupies 17,000.51 Hectares comprising the Sub-locations of Chugu, Munithu, Kithoka, Mulathankari, Thuura, Nkabune, Giaki and Kibuirine. For the purpose of adjudication Kaaga sub-location of Mbita Location was included as part of Mulathankari and Giaki was divided into two.

As of December, 1978 there are 8,250 registered proprietors of land in the Location as follows:

<table>
<thead>
<tr>
<th>Location</th>
<th>Number of Proprietors</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chugu</td>
<td>473</td>
</tr>
<tr>
<td>Munithu</td>
<td>1,897</td>
</tr>
<tr>
<td>Kithoka/Muanika</td>
<td>966</td>
</tr>
<tr>
<td>Giaki I</td>
<td>1,078</td>
</tr>
<tr>
<td>Mulathankari</td>
<td>82</td>
</tr>
<tr>
<td>Giaki II</td>
<td>74</td>
</tr>
<tr>
<td>Nkabune</td>
<td>596</td>
</tr>
<tr>
<td>Thuura</td>
<td>1,865</td>
</tr>
<tr>
<td>Kibuirine</td>
<td>327</td>
</tr>
</tbody>
</table>

After completion of the Adjudication Registers and Registration of Title, the original pattern of land distribution has significantly been altered. This is even very clearly borne out by the present settlement pattern. Zonal specialization has disappeared to be replaced with intercropping to cope with different soil ecologies. Originally, families would nominate...
one of their members to be registered the proprietor of
their land thus making him their trustee but reserving the
rights of access to their exclusive portions of their land.
This was a common practice where members of the family did
not want to be separated. Family cohesion has been difficult
to break even to-day\(^2\). Of course, the Original Murungo and
Aguato systems have been replaced by consolidated holdings
but most people got the equivalent of their traditional holdings.
The idea of trustee was common because one of the campaigns
of the reform programme was that the bigger the parcel the
bigger the loan one could raise\(^3\).

Eventually, as people discovered the benefits of the
registered title\(^4\) some people tended to abuse the trust placed
on them, for example by selling the whole piece or by acquiring
loans on it without prior consultation with the others.
Consequently, the others would petition for the declaration of
their interests and sub-division of the parcel to their respectiveshares. The present distribution shows the sub-divisions
and common proprietorship of the land thus (as of December, 1978):-

<table>
<thead>
<tr>
<th>Sub-Location</th>
<th>Proprietors in Common</th>
<th>Sub-divisions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chugu</td>
<td>18</td>
<td>24</td>
</tr>
<tr>
<td>Munithu</td>
<td>71</td>
<td>77</td>
</tr>
<tr>
<td>Mulathankari</td>
<td>82</td>
<td>101</td>
</tr>
<tr>
<td>Giaki I</td>
<td>23</td>
<td>155</td>
</tr>
<tr>
<td>Giaki II</td>
<td>17</td>
<td>12</td>
</tr>
<tr>
<td>Thuura</td>
<td>80</td>
<td>235</td>
</tr>
<tr>
<td>Nkabune</td>
<td>26</td>
<td>19</td>
</tr>
<tr>
<td>Kithoka/Munika</td>
<td>30</td>
<td>166</td>
</tr>
<tr>
<td>Kibuurine</td>
<td>40</td>
<td>19</td>
</tr>
</tbody>
</table>

Consequently, out of the total registered proprietors
approximately 20% of the proprietors are proprietors in
common: Chugu 4%; Munithu 8%; Mulathankari 13%; Giaki I 10%;
Giaki II 23%; Nkabune 6%; Kithoka 11%; Kibuurine 18%; and almost
40% of all the total parcels has been sub-divided, with Thuura...
leading in sub-divisions (235) and Giaki II with the fewest sub-divisions (12).

Out of the total 17,008.31 Hectares in the Location, 804.65 Hectares and 2,540.37 acres are occupied by and designated Public Lands. These are Trust Lands and are registered in the name of the appropriate authority, that is Meru County Council as follows:

<table>
<thead>
<tr>
<th>Sub-Location</th>
<th>Area</th>
<th>Public Lands</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chugu</td>
<td>487.42 Hectares</td>
<td>57.15 Acres</td>
</tr>
<tr>
<td>Giaki I</td>
<td>5,537.70</td>
<td>997.52</td>
</tr>
<tr>
<td>Giaki II</td>
<td>495.31</td>
<td>485.70</td>
</tr>
<tr>
<td>Munithu</td>
<td>1,528.00</td>
<td>65.23 Hectares</td>
</tr>
<tr>
<td>Kithake</td>
<td>1,592.70</td>
<td>40.49</td>
</tr>
<tr>
<td>Mulathankari</td>
<td>835.27</td>
<td>122.14</td>
</tr>
<tr>
<td>Nkahunye</td>
<td>629.77</td>
<td>52.19</td>
</tr>
<tr>
<td>Thuura</td>
<td>3,183.00</td>
<td>164.97</td>
</tr>
<tr>
<td>Kibuirine</td>
<td>2,720.00</td>
<td>349.63</td>
</tr>
</tbody>
</table>

During the process of adjudication and consolidation the survey and Demarcation Officers would first mark out how much land was required for Public Utility. Each prospective claimant of rights in land would be required to surrender some of his land towards the required Public Lands. Usually these were subtracted before the final allocation of plots. Such Public land would fall under either (or any) 

Schools; Churches and other religious purposes; Agricultural and Veterinary Research stations; market and trading centres; cattle crushes and dips; health and Community Development Centres; Administration Centres (e.g. for Chiefs and subchiefs); wells, and watering points; coffee factories, offices and nurseries; stone grounds and quarries; hills and swamps. 

.../344...
For example in Giaki II stone quarries occupy 105.05 acres; 19.60 acres are swamps; and Giaki Hill covers 321.60 acres. Therefore, in this area, out of the total area of 495.11 hectares Public Lands cover 485.70 acres leaving very little land to be occupied by the 74 registered proprietors (see figure above).

In Giaki II, swamps and hills occupy 441.79 acres and Community Development, Dispensaries, and Veterinary farms occupy 373.51 acres.

In Chugy and Munithy the pattern is familiar:

<table>
<thead>
<tr>
<th>Public Lands</th>
<th>Chugy</th>
<th>Munithy</th>
</tr>
</thead>
<tbody>
<tr>
<td>Schools</td>
<td>37.06</td>
<td>42.60</td>
</tr>
<tr>
<td>Religious Purposes</td>
<td>13.38</td>
<td>12.93</td>
</tr>
<tr>
<td>Coffee factories and offices</td>
<td>12.35</td>
<td>9.30</td>
</tr>
<tr>
<td>Trading Centres</td>
<td>3.36</td>
<td>2.11</td>
</tr>
<tr>
<td>Community Development</td>
<td></td>
<td>6.37</td>
</tr>
<tr>
<td>Other Public Lands(e.g. grave yards, wells, dips, water points etc)</td>
<td>6.35</td>
<td>2.32</td>
</tr>
</tbody>
</table>

The foregoing raises the important question of the structure of access to land, especially in relation to women, who, as we saw in Chapter I, were entitled to land to maintain their households. The first point to note about the relations of women to land in the case study is that out of the 6,250 registered proprietors only 26 are women. This, therefore means that the rest of the women will have to depend on the decisions that their menfolk make as regards use of the land. Even in the case of those women registered as proprietors the dealings in that land will usually be made by her sons, or if there are none the family. Traditionally, once a husband allotted a piece of his Murungo or Nwata to his wife she was expected to work on it with "her" children and maintain her house from it. Except for the "Man Crops" such as yams it was left to the discretion of the woman how to use "her" RWARE(farm). However, with consolidation...
point that, in the Socio-politico organization obtaining in
Mara then, individual ownership was not incompatible with co-
communal ownership, especially in view of the Mwatu and Kil-
Mwatu systems of tenure. Societal manifestations was not, in
all cases, in land tenure and structure of access, but in even back-
farming practices and extra-societal alienations. This is
However, since land is not important in itself but only in as far-
as it lends itself to humanization (Supra), and this changes with the
changing economic and technological realities, individuals did not
alienate land, even within the clan, often and anyhow. If they
did it was only after ensuring that one's issues had sufficient
land from which to derive a living. Conversely, following adjudi-
cation and registration of title, in addition to the new
Methods of land use dictated by the economic and technological
realities of the 20th century, there has been significant shift
in these relations. The basic vehicle for this shift has been
statute law, especially the Registered Land Act 14 (hereafter RLA)
which provides the basic substantive and conveyancing law for the
land formerly held under customary law.

S.27(6) of the RLA provides:-

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

And Vida s.28:-

"The rights of a proprietor, whether acquired on first
registration or whether acquired subsequently for
valuable consideration or by 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".

These two sections read together with sections 50 and
5.143(1) of the same act have the effect of meaning that once
a person is registered as the proprietor of a piece of land, and
no overriding interests are shown on the register of proprietor-
ship, as per 5.30, the customary law rights that another person
may have had on that land are automatically extinguished.
This, therefore, means that a father registered as the proprietor of land, if he were so minded, can still evict his children from that land with all impunity and the backing of the law, sue them for trespass, obtain damages against them even back-dated to their infancy when they did not know of this. This is the law as is embodied in both the Statute and Judicial pronouncements on the point in such cases as *ESIRODO v. ESIRODO*¹⁵ and *SERAH DOIERO v. OPIVO and Others*¹⁶.

In any case, even before these cases were decided, the sanctity of first registration had been secured following the decision of the East Africa Court of Appeal in *District Commission of Kiambu v. Rex exparte Ethan Njau*¹⁷ (hereafter the MANDAMUS CASE). This was the first real test on the Government policy of consolidating of land and land titles in Kiambaa, Kiambu, the Adjudication Committee, having first ascertained and made up without objection the Record of Existing Rights (R.E.R.) to land in the area, allocated Plot X to Ethan Njau, and Plot Y to one John Munge half a mile away. Munge complained that the allocation was unfair to him, after a certificate of allocation had been issued to Njau. This complaint was considered by the committee, which purported, by a majority, to reverse its previous decision, after which the Register was made up. Before the register was confirmed, Njau complained that by virtue of his certificate of allocation issued to him he was the owner of the plot originally allocated to him. This complaint which was treated as an objection under 6.17 of the 1956 Native Land Tenure Rules, was rejected by the committee, which proceeded to confirm the register as it stood. Njau moved to the Supreme Court of Kenya for an order of Mandamus against the appellant as the officer responsible under the 1956 Rules to register Njau as title holder.

*.../48*
The action was stayed until the Native Lands Registration Ordinance, 1959 came into force thus validating the consolidation under the 1958 Rules and removing the custody and control of the register from the appellant and placing it under the Native Lands Register.

On the hearing of the application the Supreme Court rejected a submission that the motion was barred by s.12 of the African Courts Ordinance, 1951 and held that since the committee had lawfully allocated Plot (X) to Mjau in the first instance, the action of the committee and other officers concerned in reversing the Plot (X) to Munge was ultra vires their powers, and accordingly made the order sought.

This was the first real test on the Government policy of individualisation and registration of African Lands. The decision would make a strong precedent in securing or destroying, as the case might be, the sanctity of first registration. Consequently, arrangements were made for Munge, who was joined as co-defendant, to be represented by an able Crown Counsel. On appeal it was argued, for the appellant inter alia, that since the appellant had no power to amend the register as it was no longer in his custody and control an order for Mandamus should not have been made. The Court of Appeal, in a lengthy judgement, held:

(i) the application for an order of Mandamus was not barred by s.12 of the African Courts Ordinance, 1951;

(ii) a distinct demand for action and its refusal is, as a general rule, a prerequisite for the grant of an order of Mandamus; in the present case it was doubtful if there had been a clear demand for the relief sought, but as the appellant was, in any event, without power to alter the Register without an order of the Court, the case fell within an established exception to the general rule and demand was not essential.
the committee's purported reversal of its first decision in the certificate, was ultra vires and of no effect and the duty of the registration officer to act on the original certificate was not thereby affected. 

(iv) the register concerned, though containing an erroneous entry, was a register which was prepared, confirmed and maintained in accordance with the idea of a polyplomacy, within the meaning of S.33(7) of the 1959 Registration Ordinance.

(v) the entry with which the court was concerned became an entry of "the first registration of title" within the meaning of S.89(1)(a) of the 1959 Registration Ordinance.

(vi) the order of Mandamus prayed for could not be made against the D.C. for it would not be within his powers to comply with it, nor could it be made against the Registrar of the Native Lands as such an order would offend against the letter and policy of the 1959 Registration Ordinance, and as the Registrar was not the successor of the D.C. within the meaning of the authorities on that subject.

Thus GOULD, J.A. (with whom Sir Kenneth O'Connor, P. and Sir Allistair Forbes, V.P. concurred) allowed the appeal reversing the order of the Supreme Court. The decision was a triumph for the administration which, throughout the land consolidation proceedings in Central Province, had sought to put an end to Kikuyu land litigation in the courts. It was to prove a strong precedent for in November, 1960, in Rex v. D.C. of Nyari, and Chairman of Kikuyu Land Consolidation Committee, ex parte Wachira Mique 15, Gould, J.A., again rejected an appeal from the Supreme Court decision on an application for the Writ of Certiorari concerning a land consolidation
stating that the appeal was bound to fail because of his
decision in the Kiambu Mandamus case (Supra). This then, made
it quite clear that, unless the Registration Ordinance was
amended, any appeals to the Courts for an alteration of first
registration were bound to fail, irrespective of any inaccuracy
or injustice that this registration may have validated. Even
to-day the situation remains the same.

For example in OBIERO V. OPIYO (above), the plaintiff, a widow
of a polygamous marriage (who was presumably childless) applied for
and was granted an ejection order (and damages) against the issues
of her deceased husband, the defendants. She was the registered
proprietor of land under the RLA and no encumbrances were noted
on the register. When she sued for possession the defendants
claimed to be donees of the land under customary law and to have
cultivated it from times immemorial. They further alleged that
the plaintiff's registration, a first registration, was obtained
by fraud.

BANNET, J. of the Kenya High Court, held that even if, fraud had
been proved the plaintiff's title was subject to no encumbrances
and was therefore free from all interests and claims; further,
that the rights arising out of customary law are not overriding
interests as per S.30 of the RLA.

KNELLER, J. followed suit in ESIROYO V. ESIROYO (above) and
held that, notwithstanding his recognition of transgenerational
rights under customary law, these were destroyed once land became re-
gistered and title to it issued under the RLA. He went on to order
an injunction to issue (and damages) against the sons of ESIROYO
from coming onto their father's land.

These decisions indicated what the registered title means in
the context of present statute property law in Kenya. A person
can disregard kindred affinity and eject his issues from land
registered in his name with all impunity. Unless courts device
ways of interpretation to give effect to customary law rights in
land there is threat of social disintegration.
Some progressive judges have attempted a social oriented approach to the problem. However, it must be emphasised that judges in the latter category seem to be in direct opposition to the Government policy of individualization of land ownership and what this ownership means in the context of economic orientation of the country. In any case their decisions are not a radical departure from the status quo as such but rather an renovation to meet the demands of natural justice and not an attack on the absolute proprietorship.

For example in MWAIGI MUGUTHU V. MAINA MUGUTHU 20, followed in MACHARIA V. MACHARIA 21, MADAN, J., recognized that customary law transgenerational rights need not be noted on the register in order to be recognised. However, since this was not the ratio decidet; (but merely Obiter dictum) it is only of persuasive authority.

It's precedent value is subject to the earlier decisions above cited. In THUKU MOUTHIA V. KABERU KIFONO 22, the court, in total disregard of all the commons of justice, principles of equity, good conscience and logic, and with slave-like adherence to statute, sanctioned the eviction of the widow (of the deceased son) by her father-in-law from the land registered in his name although under Kikuyu customary law a son (and hence a wife, in case of his death and until and unless she remarries 23) is entitled to inherit his father's property. She was neither compensated for the coffee trees that her late husband had planted on the land nor did she get the piece of land bought by him but which, in good faith, she allowed her father-in-law to register in his name together with the other family land.

The other leg of the land reform programme was economic-oriented. In order to find a scape-goat for the depletion and deterioration of soil potential in the African areas the Colonial Government and its planners and agronomists regarded African land practices as the problem. Individualization and registration was prescribed as the magic cure. It was assumed that, by itself individualization would promote security to the registered proprietor and
thus make him more enterprising and industrious. The reformers hoped that this would generate credit facilities because banks and other lending institutions would advance loans on the security of the title deeds.

However, as we noted in Chapter Two, fragmentation of holdings in Nyaki Location was extreme. And after consolidation parcels are still small. There is little evidence that the latter economic aspect of the reform programme has made impact in the Location. Out of the 8,250 proprietors of land in the location only about 1% of them, that is 1,009, as of January, 1979, have at one time charged their land for credit facilities. Even where they have done so, for the majority of them, it is usually for a small loan of between Shs. 1,000/- and Shs. 4,000/-. Mainly it is the cream of the rural elite as we shall show below who get more than Shs. 4,000/-. Credit institutions hence widening the gap between the rich and the poor. Although a true reflection of the Government Policy, albeit indirect, of enterprising many akin to that of 19th century Siles in Europe, the Chugur, Munithu, Kithoka/Mwanika, Nkahune, Kiburina, Thuura, Giaki I, Giaki II, and Mulathankari are well-known (and should be) to the Third World-developed world.

Although a person may be registered as the absolute proprietor of a piece of land not many, as evidenced above, are willing to risk getting loans on the security of their parcels. Rain or crops befall the Charger. This may lead to the charges exercising his right of sale and leave the proprietor and his dependents absolutely landless. In addition to this, both the Central and Local Government authorities have failed to introduce follow-up programmes on the importance attached to individualization, tenancy and registration.
It is common practice that when a father dies, his sons, or his brother, Secondly, the original theory that title deeds per se (or to are sufficient for the acquisition of loans has been replaced nothing, "a new formula that effectively excludes all but those who are in a position to offer substantial collaterals"24 such as 120 and unben properties, attachment of salaries and other forms of property. What counts to-day is the social-standing of the foreapplicant (for loan). For example, out of the total chargees may of land in the location over 70% are the Rural Elite owning real and over 8 acres of land in addition to their other jobs. Most are teachers or former-teachers, Councillors or prosperous or rich businessmen. Policy makers ignored the fact that it is the political, economic and social functions of tenure arrangements of and not their structure per se that will revolutionise land use. Consequently, it will be found that few people have been able to get away prosper through the credit and loan institution hence widening the gap between the rich and the poor. And this is the true reflection of the Government Policy, albeit indirectly, of enter into a non-social economy akin to that of 19th century Adam Smith Europe, the consequences of which are well-known (and should be) to the Third World. We estimate in decision affecting, for example, the failure of the land reform programme may also be seen in relation to the sizes of the plots themselves. In the employment of Location. Most parcels range from between 3 and 5 acres each in a least 70%.25 Lending institutions would and do regard such arrangements as economic risks to advance credit on. Hence, they ask for additional securities which the poor peasant does not have as an indirect way of denying him a loan. This causes friction between those who can and do get loans and those who cannot and feel do not get loans. And, as students of history and economics that we well know the ultimate result may be a disastrous Civil War and in a revolution as the rich entrench themselves at the expense of the poor and as the latter seek the overthrow of the former. The Location is a good example of impoverished peasants and these tensions are imminent especially during coffee-pay when only a
few people get "too much".26

It is common practice that when a father dies, his sons, or brothers, or relatives, as the case may be do not report the death to the Registrar because vide 5,101(4) of the MLA. It is common knowledge that only five people can be registered as proprietors of the parcel. According to the inheritance rules embodied in Sections 120 and 121 of the MLA, the Registrar, on notification of death of a proprietor of registered land, is supposed to apply to the Court for the determination of who the heirs of the deceased are. They may be more than five. Sentimental attachment to what is considered ancestral land dictate that it should not be sold. Instead, the heirs will sub-divide it amongst themselves, without notifying the Registrar, to even 1 acre sizes. Hence, parcels become even smaller and too small for any long-term large-scale investment. The problem of fragmentation so much feared by the Colonial Agronomists and planners has given way to an even more acute danger of sub-economic parcellation.

Swynerton may have been right about the ills of customary land tenure but his prescription did not and can not cure its ailments. It could be argued that if there were a diversity of economy, so that people do not entirely depend on land, as is the case in the Location, these problems could be overcome. As it is, the problem is becoming more acute as local disagreements lead to stalemate in decision effecting, for example, schools. Here there is indecision and mismanagement lead to poorasses. These in a competitive economy mean no employment opportunities for the young who tend to remain at home and insist on a share of their inheritance leading to break-down in tenurial arrangements and poor farm yield due to lack of working capital and plot sizes.

On the whole, it may be concluded that individualization of tenure leading to landlessness and its associated problems were a desired result as the Government wished to establish a free, individual enterprise economy in Kenya. Of course, it must also be conceded that there was the political-pay off motivation although as we have shown, in Meru, political pay offs were not the motive due to existing structure of access, land use and definition of boundaries.

FOOT NOTES TO CHAPTER THREE:

All data herein cited for Nyaki Location was gathered from the Land Registers in the Meru Lands Registry, Adjudication Files and Records.


2. This explains, as we saw in Chapter Two why settlers in the Betterment and Resettlement Schemes still retained portions of their traditional lands.

3. The trustee would raise the money but this would be shared out among the other right holders.

4. See infra.

5. This may be explained on basis of size and population figures. Both areas stand in the same extremes in size and population.

6. See Trust Lands Act, Cap. Laws of Kenya No. of

7. My informants insisted that the only way this could have taken place is in those who "stole" land.

8. E.g. Keaga Rural Training Centre.

9. There are six coffee factories in the Location and nurseries, viz. Kagaene, Mumitha, Chugu, Runegone, Mutorai, and Nkurwe. There is, at present one major coffee nursery at Kitui in Kithaka.

10. Meru is patrilineral in descent and the Children are regarded as belonging to the husband.

11. This is the familiar pattern all over rural Kenya.


13(a). See Chap. 2, Supra.

13(b). Social Utility.


.../cont'd. 56
In the last three chapters we saw first the customary landholding among the Meru. Second the policy considerations behind land reform; third the land reform in Nyasiki Location and fourth what individual ownership means in the context of present statute Property Law in Kenya.

This chapter will try to summarise the sum-total consequences of land reform in Kenya and whether this achieved the intended purpose.

Where consolidation has taken place its consequences can be seen in the life and landscape. The traditional nucleo settlement pattern has been displaced by disorganized settlements on each consolidated parcel. The modern houses may be better but the pattern is not.

Instead of the traditional Murosos and Mwotatos these have disappeared to be replaced by a single consolidated parcel. Land in the consolidated areas has become trationalised and is subject to sale (and purchase) to anyone regardless of origin. There are no longer the traditional extra-societal alienation prohibitions. However, sale of such land is a serious matter because of family and kindred needs. However, it is not unusual to find someone who has sold all his land and has been left landless - a clear indication that the Land Control Board does not live up to its expectations of ensuring that everyone has some land.

In theory society will sanction the new system. However, in practice social tradition and the cultural forces will force the scale of the failure of the land laws in Kenya. In this way, the smallholder scheme is seen as a way of economic parity and as others inherit their fathers lands. For example, Swynerton Plan had in mind the...
Thus, the Parent Act, the RLA, is amended to accommodate the
not social relations which are maintained through entrenched social
values. And these are difficult to change overnight. Hence,
the impossibility of realizing the expectations of Swynerton
and other Colonial agronomists.

Although a piece of land may be registered in the name of
X, there may be customary tenants on that land whom X can do
nothing about because tradition and custom permits them to stay
on that land and to inherit it on his death, for example his
prochildren. X may have allotted portions of his land to his sons
or for active uses. If he acquired a loan on the security of that
land he can not put the whole of that loan into productive use
because some parts of the land are not his for active use.

Hence, default of payment may render a whole family landless if
the charges out to exercise his right of sale under 5.77 of the
RLA. This discourages other people from borrowing and the original
new theory of agricultural revolution through individualization of
Tenure is thus rendered unworkable. The reform was initiated with
sho a first a proper grasping of what it clearly entailed. One of then
all wonders why the reform should have been embarked on in the first
preplace if follow-up programmes are not introduced. However, on
the realization of the futility of the RLA the Government was prompted
into sponsoring the Land (Group Representatives) Act, 1968 to
help solve the problem of fragmentation. The avowed purpose of
the Act is to enable groups of people to be registered as propri-
itors of land through representatives, in accordance with the

By 5.8 a Registrar of Group representatives is to be appoin-
ted, and Part III of the Act contains the procedure by which
groups are to meet, adopt a constitution, and select not more than
3 persons to be group representatives. A "group" is defined by
If 5.2 of the Land Adjudication Act in such a way that it is wide-
ning enough to cover every kind of territorial or family grouping

known to customary law. But the use of the phrase belongs

commmunally" is open to objection because is may be interpreted to
mean that there are no distinct claims of each member to that land.
Thus, the Parent Act, the RLA, is amended to accommodate the notion of group ownership(S.11(2A)) hitherto frowned on.

S.7 of the Group Representatives Act provides that if the members of a group resolve, the elected group representatives can apply to be incorporated under the Act; and the Registrar can issue a certificate of incorporation to the group thus enabling them to run ranches and farms like any other statutory corporations.

By S.8 the incorporated group representatives acquire legal personality - power to sue, to be sued and to hold property. S.9 provides for changes in group representation on death, in capacity or retirement.

The Group Representatives Act has been mentioned with emphasis because it represents a change in the orthodox system of registration. It was realized that individualization disrupted farming practices and tenure arrangements. And since the goal was agricultural revolution this Act was meant to maintain existing farm practices add new innovations and thus tremendously facilitate agricultural change. This was a first indication that the land reform programme had its shortcomings. And it is here submitted that if people had been allowed to identify claims and register their lands as groups the process of social and agricultural revolution could have been better co-ordinated, organized and successful.

One mistake that the African Governments make is to assume that human happiness cannot be measured by any other indices than the GNP, and that the maximization of economic return is the sole object of existence. If the actual occupation of registered land does not correspond to the title position recorded in the register, overcrowding on the land has not been relieved by adjudication and registration.

Two persons can hold land as trustees for an indefinite or fluctuating body of persons just like group representatives. This should have been recognized from the outset so as to realize a happier Nation.

If the result of systematic registration and land reform is a shattering of existing social patterns as has happened in Kenya, this may be too high a price to pay for facilitating lending by some banks to some farmers.