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THE PRACTICE IN LAND LAW  
AND SUCCESSION IN KENYA:  
CONSTRAINTS ON THE FULL  
ENJOYMENT OF HUMAN  
RIGHTS

Master thesis  
20 credits (30 ECTS)

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Master's Programme in International Human rights and  
Humanitarian Law

Autumn 2006 Semester

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# Preface

The central importance of land in our society can never be overemphasised. One of the most predominating influences in the socio-political history of Kenya has been the issue related to ownership and right over land. During the struggle for independence, the native who fought against the colonial administration argued that the coloniser was a ‘thief’ who stole their land, giving him a moral right to resist the oppression.<sup>1</sup> Even after independence, land has continued to play a central role in the socio-political organisation of the nation.<sup>2</sup>

Various investigations have been carried out on tenure system and land conveyancing in Kenya. For example, the Law Society of Kenya conducted a research in the land law regime, and the findings of the research committees titled ‘*Land Law Reform in Kenya*’ were consolidated and synthesized in three different volumes launched in July 2003. Other extensive researches have been undertaken in this field, and quite a number of scholarly writings exist.<sup>3</sup>

This thesis now aims to give an interconnection between land laws and the laws on property devolution by succession, with human rights law, as areas of joint application in a jurisprudential discourse.

The study is grounded on two legal regimes: On the land laws, and on the laws of proprietary succession and inheritance, which though distinct, are interrelated in their application to the subject matter of ownership, and passage of (immovable) properties. The laws on land and laws of succession closely correlate with each other, and more so in countries where the economy, largely, depends on land use. Kenya being an agriculture-dependent economy, the ownership and devolution of immovable property determines the polity and the very lifeblood of the economy.

Nalo has argued that that the study of land law is a major study of the political system of a country along the lines of the study of political concepts such as capitalism, communism and socialism.<sup>4</sup> In this regard, the substantive law of land, registration, land contracts, and passage, are not just

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<sup>1</sup> P.N. Nalo, *Land Law and Conveyancing in Kenya*, Heinemann Law Books, 1986, p 1

<sup>2</sup> In this regard, the Ndung’u Commission (discussed in this thesis) noted (in p.xvii): “Land retains a focal point in Kenya’s history. It was the basis upon which the struggle for independence was waged. It has traditionally dictated the pulse of our nationhood. It continues to command a pivotal position in the country’s social, economic, political and legal relations.

<sup>3</sup> Prof. Okoth-Ogendo has written numerous book and articles on land laws from historical and development perspectives; Dr. Patricia Kameri-Mbote has also written Extensively on Gender aspects of land rights and on Land rights and the Environment. This thesis has widely informed by their work and has, in appropriate cases sited them.

<sup>4</sup> Nalo, *op. cit.* p. 2

complementary, but also intertwined, and the study of land law without the study of the modes of conveyancing, is incomplete.

Although the land and succession laws are municipal in nature, they have great ramifications in relation to the fulfilment of national obligations in international human rights law, and are influenced by the provisions pertaining to both civil and political rights as well as economic, social and cultural rights.

The study therefore highlights the interplay between land laws and laws governing succession and human rights dispensation in the application of the legal norms, focusing on how the practices on land ownership influence the enjoyment of human rights in Kenya.

This thesis is arranged in eight parts (numbered consecutively from 1). In the first part, it provides as background information into this research, including the justification and the methodology used.

The second part analyses the human rights framework that is applicable to situations of devolution and passage of property. This is done both in terms of the relevant international instruments, as well as in terms of the Kenyan laws.

The third part looks into the crises of land and succession in Kenya that has bedevilled the nation and created a situation of conflict concerning the ownership of land. The thesis looks into the recurrent land crises in light of the historical causes that have remained unresolved and often creates communal conflicts. The problems of squatters, land grabbing, and the environmental conflicts on land use are highlighted in this part.

The thesis goes then in the fourth part to analyse the legal framework on land in Kenya as has been provided for in the Constitution and other statutes; on how law on easement and rules of adverse possession apply on passage of land; and the customary law practice. A critique of sum total of these applicable rules and the legal tenure thus established in the country and the operation of land laws in passage of property is offered.

In the fifth part, the study looks at the laws of succession and the passage of property by inheritance as are applied both testate and interstate under the statutes and in customary/personal laws

The sixth part reveals the jurisprudence of how the court has over time, applied land laws in inheritance cases. It looks at how marriage influences succession decisions, the importance of procedural aspects in succession proceedings, and how the courts have viewed their role in the protection of the property of the deceased. The study also highlights the complexity arising over the issue of ancestral land in the context of registration of ownership under the Registered Land Act (RLA).

In the seventh part, the thesis discusses the rights of particular peoples and groups in the society that have been prone to violation of their ownership

rights and claims over land by the shortcomings in the system. The groups include women, children, people related through adoption, the poor, the uneducated, the minorities and the indigenous claimants over certain lands.

Finally, in the eighth part, the application of human rights in aspects of land law and succession in relation to the international standards is analysed. The section offers some observations and recommendations in the form of criticism on the shortcoming of the existing legal regime and the problems associated with the law and customs, and biased societal attitudes. It also offers some recommendations for changes and improvement to the legal regime on the land policy and on passage of property.

# Acknowledgements

I would like to express my sincere appreciation to the many people who contributed in diverse ways to make my participation in the Human Rights programme possible, and as enjoyable as it was. I cannot begin to list them all in this section, but nevertheless, their contributions were immense.

Foremost, my gratitude goes to the Raoul Wallenberg Institute and SIDA for the opportunity to come to Sweden, by availing me with admission and a scholarship to the Masters Programme.

I remain most indebted to my supervisor Dr. Christina Johnsson, for her guidance, motivation and encouragement that enabled me to turn an idea into the work that I have compiled; although I remain fully responsible for all the errors and shortcomings reflected in the document.

My gratitude also goes to the Kenya National Commission on Human Rights who were so willing to avail some materials in their possession within a short notice every time I made the request. The librarians at the RWI were most willing to assist in any way possible, and for that I am most grateful.

A lot of thanks to Ms. Sindiso Kankasa, for graciously accepting to oppose my work, and for the encouragement she has rendered to me through the whole process. Sindi, I surely value your friendship

My appreciation to all my classmates who turned an academic formality into an interesting endeavour and I wish I had the space to acknowledge you all. I wish though to specifically thank Mssrs. Pacharo Kayira and Ronald Kakungulu Mayambala for the assistance they rendered and their willingness to offer suggestions in places where I felt stuck.

Lastly, to my family who have supported me through, God bless you, and more so to my sister Betty, to whom I say, 'you are the best.'

# Abbreviations

ACHPR	African Charter on Human and Peoples' Rights
CA	Court of Appeal of Kenya
CAT	Convention against Torture and other Cruel Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of all forms of Discrimination against Women
CPA	The Civil Procedure Act
Cr.P.C	Criminal Procedure Code
E.g.	For example
HC	High Court of Kenya
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social & Cultural Rights
ITPA	Indian Transfer of Properties Act
KANU	Kenya Africa National Union
KLA	Kenya Land Alliance
KLR	Kenya Law Reports
KNCHR	Kenya National Commission on Human Rights
KWS	Kenya Wildlife Service
LAA	Land Adjudication Act
LACT	Land Acquisition Compensation Tribunal
LCA	Land Consolidation Act
LCB	Land Control Board
LSA	Law of succession Act
NGOs	Non-Governmental Organisations
RLA	Registered Land Act, (Cap 300 of the laws of Kenya)
UDHR	Universal Declaration of Human Rights

# 1 Introduction

*You ask if we own the land . . . How can you own that which will outlive you? Only the race owns the land because only the race lives forever. To claim a piece of land is a birthright of every man. The lowly animals claim their place; how much more man? Man is born to live.*<sup>5</sup>

## 1.1 Background and Scope of the Study

Population distribution in Kenya is influenced by a number of factors, among them the physical, historical, pattern of economic development and policies pertaining to land settlement. Population density varies considerably, with areas with large portions of arable land (constituting only 17.5% of the land mass in the country) in Western, Nyanza and Central provinces having a high population density (of over 230 persons per square kilometre), while arid areas in the North Eastern province have a low population density of only about three persons per square kilometre.<sup>6</sup>

In the arable areas, the main source of livelihood for the community is cultivation of crops, while in the less fertile places, the communities occupying these tracts of land; falling mostly in the northern parts of the country and the savannah plains of the Maasai-land have had their main source of livelihood over the centuries from the rearing of animals.

An increase in population compounded with exigencies from international reorganisation,<sup>7</sup> encouraged creation of structures for extensive private ownership. This intensified the scramble for land that disregarded the rights of the marginalised groups in the community, with effects being felt in both the arable parts of the country, as well as in the arid and the semi-arid areas.

Beyond the inter-communal competition for property, acrimony has arisen because of competition within the family setting. The laws, the culture and the practice, have tended to act adverse to the rights of the vulnerable

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<sup>5</sup> Kapunan, J., separate opinion, in *Isagani Cruz & Cesar Europa v Secretary of Environment and Natural Resources, et. al.*, G.R. No. 135385, (Dec. 2000)

<sup>6</sup> According to the 1989 Population Census; cited in Kenya's National Council for Population and Development, National Population Policy for Sustainable Development, Sessional paper No. 1 of 2000

<sup>7</sup> The reorganisations were facilitated by both international order under the Structural adjustment program pushed on by the Bretton Woods institutions and the political fluidity associated with legal reforms from the single party era to political pluralism and constitutional reform debate that is still underway in Kenya. See generally, Gurushri Swami, 'Kenya: Structural Adjustments in 1980s' *World Bank Policy working research paper* 1238. This thesis refers time and again to the reform process in the constitution as a basis for transforming the institutions of human rights.

groups, and social structures have been formulated adversely towards those who cannot fight for themselves.

The Scramble for land has therefore taken the diverse nature; being articulated under gender discourses as well as under communal rights articles. This has pitted democracy against the right of those who lack the numbers to gain a voice, and in other cases, against those who have been deliberately disempowered in order to silence their voices.

Sara Berry has noted that, “competition over land has followed myriad social fault lines, pitting national and local elites against ordinary citizens, neighbour against neighbour, kinsman against kinsman, and husbands against wives.”<sup>8</sup>

Thus, the tenure system on land in Kenya, which depends on government policies as well as on the cultural aspects and the geopolitical settlement of these areas, has given rise to both a jurisprudential as well as sociological concerns.

## 1.2 Aim of the Study and Methodology

More than seven Acts of parliament are directly applicable to the field of land law alongside other statutes that are incidentally applied thereto.<sup>9</sup> The substantive land law is found in two statutes, while the adjectival laws are found in five different land related statutes and in other Acts of parliament that are not directly applicable to the field, though containing stipulation affecting land and also in the customary law of various tribes in Kenya. Succession on the other hand, is governed under various legal regimes: both statutory, under common law, and under customary practices.

Thus practices on tenure and passage of properties under all these laws are diverse, and in most case adverse to each other, creating non-uniform, segmented and sometimes-conflicting jurisprudence.

The land law and laws on succession are fragmented as applied to different social groups -both religious and cultural. Therefore for example, in inheritance matters, the Succession Act, the main Statute governing this field is not applicable to Muslims,<sup>10</sup> and in relation to customary law, the practices differ a lot as applied by the different tribal and cultural communities.<sup>11</sup>

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<sup>8</sup> Sara Berry, “*Debating the Land question in Africa*” 2002, Society for Comparative Study of Society and History, p. 639

<sup>9</sup> These laws are highlighted in depth in Chapters 4 and 5 of this thesis

<sup>10</sup> According to section 2

<sup>11</sup> Kenya has over 40 tribal and cultural groups, with many more subgroups, which in many instances differ in customs and cultural norms, which they perceive as law.

Eugene Cotran has noted that the heritage of colonial rule on these laws is legal confusion as “within the African State, are numerous ethnic groups each with its own, still unwritten customary law.”<sup>12</sup> To put all these into perspective, it therefore requires a study, which is intended at analyzing and highlighting the various inconsistencies and thereby creating a research that would be a reference point on discussions on how to reduce these inconsistencies.

This thesis focuses on laws controlling land tenure, and the laws and practice of succession and inheritance, by analysing the human rights implications in the application of these regimes. On the background of international law, it aims at synthesising the existing diverse and fragmented material, undertaking an analysis of the laws and practices, and how they relate to human rights.

It is hoped that, from human rights approach, the study will highlight on the viability of harmonial interpretation of these laws to overcome some of the system’s shortcomings; and where possible make necessary and tenable suggestions for reforms that could be undertaken to realize conformity to international law and to the people’s aspirations.

This study will basically be library oriented. Textbooks, journals and articles on the subject will be of primary importance as will be case laws of respective courts. Important also will be global and regional treaties, charters, conventions, protocols and declarations in the field of human rights. Magazines, newspaper reports and journals will also be used. Some of the materials used will be in raw form, that being unpublished.

### **1.3 Justification**

At present, Kenya is in transition. With legal reforms at centre-stage, a comprehensive constitutional overhaul is underway. When the new order comes into place, new interpretation of the existing laws would suffice.

There is also currently global movement towards engendering human rights practices in all systems to ensure that there is a human rights approach to executive, legislative and judicial activities in all States. The country is therefore at the moment, a fertile ground for such implementation and a comprehensive research and scholarly out-look on these issues would be timely to direct the trend of the legal reforms now underway.

Various researches have been undertaken in this field and there are quite a number of texts, which highlight the rights of succession and land laws as

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<sup>12</sup> Eugene Cotran, Kenya. Vol. 1, *The Law of Marriage and Divorce*, Vol. II; *The Law of Succession*, Restatement of African Laws, 1968-9, Sweet and Maxwell

aspects of human rights. Nevertheless, in most cases, these studies are thematic, intended only on asserting certain perspective.<sup>13</sup>

Other materials are short and transitional, aimed at creating a linkage between the law of succession and Laws governing proprietary rights, such as the transfer of property law, public trustee laws and land law, in thematic application to certain discourses. Thus, there is a shortage of a comprehensive research undertaken on the field of succession on a human rights approach apart from those relating to gender issues; and to a smaller extend, on the rights of the child and minority rights in Kenya.

This research, cannot realistically aim to cover all these aspects within the limits of this thesis. However, it is my wish that this discourse will create a background for further future research, that will comprehensively cover this area.

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<sup>13</sup> For example writings are found highlighting women rights perspectives, the Minority rights, and indigenous rights without interlinking them in a single context

# 2 Human Rights Framework in the Law

## 2.1 Introduction

Land is not only a basic component of human activity but is also, in most cases, the most important means of livelihood. It is the foundation for shelter, food, work and a sense of nationhood. Therefore, the passage and transfer of land defines the rights of all the sectors of the society to live and to benefit from this limited resource.

As the population has grown, so has the desire for more land in Kenya. Coupled with the instability in the economic system, the value for land and real estate has shot up with the passage of time. This has led to subdivision and fragmentation of land holdings throughout the country.<sup>14</sup>

In these subdivided land holdings, the productive efficiency have declined because of reduction in economy of scale resulting from the reduction of the size of per capita holding, and among the peasant population poverty has been on the increase. Unscrupulous groups of people have taken advantage of this instability to con innocent people and dispose off public property to the unsuspecting individuals, further aggravating the land problem.<sup>15</sup>

The lack of a comprehensive policy framework within the government has not helped either, creating a cycle of human rights violation titillating into widespread poverty and squalor in the country.

This state of affairs has been detrimental to the enforcement of human rights and a just legal order in the country. The rights of women; children; minorities; backward communities; the illiterate population and of other ordinary citizens have been relegated to the backbench, as the country runs on crisis management, rather than progressive thinking.

Kenya now seems to be perpetually inconsistent with its international obligations, and this has reflected on the rate of economic growth and social welfare of the masses, the few rich people in the country continue to control most of the resources, while the poor live in absolute squalor. This condition

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<sup>14</sup> For general overview see Angelique Haugerud, 'Land Tenure and Agrarian Change in Kenya,' *Journal of the International African Institute*, Vol. 59, No. 1, Access, Control and Use of Resources in African Agriculture (1989), pp. 61-90. See also Bilsborrow, RE; Okoth-Ogendo, HWO, 'Population-driven changes in land use in developing countries,' *Ambio. Stockholm [AMBIO.]*, Vol. 21, no. 1, pp. 37-45. 1992.

<sup>15</sup> Ekobom *et. Al.*, Sustainable development based on agriculture attainable in Kenya? A multidisciplinary case study of Murang'a district, *Land Degradation & Development* 2001 Vol. 12:5 Pp. 435-447 at 436

runs contrary to the position under the international framework that Kenya has endeavoured to uphold through the treaty-making process.

## 2.2 The International Framework and Human Rights Dispensation

Kenya is state party to various international human rights instruments that oblige it to uphold certain core human rights standards, and if possible ensure that the citizens, and other persons resident in the country, enjoy more rights beyond those provided for in these treaties.<sup>16</sup>

Among the instrument it has acceded to, include the International Covenant on Civil and political Rights (hereinafter referred to as ICCPR),<sup>17</sup> the International Covenant on Economic Social and Cultural Rights (ICESCR),<sup>18</sup> and the Covenant for the Elimination of Discrimination against Women (CEDAW).<sup>19</sup> It has also acceded to the Convention on the Rights of the Child (CRC),<sup>20</sup> and to the Convention against Torture, Inhuman and Degrading Treatment or Punishment (CAT).<sup>21</sup>

Being a member of the African Union; AU (formerly Organisation of African Union), Kenya is a party to the African Charter on Human and Peoples' Rights (hereinafter referred to as ACHPR or the African Charter).<sup>22</sup> It has acceded to the African Charter on the Rights and Welfare of the Child,<sup>23</sup> and has signed the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa,<sup>24</sup> and the African Union Convention on Preventing and Combating Corruption.<sup>25</sup>

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<sup>16</sup> E.g., under the wording of ICCPR in art 5, the treaty cannot be interpreted to imply that it is limiting the existing rights or those rights that are being enjoyed to a greater extent than recorded in the text.

<sup>17</sup> Kenya acceded to ICCPR (adopted by the General Assembly resolution 2200A (XXI) of 16 December 1966) on 1/5/1972

<sup>18</sup> Adopted by General Assembly resolution 2200A (XXI) of 16 December 1966. Kenya acceded to the instrument on 1/5/1972

<sup>19</sup> Deposited the instrument of accession on 9/3/1984

<sup>20</sup> Adopted by General Assembly resolution 39/46, (annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984) and entered into force June 26, 1987. Kenya signed the instrument on 26/1/1990 and acceded to it on 30/7/1990

<sup>21</sup> Kenya acceded to CAT on 21/2/1997

<sup>22</sup> (Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986) For status of ratifications to African treaties, see AU website at [www.africa-union.org/root/AU/Documents/Treaties/treaties.htm](http://www.africa-union.org/root/AU/Documents/Treaties/treaties.htm) last visited on 20/11/2006

<sup>23</sup> OAU Doc. CAB/LEG/24.9/49 (1990) entered into force Nov. 29, 1999. Kenya ratified it on 25/07/2000 and deposited the instruments of ratification at the depository on 10/08/2000

<sup>24</sup> Signed on 16/12/2003

<sup>25</sup> Signed in 2003

Other instruments of relevance to the country include the non-binding soft laws such as the Universal Declaration of Human Rights (hereinafter referred to as UDHR),<sup>26</sup> the Declaration on Social Progress and Development,<sup>27</sup> Proclamation of Teheran<sup>28</sup> and the Declaration on the Right to Development.<sup>29</sup> Although these declarations are not binding, it is universally agreed that they are important in enumeration of the law and as guiding principles to the “common standard of achievement” that the States aim for.<sup>30</sup>

From these texts, we see various rights enforceable against the states as entitlements to the people; they include the right to human dignity, the rights associated with property ownership; freedom from discrimination, freedom from inhuman and degrading treatment, equal protection of the law, freedom pertaining to cultural life, and the right to redress against violation of individuals’ rights.

With time, there has also been a move to assert the right to development by the people as part of the basic rights. Although this right has yet to gain adequate support for its enforcement through international accountability under a binding treaty, it is widely accepted as a fundamental right.<sup>31</sup> As declared under the declaration on the right to Development, it is widely accepted that:

The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.<sup>32</sup>

All human rights are also associated with the issue of human dignity that forms the base upon which all other human rights are protected. The UDHR notes this in the preamble and states that: “[the] recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”

In fact, the centrality of human dignity has a foundation in the UN charter itself which acknowledged it and endeavoured: “To reaffirm faith in

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<sup>26</sup> Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948

<sup>27</sup> Proclaimed by General Assembly resolution 2542 (XXIV) of 11 December 1969

<sup>28</sup> Proclaimed by the International Conference on Human Rights at Teheran on 13 May 1968

<sup>29</sup> Adopted by General Assembly resolution 41/128 of 4 December 1986

<sup>30</sup> See for example the preamble of the UDHR

<sup>31</sup> See generally Arjun Sengupta, ‘The Human Right to Development,’ *Oxford Development Studies*, Vol. 32, No. 2, June 2004; Arjun Sengupta, ‘On the Theory and Practice of the Right to Development,’ *Human Rights Quarterly* 24 (2002) 837–889, the Johns Hopkins University Press

<sup>32</sup> See *The Declaration on the Right to Development*, Adopted by General Assembly resolution 41/128 of 4 December 1986

fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women...”

The same approach is seen from the texts of the ICCPR and ICESCR.<sup>33</sup> Therefore, any framework of law in a country has to take account of the dignity of its people, that is derived from the way the government and its machinery treat its population and on the way the laws are framed to accord protection and access to welfare by all individuals in the country.

The ACHPR in regards to human dignity provides in article 5 that:

“Every individual shall have a right to the respect of dignity inherent in a human being and to the recognition of his legal status. All form of exploitation and degradation of man, particularly slavery, slave trade, torture, inhuman or degrading punishment and treatment shall be prohibited.”

The prohibition on inhuman and degrading treatment has relevance in the way even those perceived to be on the wrong side of the law are treated. In the context of Kenya for example, the way that evictions are carried out against those perceived to be in illegal possession of property would in most cases be perceived to be inhuman, sometimes bordering on torture itself; especially where police use force on the evictees and burn their homes in order to force the evictees out. This generally infringes on the right against torture, inhuman and degrading treatment.<sup>34</sup>

Under the UDHR article 5 provides that *no person* shall be subjected to torture or cruel or degrading treatment or punishment. The ICCPR directly codifies this provision under article 7, while CAT forms the basic text in the proscription of inhuman and degrading treatment is made.

Article 16 of CAT provides that each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishments which do not amount to torture as defined in article I, further extending the application of the Convention.

Another right visible within international legal framework is the right to own property. The UDHR, under article 17, provides that everyone has the right to own property alone as well as in association with others, and that no one should be arbitrarily deprived of his property.

This right is not without controversy, and because of disagreements on the framework along which the right would operate; it did not find mention in the ICCPR or in the ICESCR. However, it should be noted that the main contention over this right does not come from arguments as to its existence. It normally arises because of conflicting ideologies associated with arguments on the permissible limitation on the right of property ownership

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<sup>33</sup> From the preamble of both documents

<sup>34</sup> This is discussed under the topic on Eviction in chapter III of this thesis

by the state.<sup>35</sup> Moreover, other treaties and declarations and the regional human rights conventions of general character have included this right in some form.<sup>36</sup> Thus, in the regional context, for example, the African Charter (ACHPR) provides in article 14 that the right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.

In non-discrimination clauses of treaties, the right to property ownership is subject to the fundamental rule of human rights concerning equal enjoyment of rights without distinction. This can be had from article 26 of the ICCPR, which though not mentioning property, provides for the enjoyment of all rights without distinction.

The ownership of property also has specific mention in ICERD under article 5, which stipulates for the right to “own property alone as well as with others” alongside “the right to inherit,” while CEDAW also asserts for the right to both spouses with regards to ownership, acquisition, management, administration, enjoyment and disposition of property under article 16.”

Culture creates an important issue of discourse in the enjoyment of fundamental rights. The right to cultural lifestyle as provided by the texts of these conventions at times seems to conflict with other provisions when taken to be allowing some cultural behaviours which contradict other rights.

The UDHR articulates this right, stating that everyone has the right to freely participate in cultural life.<sup>37</sup> This was codified later under article 15 of the ICESCR. The right is also to be found also in article 17 and 29 of the African Charter, which creates a duty to the people to preserve the African cultural traditions.

The right associated with redress for violation of individual’s rights under article 8 of the UDHR is of great significance in human rights discourse. This is the right to “effective remedy” for acts violating the fundamental rights. Article 2(3) of the ICCPR, contains a codification of the right to a remedy without any distinction, while the African Charter in article 7 provide that every individual shall have a right for “his cause to be heard.”

In Article 26, the African Charter affirms a duty upon the state to guarantee the independence of courts and to allow the establishment and improvement of appropriate national institutions for the promotion and protection of the

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<sup>35</sup> See G Alfredsson and A. Eide, (Eds.), *The Universal Declaration of Human Rights: A Common Standard of Achievement*, 1999, Martinus Nijhoff Publishers, p359

<sup>36</sup> Ibid, p 360

<sup>37</sup> Under article 27

rights.<sup>38</sup> The right can also be associated with that on equality before the law and equal protection of the law without distinction.<sup>39</sup>

Nevertheless, it has to be noted that this right does not make all difference in treatment discriminatory. Discriminations based on reasonable and objective criteria do not amount to prohibited discrimination in law.<sup>40</sup> Thus in *L.G Danning v Netherlands*, the Human Rights Committee was not persuaded that the distinction made by the legislation of the Netherlands between married and unmarried couples amounted to discriminatory treatment, because it was based on an objective and reasonable criteria.<sup>41</sup>

Another right of relevance to this discussion involve the right to social security. In the UDHR, it is provided that:

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

The ICESCR, enjoins the States Parties to recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.<sup>42</sup> States are therefore obliged to take appropriate steps to ensure the realization of adequate standard of living, individually and through international co-operation based on free consent of these states. These measures include specific programmes, which are needed to improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources.

From these international and regional texts, it is seen that under these treaty obligations, the states bind themselves to take legislative, judicial and executive measures and formulate policy frameworks that would ensure that all individuals enjoy all rights to the maximum extent.<sup>43</sup>

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<sup>38</sup> See Erik Mose, Article 8, in *op. cit.*, G Alfredsson & A Eide (Eds.), *The Universal Declaration of Human Rights: A Common Standard of Achievement*, at p 201-2

<sup>39</sup> See E.g., art 6 & 7 of the UDHR; art. 16 of ICCPR

<sup>40</sup> According to *F.H Zwaande Vries v. Netherlands*; Human Rights Committee, case 182/1984

<sup>41</sup> HRC Case No 180/1984, Annex VIII, Section C, HRC 1987 Report

<sup>42</sup> Art. 11

<sup>43</sup> See e.g. Article 2 of ICCPR and art 2 of ICESCR. States are enjoined to undertake legislative, judicial and other measures to enforce and ensure maximum enjoyment of rights.

Such policies in land rights and rights of acquisition of property are essential; to ensure maximum enjoyment of all human rights, especially given the agrarian pattern that has so far controlled the economy of Kenya, which is a state party to these treaties.

## **2.3 The Human Rights Framework in National Law**

The Constitutional framework of human rights in Kenya can be assessed on two fronts: First, it can be analysed based on the current constitution, which has been in force since independence in 1963, with the amendments made to it from time to time. It can also be highlighted under the Constitutional review process that has been ongoing. This process coalesces around the majority opinion that the present constitution is inadequate to facilitate progress, development and enjoyment of human rights.<sup>44</sup>

In the current constitution, chapter V provides for the Protection of Fundamental Rights and Freedoms of the Individuals in the Country. Under which every person in Kenya is entitled to the fundamental rights and freedoms of the individual... Whatever his race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest.

This chapter provides for the rights to life, liberty, security of the person and the protection of the law, and for the protection for the privacy of home and other property and from deprivation of property without compensation. Section 75(I) of the constitution further guarantees land rights, and provides that, no individual shall be deprived of his/her rights over land without a justifiable cause.

However under this old Constitution, land acquisition is permissible for the purposes of defence, public safety, public order, public morality, public health, town and country planning and for the development and utilization of any property in such manner as to promote public benefits.

The current constitution can be criticised for a number of shortcomings visible from its very text:

First, the sweeping exclusion clauses has made it possible that the state can for any reason violate these rights with consequent impunity. The executive arm of the government has been empowered so much so that the power of the presidency is presumed to be coextensive to the powers of the

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<sup>44</sup> See Report of a Fact-Finding Mission of The Kituo Cha Katiba on the Progress of the Constitutional Review Exercise in Kenya, at <http://www.kituoachakatiba.co.ug/kenyap.htm>, last visited on Nov. 2, 2006

constitution itself; and nothing done by the president can thus be considered unconstitutional.

Second, the construction gives some of the rights in one chapter and takes them away by the provision of another chapter. Property rights are encumbered by the provisions that parliament may make laws relating to land tenure system, which would not be interpreted as being confliction with the constitution.

Further, the text also sanctifies the applications of personal law to certain groups. This has had the effect of legalising some discriminatory practices against some persons and groups.<sup>45</sup>

These shortcomings necessitated to a great extend the scramble for constitutional review process that earnestly began with the creation of a Constitutional Review Commission, mandated to get the view of the citizens and facilitate a comprehensive overhaul of the current constitution.<sup>46</sup>

The process resulted into two drafts: The Draft Constitution of Kenya, of March 15 2004 (commonly known as the Bomas Draft, named after the venue where the process took place), that was adopted by the Constitutional Conference. This was later modified by the Attorney General under a resolution of parliament and presented for a referendum (and is commonly referred to as Wako Drafts, named after the Attorney General)

Under the Bomas Draft, chapter 6 contained the bill of human rights. Article 28 indicated that the bill of rights was an integral part of Kenya's democratic State; being the framework for social, economic and cultural policies. The draft stated that the purpose of the recognition and protection of human rights is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings. Accordingly, the rights and freedoms set out in the constitution, belong to each individual and are not granted by the State; and do not exclude other rights not mentioned but recognised or conferred by law.

The bill provided for specific rights including the right to life,<sup>47</sup> the right to equality (entailing equality before the law, equal protection and benefit of the law, and equality in opportunity),<sup>48</sup> the right to freedom from discrimination,<sup>49</sup> gender rights,<sup>50</sup> and right to human dignity.<sup>51</sup>

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<sup>45</sup> The critique of these shortfalls in the constitutional order is offered in depth under chapter 8 of this thesis.

<sup>46</sup> The process was sanctioned by parliament under the Kenya Review Act (Chapter 3A of the Laws of Kenya) (CKRC Act or Cap 3A).

<sup>47</sup> UDHR art., 34

<sup>48</sup> Art. 35

<sup>49</sup> Art. 36

<sup>50</sup> Art. 37

<sup>51</sup> Art. 44

The rights of specific groups in the society were also highlighted. These included the rights of women; the older members of society; children, the minorities and marginalised communities.

Right of ownership and specifically on land were not included on the bill of rights, apart from the right to privacy, which provided for a right against the seizure of possession. However, these land rights were catered for in chapter 5, which provided for the land tenure systems allowing for public, communal and private ownership of land.

The framework under this bill was largely unaltered in the Wako draft that was submitted for the referendum. However, as a point of diversion, the Wako bill included the right to ownership of property in the bill of rights. Under article 58, it stipulated that every person has a right to acquire and own property in any part of Kenya, either individually or in association with others.

Parliament could therefore not enact any legislation that would permit the State, or any person to arbitrarily deprive a person of property of any description; or any interest in, or right over, such property; or limit or in any way restrict the enjoyment of any right, and the State would not be empowered to deprive a person of property unless that deprivation resulted from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with the constitution.

Acquisition of land or rights to land could only be carried out under the provisions of an Act of Parliament, that would require the prompt payment in full, of a just compensation to the person, before the property was taken; and also allow any person who has an interest in or right over that property, access to a court of law. The draft further enshrined a duty on the parliament to make provision for compensation to be paid to occupants in good faith of the land acquired, who may not hold title to that land.

The success of the human rights framework has however yielded little benefit to the common person so far. The new constitutional dispensation is yet to be adopted while the old one has coexisted with some vital aspects of crises, which the lack of clarity in that framework has sustained.

# 3 The Crises on Land

## 3.1 Introduction

The current constitution in Kenya has inadequate protective machinery to ensure the protection of rights associated with land. Unfortunately, a new constitutional dispensation aimed at the rectification of the existing imbalances has not yet been achieved.<sup>52</sup>

The land problem in Kenya itself is not of recent genesis. It has a background on historical injustices and more recently on acts of corruption and unjust enrichment that were undertaken by the ruling elites. These put a lot of pressure on the land and a spotlight on the government and its capacity to enforce and ensure adherence to democratic and human rights norms.

This chapter will look at some of the crises associated with land that have existed, and some of which persist to date that have hindered a just framework for the full enjoyment of human rights in the country.

These crises have been articulated in reports submitted by two Commissions of Inquiry that were appointed to assess certain aspects and practices on land that are critical to the country. The findings of these Commissions will be highlighted at appropriate places in this section.

## 3.2 The Historical Background

The land crisis affecting most of Africa is so serious that some analysts have christened it 'The Second Scramble for Africa.'<sup>53</sup> This crisis is rooted in a colonial past that displaced natives from prime arable land, gave it to settler farmers, and pushed the locals into tribal reserves. In the process, existing communal land ownership systems were disrupted and replaced with the western model of private ownership. In some countries like Kenya, the struggle to reclaim land from colonialists turned into full-blown crusades for independence.

However, the turning point in the legal practice, which helped entrench the current crises, probably came during the colonial period when the white settler turned over the judicial work to senior African men, charged with

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<sup>52</sup> Kenya went to a referendum over the Wako Draft Constitution that was rejected. In the referendum, those who campaigned against the Wako Draft were supporters of the Bomas Draft, both of which had elaborate land ownership and passage rights.

<sup>53</sup> See e.g. Robin Palmer, *THE LAND PROBLEMS IN AFRICA: THE SECOND SCRAMBLE*, Published in *New People*, May 1998

adjudicating according to ‘customary law’ of the respective community involved.

Fredrick Lugard once wrote,

If the aim of the British colonizers was to civilise Africans and to devote thoughts to those matters, which most intimately affected their daily life and happiness, there are few of greater importance than the constitution of (these) native courts.<sup>54</sup>

He argued that only from native courts, employing customary law was it possible to create rudiments of law and order, to inculcate a sense of responsibility, and evolve among a primitive community some sense of discipline and respect for authority.<sup>55</sup>

This was indeed an epitome of the colonial mentality on the importance of the regime they created, though their devotion was not on the happiness of the native people, but to the expedience of the administration, taking not into account the needs of the locals.

In order to make colonial rule work, with only ‘a thin white line’ of European administrators, African ideas of customs and law had to be incorporated into the new state system, providing for ideological and financial underpinnings for the colonial rule. Thus African courts were created for the natives. These were hybrid beings; created and backed by the British government, fully African in staff, employing a mixture of customary and colonial laws. Senior African men; elders and chiefs were appointed by the colonial administration to administrate over the traditional courts, using African customary law.<sup>56</sup>

The senior men went on to invent customs that expanded their powers in respect to matters relating to land, matrimonial causes, and succession to property. The staff qualification for the arbiters was hinged on them being traditional and hence knowledgeable on customary law, with little formal education requirement. Nevertheless, little by little, education also became an important aspect, but only requiring the grasp of Swahili as the language of the court, even as the knowledge of the customs retained its centrality in the selection.

The hybrid system of the court had three adverse impacts on the law. First, it created the confusion on the land tenure it envisaged, by retaining the traditional tenure under customary law while also imposing a norm of individual ownership, governed under statutory law.

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<sup>54</sup> Lord Lugard, “The Dual Mandate in British Tropical Africa, London, 1965 (1922)), pp. 547-50.

<sup>55</sup> See Brett L. Shadle, “Changing Traditions to Meet Current Altering Conditions: Customary Law, African Courts and the Rejection of Codification in Kenya, 1930-1960,” *Journal of African History*, 40 (1999), pp. 411-431, at p 411

<sup>56</sup> See Karen Fields, *Revival and Rebellion in Colonial Central Africa*, (Portsmouth, NH, 1997), in Ch. 1 and 2

Secondly, the system of appointment of arbiters for these native courts was faulty. It retained a tradition where only men were positioned in power to be the 'judges' of the customs, without any essence of gender sensitivity. This ensured that the colonial bequest retained the gender stereotypes that suppressed the position of women

The education qualifications for the arbiters were also lacking, giving rise to a situation where the appointed persons had the power to themselves determine what the law was, as customary law itself remained unwritten and thus within the discretion of the elders to decide what they thought it was.

### **3.3 The Problem of Squatters**

On analysis of the statutes, the genesis of formal law to govern land rights in Kenya began with the Crown Land Ordinance (1902), which gave the Commissioner of Lands power to alienate crown land by the way of a sale or by the grant of a lease for 99 years. The Commissioner could also grant licences for temporary occupation. This marked the starting point of the trend on land dispossession against the natives who were pushed into native reserves to make room for the colonial settlers.

The Government Land Act (GLA), (1915) which was enacted to replace the Crown Land ordinance, further extended the power of the Commissioner of Lands, who could now lease the land within townships, for a period of 99 years and the agricultural areas for 999 years. He could also convert the 999 years leases into freeholds.

Under the ordinance of 1902 and the 1915 Act, the Commissioner had power to alienate or grant leases of areas comprising of African villages or settlement. And although it was stipulated that he could only sell or lease such areas subject to the rights of the natives in actual occupation, where the land occupied by the Africans was alienated to the settlers, peanut compensation was made, or as an alternative, they were allowed to stay on, thereby providing labour as squatters.<sup>57</sup> Many natives were thereby dispossessed of their land without compensation either through administrative or "accidental" omissions, or through their refusal to accept these compensations as a means of resistance. (This characterised the greater part of the Mau Mau resistance.)<sup>58</sup>

After independence, the consolidation of the mixed tenure system into the law formalized the effect of irregular settlement, with unrecognised title for many people disentitled through colonialism being sanctified by the new system. Those who occupied some parcels of land were not registered under any law as owners, even as the land they occupied were consolidated and

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<sup>57</sup> Nalo *op. cit.*, at p. 42

<sup>58</sup> *Ibid.*

registered under specific titles or to specific individuals. This made the settlement of such people illegal and enhanced the problem of squatters.

In the independent State, the problem was compounded by widespread poverty that forced those people who could not pay the government for the land set aside for settlement schemes to occupy land that was unoccupied after the departure of the settlers. Some of this land was sold to new owners who did not settle in it or put it into use, making it prone to occupation by squatter.

To date, this problem still confounds the government as it tries to strike a balance in the system of tenancy. For example, recently, the president warned absentee landlords at the Kenyan coast that they risk having their land repossessed and distributed to the landless, unless it was put into productive use.<sup>59</sup> This stimulated some landless people to invade and occupy parcels of land believed to belong to absentee landlords.<sup>60</sup>

### 3.4 Evictions

Since squatters lack the title to land they occupy, they are liable for eviction by the registered owners. When such evictions take place, the results are destruction of property and people's development initiatives and displacement as well as interference with the efforts of well-intentioned development agencies and institutions.<sup>61</sup>

During most evictions, the evictees are given insufficient time to remove their shelter or to appeal against such actions; legal notices are rarely given before the eviction is carried out and normally, the bulldozers are brought abruptly, and often at inconvenient hours, and property and building materials are destroyed.

As a result of this style of evictions, lives are lost, children are forced to miss school, livelihoods are destroyed, homes are razed to the ground, and people are forced out onto the streets, sometime with no compensation offered even when it is found that the eviction was unjustified. In the few instances where offer for resettlement is made, the available relocation sites are normally far from the central business areas, taking residents away from their main source of income and their ancestral land (to which culturally, people have immense attachment to).

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<sup>59</sup> This was contained in the Official Website of State House, at [www.statehousekenya.go.ke](http://www.statehousekenya.go.ke) last visited on 12/8/2006 in a news item titled "We will deal with absentee landlords declares President Kibaki"

<sup>60</sup> Ibrahim N. Mwachane, Kenya: *Land Invaders Involved in Speculative Squatting*, The East African (Nairobi), posted to the web on September 19, 2006

<sup>61</sup> The author in this section relies heavily on his experience as observed in the cases of evictions carried out in Kenya, mostly between 2003-2006

In general, it is observed that the perpetrators of evictions are mostly local authorities, private developers, private organizations, public institutions, individuals, state corporations and companies. Where eviction is done by private person or corporations, the authorities normally collaborate with the evictors, offering reinforcement against any resistance.

Thus, the evictions are characterised with high level of violence,<sup>62</sup> with the evictees refusing to vacate and leaving the only place they know as home, even resorting to sleep out in the cold at night and often returning to the land after the authorities have left.

Sadly after the evictions, the land is often kept unoccupied for speculative purposes and lies free from any use, long after the people have been forced out. For example in 2003, people were evicted to create space for road bypasses around Nairobi area.<sup>63</sup> As at the date of writing this paper, most of this land is still undeveloped, and no roads have been constructed.<sup>64</sup>

Also most of the evictions are carried out contrary to the legal procedures laid in the Statutes and in a cruel manner. For example, in June 2003, the government evicted over 3,000 families from the Mau Forest complex, despite a court order temporarily suspending the eviction. During the eviction, forest guards and police officers set the evictees' houses on fire and destroyed their crops to force them out of the forest. Indeed, some of these evictees had title deeds issued by the government, but the minister in charge was quoted as saying that these deeds were only "pieces of paper" for which he was empowered to revoke.<sup>65</sup>

Again, in March 2006, the police and forest officials evicted more than three thousand people claimed to be squatters living in forestland in the Kipkurere forest area in the Rift Valley province. Here again, high level of violence and use of force by the police and forest officials was witnessed<sup>66</sup>

The Government's lack of commitment to legalizing informal settlements including giving titles, leases or any form of security is noticeable in this scenario. The respective governments have shown little propensity to develop appropriate policies. Thus, the evictions are a major cause of urban poverty as well as rural squalor with people who have occupied and lived in

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<sup>62</sup> See Munene Kamau, 'Anguish as squatters evicted from forest', The Sunday Standard, 6 Feb. 2005; see also cool planet, *Oxfam in Kenya - facing up to the threat of eviction*, <http://www.oxfam.org.uk/coolplanet/kidsweb/world/kenya/kenoxf2.htm>, last visited on 29/9/2006 COHRE,

<sup>63</sup> Done under s. 91 of the Traffic Act Cap 403 of Kenya which make it an offence to encroach upon a road reserve without prior permission

<sup>64</sup> See COHRE, *Listening to the poor? Housing Rights in Nairobi Kenya*, COHRE Fact-Finding Mission to Nairobi, Kenya, Final report of June 2006

<sup>65</sup> AMNESTY INTERNATIONAL, *Africa: Forced evictions are a human rights scandal*, Public Statement, 3 October 2005, at <http://web.amnesty.org/library/Index/ENGAFR010032005?open&of=ENG-369>, last visited on 23/11/2006

<sup>66</sup> 'Kenya removes forest squatters,' BBC News, 24/3/2006

a settlement for a long time, being driven into destitution, disregarding the laws on adverse possession and easements thereby created.<sup>67</sup>

### **3.5 Land Grabbing: The Ndung'u Report**

A discourse on land crises in Kenya behoves an analysis of the concept of land grabbing, so prevalent in public administration.

“Land grabbing” is a term that has been used to describe the irregular allocation or sale of public land to individuals to reward political patronage. This has been widespread and has variously determined the political dispensation in the country. Land is also one of the most important ways through which political influence is practised. For example, the discretionary allocation of publicly owned land to individuals or organizations has become one of the means through which political patronage is rewarded. This in fact renders the land upon which informal settlements are situated prime for "grabbing". It has resulted not only in mass forced evictions, but has also led to a deterioration in the landscape as public spaces such as parks, playgrounds and even public toilets are sold or allocated to people who then construct on them.

No claims lie against the authorities who issues titles or fail to ascertain the right title to the property before registration, since it is stipulates that the registrar of lands or person acting under his orders shall not be liable in any suit or proceeding in respect of any matter done or omitted to be done in good faith<sup>68</sup>

A Commission of Inquiry into the Illegal and Irregular Allocation of Public Land (popularly referred to as the Ndung'u Commission after its chairperson) was appointed by the current president Mr. Kibaki to assess the land issues in Kenya, especially as concerning the illegal acquisition of land and land grabbing.<sup>69</sup>

The Commission was tasked with inquiring into the unlawful allocation of public lands, ascertaining the beneficiaries, identifying public officials involved in illegal allocations, and making recommendations for appropriate measures for the restoration of illegally allocated lands to their proper purpose. This, it was hoped would prevent future illegal allocations, by the undertaking appropriate criminal prosecutions for those found to have participated in the illegal acquisition schemes.

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<sup>67</sup> The issue of Easement and Adverse possession will be discussed in relation to the framework on land law in part 4 of this thesis

<sup>68</sup> The Government Land Act, The Land Titles Act also makes a similar provision protecting the recorder, Principal Registrar and Registrar of Titles.

<sup>69</sup> The Commission was appointed via the Gazette Notice No. 4559 dated 30th June 2003 and published on 4th July 2003

In its report, the commission looked substantially into the problem; even identifying vast tracts of land that were *prima facie* acquired through questionable process.

According to the Report, various excisions took place between 1964 and 1996. Schools, churches, private individuals and charitable organisations all benefited from these irregular allocations. For example it was reported that a school was in 1990 allotted 26 hectares of forest land without a legal notice being published as required by law, and in 1989, a cabinet minister was also irregularly given another parcel of that land.

In total, it is estimated that the country lost a great deal of its natural wealth through illegal and irregular allocation of land. Indeed, the Kenya National Commission on Human Rights (KNCHR) avers that, were the Government to implement recommendations of the Ndung'u Commission, to recover monies obtained through illegal allocation of public land, a substantial amount would be realised to complete a vast number of public projects.<sup>70</sup>

### **3.6 Impact of Environmental Protection Law on Land Rights**

Another predominant land related problem that afflicts the country arises from the conflicts between land rights and environmental conservation norms.

The serious depletion of forests, wildlife corridors and amenity land destruction, has brought conservation of environment issues to the fore. Members of the government have been regularly accused of giving government land set aside for forest conservation to party supporters and sympathisers. Town and city councillors throughout the country are also regularly accused of grabbing public land to sell for profit.<sup>71</sup>

The setting aside of land for environmental conservation and its distribution to individuals, it has been argued, cannot be just an issue of environmental law, because the way it is done impacts directly upon the upholding of the economic social and cultural rights of the citizens, where the disparity of wealth between the rich and the poor is very high. It also affects the ideals of democracy, justice, and the rule of law.<sup>72</sup> For example, it is estimated that about ten individuals and organisations control over two billion Shillings worth of Karura Forest, in Nairobi, and that the public has lost over eighteen billion shilling through irregular and illegal land allocations in three

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<sup>70</sup> “*Unjust Enrichment: The Making of Land Grabbing Millionaires*,” 2006, Report by KNHRC and KLA. (Yet to be published)

<sup>71</sup> See generally KNCHR and KLA, *Unjust Enrichment: The Making of Land Grabbing Millionaires*, Living large series, vol. 2

<sup>72</sup> *Ibid*

forests.<sup>73</sup> (Karura Forest is one of the last indigenous forests that clean up the city environment by absorbing large amounts of carbon dioxide produced by industries. It also serves as a water catchment, and can be developed into a place for recreation. Alongside the Ngong Forest, which was gazetted in 1932 (at a time when it covered two thousand nine hundred hectares), it forms the base of the environmental conservation projects in and within the Nairobi area.)

A prominent feature of Kenya's environmental law, as visible in all areas of legislation, is its diffuse nature. Environmental provisions are contained in over 77 statutes, most of which are thematic; either by their coverage of natural resources such as fisheries, water, forestry and wildlife, or by the functional sectors such as public health, agriculture, factories, mining, shipping or chiefs' authority<sup>74</sup>

The current Constitution of Kenya does not have direct environmental protection provisions, though it has been argued that Section 71, which deals with the right to life, encompasses the right to a clean and healthy environment.<sup>75</sup> Nevertheless, a case is being made at the Constitutional Review Process taking place, for the right of individuals to enjoy a clean and healthy environment to be incorporated in the Constitution. This found a place in the draft that was debated, at the Bomas Constitutional conference.<sup>76</sup>

Human beings and wildlife have shared resources such as vegetation and water in Kenya for a long time without any conflicts, and wildlife did not adversely affect the survival of the people, since there was adequate land that prevented persistent confrontation. Moreover, the benefits of co-existence were mutual in many ways, with the wildlife providing food for the hunting and gathering communities as well as for the pastoralists.

This changed in 1898 when the colonial government enacted the first Wildlife Legislation aimed at controlling indiscriminate hunting. Forceful evictions to create room for national parks and reserves resulted. This

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<sup>73</sup> "How billions are lost in grabbing of forest land," Daily Nation NEWS, on 9/25/2006

<sup>74</sup> See Anne Angwenyi, "Environmental Legislation and Domestication of International Environmental Law in Kenya," A Paper Presented at the Sesei Programme Sub-Regional Legal Workshop Held in Nairobi on 13th -17th December 2004

<sup>75</sup> This is borrowed from the Indian Case law propounded by *MC Mehta v Union of India*, I.A. No. 22 in Writ Petition [C] No. 4677 etc

<sup>76</sup> In Bomas draft, s. 67 provides that,

Every person has the right –

- (a) to an environment that is safe for life and health;
- (b) to have the environment protected, for the benefit of present and future generations, through legislative and other measures that –
  - (i) prevent pollution and ecological degradation; and
  - (ii) promote conservation; and secure ecologically sustainable development and use of natural resources while promoting economic and social development; and
- (c) to free information about the environment.

contributed greatly to the impoverished status of many communities who had cohabited with the wildlife.

Now, it is estimated that 29% of Kenya's land area is protected for wildlife conservation. The traditional communities that rightfully occupied these areas before they were gazetted were forced to leave their land and stop some of their traditional practices such as hunting and gathering from the protected areas.<sup>77</sup> The communities were therefore opposed to the creation of conservation areas at their expense and demanded compensation for loss of land and/or tangible benefits from activities associated with wildlife conservation like tourism. To date, these communities are seeking to be directly involved in management of the conservation areas and all resources found therein. They are essentially asking for restitution for the relative deprivation they have incurred over the years.

The government's responsibility on the environmental management is manifold: It has to ensure that the environment is protected. At the same time, it cannot take steps to that effect which infringes on individual liberties and human rights without due recourse to the law.

In *Sea Star Malindi Ltd v Kenya Wildlife Services*,<sup>78</sup> the applicant made an application for writs of Certiorari, mandamus and prohibition to declare that the action by the Kenya Wildlife Service (hereinafter referred to as the KWS) restricting the owner of the land from developing it on the allegation that the development would harm the environment, was *ultra vires*. He sought the court to declare that land was the private property of the owner and that land that was not government property and not compulsorily acquired, could not be restricted in use by the government.

KWS, a government statutory body, had ordered the applicant to stop his construction on the land allegedly because there was 100 ft. space between the applicant's land and the high water mark, which space fell under the jurisdiction of KWS, within the provision of the Wildlife (conservation and Management), Act.<sup>79</sup> The KWS stated that the area needed to be preserved in order to ensure the protection of the fragile ecosystem in the area. The applicant argued that the land had always remained freehold private land and there was no showing that the government had acquired it. Furthermore, the Municipality of Malindi had given the approval for the construction of a hotel in the area in question.

The court held in this case that in a situation where private land is required to be a protected area so as to protect the ecosystem, for the greater good of the environment, the procedure provided by the Wildlife (Conservation and

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<sup>77</sup> See generally KLA, "Background to Human-Wildlife conflicts in Kenya," Fact sheet 1

<sup>78</sup> Misc. Civil suit No 982/1997 (2002) 1 KLR

<sup>79</sup> Cap 376 of the Law of Kenya

Management) Act,<sup>80</sup> had to be followed. Without which, the action by the parastatal would be *ultra vires*.

### 3.7 The Njonjo Commission

It is noteworthy that the land use and problems of allocation have been on the policy-framers' mind for some time now, and the issue of irregularity of tenure and resultant crises have been articulated in policy documents before.

In 1999, the Commission of Inquiry into the Land Law System of Kenya (the Njonjo Commission) was appointed by the then president Daniel Arap Moi and given the task of undertaking a broad view of land issues in the country. It was mandated to recommend the main principles for a land policy framework for the country.

In its submission, the Njonjo commission noted that:

[T]here has been abuse of trust by the Government and the county councils, its officials and councillors in the irregular allocation of public and community land without following legally laid down procedures that ensure appropriateness, transparency and fairness. The abuse has led to massive grabbing of land reserved for public use.<sup>81</sup>

The report advocated for a comprehensive land policy with a goal to establish a framework of values and institutions that would ensure that land and associated resources were held, used, and managed efficiently, productively and sustainably. It recommended that the overall objective of land policy should be to establish a land administration and management system that is economically efficient, socially equitable, environmentally sustainable and operationally accountable to the Kenyan people.

It also recommended that all citizens of Kenya, irrespective of gender, should have equal opportunity of access to land, whether through the market, or through any system of inheritance, customary or statutory disposition. The duty of public officers would then be to ensure that land was administered in a transparent manner, while they remained accountable to Kenyans at all times.

The report concluded that since land is the common heritage of all Kenyans, it was their to ensure that it is responsibly administered and managed, and productively use, as sustainable management of land is a prerequisite to security of access to that land.

It is with this in mind that the author strongly feels that the crises on land in Kenya arouses a need to analyse the laws regarding land use, since the

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<sup>80</sup> At s. 6 (1)

<sup>81</sup> At p 91

government is bound by both international and municipal law to secure a stable environment where all human rights are enjoyed.

# 4 The Legal Framework on Land in Kenya

## 4.1 Introduction

There are various land tenure regimes in operation in Kenya, some affecting the rural and other the urban areas, which govern the access and use of land and natural resources, that have a repercussion on the property rights, and impact on the economic wellbeing of the country.

Land tenure refers to possession or holding of the rights associated with each parcel of land. Thus Prof. Okoth-Ogendo avers that a search for the tenure system operative in a particular society is an attempt to answer the tripartite question as to who holds, what interest, in what land.<sup>82</sup>

In this regard therefore, land tenure can be categorised under four basic types: state property, private property, common (or communal) property, and systems with unrestricted access to resources or open access.<sup>83</sup> Each one of these property rights categories has its own characteristics in respect of exclusiveness, inheritance, transferability, and enforcement mechanisms; they constitute the rights and responsibilities of resource use and management by individuals or groups of people within a community. The tenure systems are created by the law and are observed from the provisions of statutes and customary practices.

In Kenya, there exists a mixed tenure involving absolute private ownership of land, and communal ownership, with the State having the power to acquire and possess land for public use. This tenure is characterised by dualism, consisting of tracts of land held as state property and other lands held under indigenous tenure systems<sup>84</sup> that overlap and are sometimes contradictory and contrary to each other.<sup>85</sup>

This section looks at the provisions of law that creates the diverse tenures recognised in the country. The legal framework for the management of land is principally governed under the structures created within the Constitution, the Land Adjudication Act and the Land Consolidation Acts.

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<sup>82</sup> Okoth-Ogendo, *Tenants of the Crown: Evolution of Agrarian Law and Institutions in Kenya*, Nairobi, 1991 ACTS Press.

<sup>83</sup> Feder, and Feeny, *Land tenure and property rights: theory and implications for development policy*. (1991), the World Bank Economic Review, 5(1): 135-153.

<sup>84</sup> See Okoth-Ogendo, *Agrarian reform in sub-Saharan Africa: An assessment of state responses to the African crisis and their implications for agricultural development*. In Basset, J. T. and Crummey, D. E. (eds.), *Land in African agrarian systems*. Madison-Wisconsin: University of Wisconsin Press (1993): 247-273

<sup>85</sup> *Ibid*

Beside these, there are other Acts that will be highlighted, which also control the tenure and the rights of individuals over land, either by the vesting of the rights or by regulating how these rights are to be enjoyed by the owners upon whom these rights are vested.

## 4.2 The Statutes

### 4.2.1 The Constitution

The constitution comes first, in the order of enforceability within the hierarchy of laws in Kenya, and all laws that are contrary to it are void to the extent of their repugnancy.<sup>86</sup>

Land rights are regulated within two places in the current constitution: First, as an issue of human rights, within section 75, which grants the right to ownership of property and right against compulsory deprivation, except under procedure established by law, along with due compensation in case of legal acquisition. These rights are enforced within the right to access the courts for redress.

Secondly, the Constitution also dedicates seven sections (which constitute chapter IX) on matters related to trust land, thus regulating the tenure on this specified type of land.<sup>87</sup>

Other than that, not much is established pertaining to the general legal tenure on land in constitution. It is noteworthy however that the constitution gives important recognition to customary laws regarding rights in land and therefore embraces these laws within framework of trust land. In this regard, section 115 states that:

Each county council shall hold in trust the land vested in it for the benefit of the persons ordinarily resident on that land and shall give effect to such rights, interests or other benefit in respect of the land as may, under the *African customary law* for the time being in force and applicable thereto be vested in any tribe, group, family or individuals (Emphasis added).

In comparison with the draft constitution adopted by the Constitutional Conference in 2004, (the Bomas Draft), more clarity was envisaged under the new draft. It was provided that, land, being Kenya's primary resource and the basis of livelihood for the people, shall be held, used and managed in a manner, which is equitable, efficient, productive and sustainable.

The Government was then obliged to define and keep constantly under review a national land policy that would ensure the following principles were adhered to, namely:

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<sup>86</sup> As provided under its s. 3

<sup>87</sup> S. 114 of the Constitution of Kenya gives the definition of the land which is categorized as Trust Land

- (a) Equitable access to land and associated resources,
- (b) Security of land rights for all landholders, users and occupiers in good faith,
- (c) Sustainable and productive management of land resources,
- (d) Transparent and cost effective administration of land,
- (e) Sound conservation and protection of ecologically sensitive areas,
- (f) The discouragement of customs and practices that discriminate against the access of women to land, and
- (g) Encouragement of communities to settle land disputes through recognized local community initiatives consistent with the constitution.<sup>88</sup>

Under that draft, it was proposed that all land in Kenya should belong to the people of Kenya collectively as a nation, as communities and as individuals. The land would however be designated as public, community or private,<sup>89</sup> with the law recognising the right of the individuals to own land individually, jointly and communally, as well as vesting absolute right to other portions of land to the State as public land.

This dispensation did not come to fruition and the constitutional reform process is still underway.

## **4.2.2 Acts of Parliament**

Other statutes exist for thematic application to land ownership and determination of titles, deriving their sanctity from the constitution and from Acts of parliament.

Some of these Acts are cross-referenced with other statutes dealing with similar subject matter and are therefore interpreted in reference to each other, while others are enacted independently to tackle thematic issues without reference to other laws.

The Acts include:

### **4.2.2.1 The Land Adjudication Act<sup>90</sup>**

This is an Act of Parliament that provides for the ascertainment and recording of rights and interests in Trust land.

The Act provides for the appointment of an Adjudication Officer and his staff, and the constitution of adjudication committees and arbitration boards.

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<sup>88</sup> Art 77, Chapter 7, Land and Property, Draft Constitution of Kenya, 15 March 2004

<sup>89</sup> Art 78, Chapter 7, Land and Property, Draft Constitution of Kenya, 15 March 2004

<sup>90</sup> Cap. 284 of the Law of Kenya

The Adjudication Officer has jurisdiction in all claims made under this Act relating to interests in land in the adjudication area, with power to determine any question that needs to be determined in connexion with such claims.

For that purpose, the adjudication officer is legally competent to administer oaths and to issue summonses, notices or orders requiring the attendance of persons or the production of documents considered necessary for the carrying out adjudication.<sup>91</sup>

The Act provides for the process of ascertainment of interest in Land through the process of adjudication and survey,<sup>92</sup> and the preparation of adjudication records and register. These documents are thereafter submitted to the Chief Land Registrar, for registration as public record of land rights.

The Act however does not apply in areas where the Land Consolidation Act is in force.<sup>93</sup>

#### **4.2.2.2 The Land (Group Representatives) Act<sup>94</sup>**

At independence, the Government's policy was to achieve optimum land utilization and equitable land distribution. Group farming became a solution in the drier pastoral areas where traditional land tenure led to the misuse of grazing land. Thus, this Act was aimed at establishing a framework for group ownership whereby communal lands that could not be viably subdivided were foreclosed in to ranches under the management of a committee established, working as trustees of the entire group.

The Act provides for the incorporation of representatives of groups who are then recorded as owners of land under the Land Adjudication Act. A Registrar of Group Representatives appointed under the Act is thereafter given the responsibility to supervise the administration of groups constituted under the Act, for optimisation of land use.

Where a question arises as to the membership of a particular person in a group under the Act, a certificate signed by a majority of the group representatives conclusively determines the question unless a person who is aggrieved applies to a District Magistrate's Court. In That case, the court's decision becomes the final determinant.<sup>95</sup>

#### **4.2.2.3 The Land Acquisitions Act<sup>96</sup>**

The Land Acquisition Act is the most commonly used Act in land acquisition and derives its powers from Sec. 75 (I) of the Constitution.

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<sup>91</sup> As provided by s. 10

<sup>92</sup> According to part III of the Act

<sup>93</sup> According to s. 3

<sup>94</sup> Cap 287 of the Laws of Kenya

<sup>95</sup> S. 28

<sup>96</sup> Cap 295 of the Laws of Kenya

It provides for the compulsory acquisition of land for the public benefit in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of any property in such manner as to promote the public benefit.<sup>97</sup> It enacts the requirements and procedures by which registered interests in land can be distinguished from individual or group owners to provide access to land for public purposes.

The Act was amended in 1990 in order to establish a Land Acquisition Compensation Tribunal (LACT) to hear and determine appeals on issues of acquisition before an aggrieved party can be allowed access to High Court.

#### **4.2.2.4 The Government Land Act<sup>98</sup>**

The short title of this Act states that it is “(a)n Act of Parliament to make further and better provision for regulating the leasing and other disposal of Government lands.”

Under it, the President is vested with great power and authority to make grants or dispositions of any estates, interests or rights in or over unalienated Government land and is also empowered to delegate some of these powers to the Commissioner of Lands.<sup>99</sup>

This power has in most cases been misused to vest rights over land to unscrupulous person by previous regimes without due recourse to the procedures established by the law.<sup>100</sup> This was facilitated by the fact that all conveyances, leases and licences of or for the occupation of Government lands, and all proceedings, notices and documents made, taken, issued or drawn were *deemed* to be made, taken, issued or drawn under the Act.<sup>101</sup>

#### **4.2.2.5 Physical Planning Act<sup>102</sup>**

Another relevant Act on land matters is the physical planning Act, which provides for the procedures for the preparation and implementation of physical development plans by the government.

This statute provides a legal basis for plan preparation and gives them legal force to bind landowners and developers to comply with them for a sustained planned environment. Absolute owners of land are thereby encumbered on how to use their land by the plans that are made under the Act.

The a Director of Physical Planning is tasked with the function to formulate the national, regional and local physical development policies, guidelines

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<sup>97</sup> Under s. 6

<sup>98</sup> Cap. 280 of the laws of Kenya

<sup>99</sup> S. 3 of the Act

<sup>100</sup> This was discussed in the Ndung’u Report

<sup>101</sup> As provided by s. 4 of the Act

<sup>102</sup> Cap 286 of the Laws of Kenya, (Act No. 6 1966)

and strategies, and is responsible for the preparation of all regional and local physical development plans.<sup>103</sup>

He is also mandated to advise the Commissioner of Lands on matters concerning alienation of land under the Government Lands Act and the Trust Land Act, and has the duty to advise the Commissioner of Lands and local authorities on the most appropriate use of land, including land management such as change of user, extension of user, extension of leases, subdivision of land, and amalgamation of land.

Under his duty, the director may require local authorities to ensure that physical development control and preservation orders made under the Act are properly executed.

#### **4.2.2.6 Land Control Act<sup>104</sup>**

The Land Control Act provides for control of transactions in agricultural land.

The Minister of Agriculture is empowered, by giving a notice in the official Gazette, to apply this Act to any area, if he considers it expedient to do, and he/she can divide such areas into divisions.<sup>105</sup> The minister then is mandated to establish a Land Control Board (LCB) for every land control area or, where it is divided into divisions, for each division.

The Boards' task is look into all transactions in agricultural land and approves all dealings in the land before a legal title can be established through registration of titles. Consent to sell or transfer, and to charge or mortgage agricultural land outside urban areas has to be granted by respective Land Control Boards, before such rights can be registered or even recognised under other laws.

#### **4.2.2.7 Trust Land Act<sup>106</sup>**

The Act provides for the administration of certain lands under Chapter IX of the Constitution, which is devoted to Trust Land; the only land category specifically dealt with in the Constitution.

The setting aside of Trust Land was intended to provide a mechanism for the direct involvement of the people in the specified areas in the management of their resources. Thus, chapter IX stipulates, that trust land shall be vested in local authorities for the benefit of communities resident in the area.

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<sup>103</sup> Under s. 5 of the Act

<sup>104</sup> Cap 302 of the Laws of Kenya; For a detailed critique of this Act, see Simon Coldham, "Land Control Act in Kenya," *Journal of African Law*, Vol. 22, No. 1 (Spring, 1978), pp. 63-77

<sup>105</sup> S. 3 and 4

<sup>106</sup> Cap 288 of the Laws of Kenya

The constitution outlines the conditions and procedures under which Trust Land may be set aside for other purposes, through an Act of Parliament or through a request from the President. This setting aside may be for the purposes of public utility, for prospecting for minerals, or any other purpose that a county council may deem to be of benefit to the people resident in its area of jurisdiction.

Therefore, the Trust Lands Act gives effect to this constitutional provision and establishes how the trusts would operate. The Commissioner of Lands is empowered to administer the trust land of each council as agent for the council, and may exercise on behalf of the council, personally or by a public officer, any of the powers conferred by the Act on the council, including the execution of grants, leases, licences and other documents.<sup>107</sup>

#### **4.2.2.8 The Registration of Titles Act<sup>108</sup>**

This is an Act of Parliament to provide for the transfer of land by registration of titles.

The Act applies to all land, which is comprised in any grant that was issued after the commencement of the Act and such land are not capable of being transferred, transmitted, mortgaged, charged or otherwise dealt with except in accordance with the provisions of the Act.<sup>109</sup>

For the administration of the registration of titles, the president is empowered to divide the country into registration districts, which would have a Registrar, obliged to keep a register of titles of all land within it.<sup>110</sup>

The Act makes provision for the administration and procedures relative to the registration of titles in land to which the Act applies, and defines the effect of registration of title.

It further stipulates for the special powers of the principal registrar of titles (as well as a registrar of titles) and for rights to appeal against decisions of the Registrar to the High Court.<sup>111</sup> It also provides rules relative to the form and effects of transfer of title, lease, charges, power of attorney, and caveats.

#### **4.2.2.9 The Land Consolidation Act<sup>112</sup>**

This Act was enacted to provide for the ascertainment of rights and interests in land, and for the consolidation of land in the special areas. It created a structure for the registration of title to land, and of transaction and

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<sup>107</sup> S. 53 of the Act

<sup>108</sup> Cap 281 of the Laws of Kenya

<sup>109</sup> Part IV of the Act

<sup>110</sup> Part III of the Act

<sup>111</sup> S. 62

<sup>112</sup> Cap 283 of the Laws of Kenya

devolutions affecting land in special areas (where trust land as provided for by the constitution is being converted to individual ownership).<sup>113</sup>

Under it, the Minister is empowered, by notice in the Gazette, to appoint public officers to be the adjudication officers for every adjudication area created under the Act. The adjudication officers would then be entitled to appoint demarcation officers, survey officers and recording officers, as may be necessary for demarcating, surveying and recording interests within the adjudication area.<sup>114</sup>

The Act also stipulates for Appointment of arbitration board and setting up of adjudication Committees to assist in the consolidation process under the Act<sup>115</sup> (with all the structures established thereunder matching those provided for by the Land Adjudication Act).

Every person who considers that he has an interest in land within an adjudication section has to make a claim to the recording officer, and point out his boundaries to the demarcation officer in the manner stipulated under the Act. The adjudication officer then has to make a determination on any dispute arising from it, and if necessary submit it for arbitration. Thereafter the Demarcation officers and/or the Survey officers are dispatched to make the physical determination of the rights so determined.

When the process is complete, the land is registered and the registered persons obtain absolute ownership over that parcel of land.

#### **4.2.2.10 The Registration of Documents Act<sup>116</sup>**

This Statute was enacted in order to create a register for documents in all legal transactions made in the country that were required to be registered.

Under section 4, all documents conferring or purporting to confer, declare, limit or extinguish any right title or interest, whether vested or contingent to, in or over immovable property (*that is to say, land*) other than such documents as may be testamentary in nature shall be registered within one month after their execution.

If not registered, such documents cannot be tendered in court as evidence without consent of the court.

Nevertheless, under section 5, the Act stipulates for registration of any document at the option of the owner while the registrar retains discretion to refuse registration to any document presented to him.

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<sup>113</sup> According to s. 2

<sup>114</sup> S. 4

<sup>115</sup> Ss. 6 & 7

<sup>116</sup> Cap 285 of the Laws of Kenya

#### **4.2.2.11 The Registered Land Act<sup>117</sup>**

The Registered Land Act makes '*further and better provision*' for the registration of title to land, and regulates the dealings in land registered under it. Thus, the registration of an interest under the Act frees the registered proprietor from claims of other parties.<sup>118</sup>

The RLA governs freehold land and provides that the registration of a person as the proprietor of the land, vests in that person, the absolute ownership of that land together with all rights, and privileges relating thereto.<sup>119</sup>

The Act empowers the minister to establish Land Registration District, for which there shall be maintained land Registry with maps of the land and interests in land over those areas.

#### **4.2.2.12 The Agriculture Act<sup>120</sup>**

The Agriculture Act also affects the right to the use of land. It is an Act of Parliament to promote and maintain a stable agriculture, by providing for the conservation of the soil and its fertility, and to stimulate the development of agricultural land in accordance with the accepted practices of good land management and good husbandry.

This Act gives the Minister for Agriculture wide powers in connection with preservation, land development and management orders. He can therefore regulate how individuals choose to use their private land.

Whenever the Minister considers it necessary or expedient, for the purposes of the conservation of the soil, or for the prevention of the adverse effects of soil erosion on, any land, he may, with the concurrence of the Central Agricultural Board, make rules prohibiting, regulating or controlling certain activities by land owners. This include prohibition or regulations on: The breaking or clearing of land for the purposes of cultivation, the grazing or watering of livestock, and the firing, clearing or destruction of vegetation.

### **4.2.3 Law on Easement and Rules of Adverse possession**

Other rules that affect the rights over land include prescriptions in the law of Easement and rules of adverse possession.

An easement is a limited right to use another person's land for a particular purpose. Therefore, the owner of land is limited on how he/she can exercise his/her rights in order to protect the rights of the possessor(s) of easement attached to that land. Examples of these are the right to have a road through

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<sup>117</sup> Cap 300 of the Laws of Kenya

<sup>118</sup> The power of allocation is what is considered a registrable interest

<sup>119</sup> S. 27 of the Act

<sup>120</sup> Cap. 318 of the Laws of Kenya

a person's land, or the right to have water flowing from a river that passes through a neighbour's land.<sup>121</sup>

These rights can be created in four ways, that is:

1. Expressly, where the owner of the land being used for the easement makes an express, written grant to another person,
2. By reservation or exception, where a landowner who is conveying his land reserves an easement to himself,
3. By implication, which usually requires some sort of necessity, and
4. By prescription, or under adverse possession,

Adverse possession arises where one seeks to acquire title to another's real property without compensation, holding the property in a manner, which conflicts with the true owner's rights for a specific period. This arises from the statute of limitations, prohibiting a suit after the passage of time since the arising of the cause of action.<sup>122</sup>

Normally, an adverse possessor will be committing a trespass on the property that they have taken and the owner of the property should have them evicted by an action in trespass brought within a specified time. The effect of a failure by the landowner to evict the adverse possessor within the specified period of limitation for the suit extinguishes that person's right and therefore the right becomes vested on the adverse possessor.<sup>123</sup>

Adverse possession requires the actual, visible, hostile, notorious, exclusive, and continuous possession of the property, and is a basis for a claim of title or a claim of right.

In *Temo and 6 others v Swaleh*,<sup>124</sup> the plaintiffs brought an originating summons claiming title by adverse possession to a piece of land which they said they had occupied all their lives, claiming that they had continuously and uninterrupted, occupied the land until 1990 when the defendant claimed an interest in it, by allegedly having bought it in 1978.

Though the court found that there was no continuous, uninterrupted possession of the land by the plaintiff, in order to create adverse possession, it ruled that under the Land Titles Act, to which the land was registered, the peculiar phenomenon of "houses without Land" was recognized. Thus it was held that the residential structures and commercial plants on the portion of land occupied by the plaintiffs, which ordinarily by definition would go

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<sup>121</sup> This the riparian rights to for example unobstructed and clean water supply

<sup>122</sup> In Kenya, this is under s. 13 of Limitations of Actions Act

<sup>123</sup> Under S. 17 of the Limitation of Actions Act, "at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished."

<sup>124</sup> Misc. Civil Suit No 155/1993 (OS), (2002) 1 KLR, p 469

with the land, belonged to the plaintiffs, and therefore, reasonable compensation should be paid to them.

### 4.3 Practice under Customary Law

A major role of the informal pre-colonial African tenure systems was that of providing basic livelihood security. This was achieved through customary tenure that guaranteed household access to land-based resources such as fuel-wood, wild foods, grazing for subsistence livestock, water, and thatch grass without necessarily granting absolute ownership of land to individuals.<sup>125</sup>

The rights that were thus created by these customary norms are still applicable in Kenya under the Judicature Act, which provides that customary laws are enforceable in the Courts, as part of the legal system, to the extent that they are not repugnant to the constitution and other statutory laws.<sup>126</sup>

These customary laws are however not formal and remain largely unwritten, apart from those that have found mention in court decisions as precedents. Therefore, one who seeks to rely on any African Customary law as a basis for a claim must prove its existence in evidence.<sup>127</sup>

The problem is precipitated by the fact that in case of Land, any land that does not lie under a municipality is termed as agricultural land, in which case, ownership and the tenure is decided according to the customary law.<sup>128</sup>

One could otherwise sidestep the customary law on the succession to agricultural land by writing a will that complies with provisions of the laws of succession, which would then take precedence over customary law.<sup>129</sup>

From the operational tenure, it is seen that a conflict of application arises over the statutes, which have to co-exist with customary laws. Even though customary law can only be applicable where there are no constitutional or statutory prescriptions for the dispute before the court, traditions and practice have retained a force of law such that even where they conflict with written laws, they have tended to supersede the statutes in day-to-day practice.

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<sup>125</sup> Quan, "Land tenure and Sustainable Rural Livelihoods," D. Carney, (ed.) *Sustainable rural livelihoods 'what contributions can we make?'* London: Department for International Development, (1998)

<sup>126</sup> S. 3 of the Judicature Act, cap 7 of the Laws of Kenya

<sup>127</sup> *Kimani v Gikanga and another* (1965) EA 735, *Kaitany and another v Wamaiitha* (1995) LLR 2394 (CAK)

<sup>128</sup> Justice Juma of the high court of Kenya speaking at the Destiny Ministries Ladies Luncheon in Thika where he gave a public lecture on the Role of Succession, see The Standard Newspaper on 19/4/05 at p 14 (infra note)

<sup>129</sup> As will be discussed infra on the law of succession

# 5 The Operation of the Law of Succession

## 5.1 Introduction

One of the central modes of acquisition of rights associated with land is through the devolution by inheritance. The laws, both written and customary, recognize a system of transfer of properties from the dead to the living, since only living persons have the capacity to being holders of rights and obligations. This capacity ceases at death.

In Kenya, this passage from the dead to the living is principally governed under the Succession Act,<sup>130</sup> and is largely controlled by other laws including the Transfer of Property Act,<sup>131</sup> the Marriage Acts,<sup>132</sup> the Land Acts,<sup>133</sup> the Public Trustees Act,<sup>134</sup> and other statutes that incidentally affect it, as a mode of transfer of properties.

As early as 1967, the government of Kenya was grappling with the issue of reforms in the law of succession. In fact, the Attorney General indicated that, the intentions of comprehensively reforming the law of succession had been on the governments mind for some time.<sup>135</sup> In that year, the government set up a Commission to investigate on the laws of succession in the country.<sup>136</sup> The commission's terms of reference were:

1. To consider the existing laws on succession to property on death, at the time and the making and proving of wills and the administration of estates,
2. To make recommendation for a new law providing a comprehensive and, so far as it may be practicable, uniform code applicable to all persons in Kenya, which would replace the existing law on the subject, comprising customary law, the Indian applied Acts, and the relevant Acts of Parliament including those governing Muslims and Hindu succession, and
3. To prepare a draft of the new law in line with their findings.

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<sup>130</sup> The Law of Succession Act (Cap. 160) of the Laws of Kenya

<sup>131</sup> The (Indian) Transfer of Property Act, 1882

<sup>132</sup> Cap 150 of the Laws of Kenya, Act of 1902, alongside the African Christian Marriage and Divorce Act, cap 151; and Matrimonial Causes Act, Cap 152 of the Laws of Kenya

<sup>133</sup> Discussed in chapter 4

<sup>134</sup> Cap 168 of the Laws of Kenya

<sup>135</sup> Commissions on the Laws of Marriage and Succession in Kenya, *Journal of African Law*, Vol. 11, No. 1 (Spring, 1967), pp. 1-4

<sup>136</sup> Kenya Gazette Vol. LXVIX, No. 15, Gazette Notice No. 1095 (March 17, 1967)

This Commission's recommendations led to the enactment of the Law of Succession Act, as the written code that laid down the rules on the distribution of the estate of the deceased to the legal heirs, that is applicable to Kenyans of all tribes and cultures. However, within the commission's recommendations, Muslims were excluded from the application of the Act.<sup>137</sup> This was codified under section 2 of the Act, which stated in sub-clause (3) that:

“Subject to subsection (4), the provision of this Act shall not apply to testamentary or intestate succession to the estate of any person who at the time of his death is a Muslim to the intent that in lieu of such provisions the devolution of the estate of any such person shall be governed by Muslim law.

Nevertheless, subsection 4 provided that notwithstanding the above provision on non-applicability to the Muslims, the part relating to the administration of estates in the Act would apply where they were not inconsistent with the Muslim law.

The Succession Act was therefore made the substantive law governing issues of inheritance in the country, overriding almost all other laws and practices that subsisted before its enactment. The Act prescribed what would be done to the estate of a deceased when one died without leaving a will (that is intestate) as well as when the deceased left a will (referred to as ‘testamentary succession’)

This part of the paper will look at the application of the Act to both testamentary and interstate succession in the country.

## **5.2 Testamentary Succession**

Testamentary succession, involves the devolution of property made under a will by a person of prerequisite competence.

A will has been defined in the Succession Act as a statement by a person, made during his/her lifetime with all legal competence, expressing his/her wishes on how the property he/she possesses should pass on upon his/her death.<sup>138</sup>

The will can be changed by the maker (who is referred to as the testator) at any time he/she so wishes, as long as he/she maintains legal competence, following the same procedure used in making the initial will. When this is done, the initial will has to be destroyed, to avoid there being two conflicting wills at the time of death.

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<sup>137</sup> Muslims are governed by their personal laws as regards passage of properties in matters of inheritance under the Amendment Made to the Law of Succession in 1991( by Act No. 21 of 1990 that came into force in 1991)

<sup>138</sup> Under s. 3 (1)

The will would normally list the beneficiaries of the estate and may at times include the extent to which the beneficiary would inherit to the estate. Nevertheless, there are times when the testator makes a general will, not demarcating the extent to which such property would devolve to the named beneficiaries.

As a general rule, a will has to be written and signed by the testator and witnesses thereto. However, in special cases, it is permissible to make an oral will,<sup>139</sup> which would only be valid if it fulfils the conditions set forth in the Act, which include stipulations that the testator should be 18 years of age or above, and of sound mind when the will is made, and it should have been made within three months before his death. The Will must also have been made in the presence of two adults that are not beneficiaries of any bequest under it. These witnesses must corroborate the contents of the will in full, because if they differ as to the details or content, this would invalidate the will.

In case of a written will, the following conditions are pertinent: the testator must be aged 18 or above and be of a sound mind when the will is made, and the will must be signed or thumb-printed by the testator. Moreover, two witnesses who are not beneficiaries of the estate must attest to the signing of the will.

The Act further provides for the procedures for validating and giving effect to a will after the death of its maker. The executor of the estate has to deposit the death certificate together with the will with the court.<sup>140</sup> The court thereafter grants letters of administration to the administrator<sup>141</sup> who would then determine according to the ‘arm chair rule’<sup>142</sup> the extent to which the testator wanted his property to pass. If some properties of the deceased are not clearly stipulated in terms of distribution, then, they devolve under the rules of interstate succession (as described in the next sub section of this thesis). The transfer and registration of the successor’s interests takes place under the supervision of the court.

It is to be noted that the Act stipulates that if a testator marries (or remarries), after he/she has made a will, then the will is automatically

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<sup>139</sup> S. 9 of the Act provides for the validity of oral wills

<sup>140</sup> This is according to s. 51 of the Act. Under s. 65, “When there is no executor, and no residuary legatee or representative of the residuary legatee, or if every such person declines or is incapable of acting, or cannot be found, the person or persons who would be entitled to the administration of the estate of the deceased if he had died intestate, or the Public Trustee, or any other legatee having a beneficial interest, or a creditor, may be admitted to prove the will, and letters of administration may be granted to him or them accordingly”

<sup>141</sup> Under s. 53

<sup>142</sup> This implies that the administrator has to position himself in the place of the deceased to determine what the exact intention of the testator was.

revoked/invalidated and a new one has be made in its place or else, the property would devolve under rules of interstate succession.<sup>143</sup>

There are also cases where interested persons may challenge and benefit from the estate of the deceased, even though they have not been included in the will. These persons must however, prove that they were rightful dependent of the deceased, and qualify to be beneficiaries under the will.

The court would in that case make an order for their provision irrespective of the will. The order would give the specific share of the deceased's property or a periodic or lump-sum payment that the claimant would receive from the deceased's estate. This would be based on the nature and amount of property, and income, means and needs of the dependent, conduct of the dependent in relation to the deceased, and the reason why the testator left the dependent out of the will.<sup>144</sup>

### **5.3 Interstate Succession and Order of Priority to Inherit**

When one dies without having made a will, or if a will has been invalidated for any reason under the Act, the law stipulates for interstate succession.

The interested parties have to petition the court for letters of administration in case of devolution interstate. The court would then appoint an interim administrator; usually the wife or husband of the deceased (and in case of a polygamous marriage, both wives would be co-administrators of the estate.) In the absence of a wife, the law provides for the court to make the children of the deceased, ordinarily represented by the eldest one, but with all siblings having equal rights of which they could jointly consent to one of them being the administrator.

The administrator is tasked with gathering the estate by bringing in all the assets, liabilities and beneficiaries, and allocating the bequest to proposed beneficiaries within a minimum period of 6 month in order to allow for objections

Upon the grant of confirmation of letters of administration, the administrator effects the dealings and distribution of the estate of the deceased, under the supervision of the court.

The Act restricts inheritance in interstate succession to the immediate family of the deceased. Nevertheless, the Act also establishes the proximity of the right holders in case of lack of immediate right-holders.<sup>145</sup> Thus, the following order of priority of the successors has been established:

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<sup>143</sup> S. 19

<sup>144</sup> S. 26

<sup>145</sup>S. 29

### **5.3.1 The Surviving Spouse (Husband or Wife)**

If a wife dies, her husband acquires an absolute right over her properties; he inherits everything. When a husband dies, the wife also inherits from him and if there is more than one wife, the property is divided between them and their children, the quantity depending on the number of children in each “house.”

However, in the case of wife/wives, there is a limit to what she/they can inherit under the Act; she/they cannot inherit agricultural land and livestock for instance. The wife/wives can only get life interests on immovable properties, which she/they can only enjoy during her/their own lifetime or until remarriage. She/they thus cannot alienate such immovable properties, and after death or remarriage, the property devolves to the other legatees.<sup>146</sup>

### **5.3.2 Children**

All children inherit equal shares of the deceased’s property. It does not matter whether they are male or female, or whether they are married or unmarried. If the father dies when the wife is pregnant, the child born from such pregnancy also inherits. The same applies to a child born out of wedlock, if the father, during his lifetime accepted responsibility for that child.<sup>147</sup>

However, since a person under the age of 18 is incapable of contracting under the law, if a minor inherits property, a trustee is put in charge and has to manage the property until the child attains 18 years of age when he/she gains competence to deal with the property by him/herself.

### **5.3.3 Other Beneficiaries**

After the husband, wife/wives and children, the next in the order of priority to inherit from the deceased is the father, who inherits, where none in the above category exist.

After the father, the mother is next in, then Brothers and sisters of the deceased come next in the order and would inherit in equal proportion if they are more than one, along with the children of the brother or sister who predeceased the deceased.

Half brothers and half sisters follow next in the order if none of the above named before them in the list of priority exist. As in the case of brothers, the half brothers and sisters inherit in equal shares.

If none of the above is found, then the property goes to any other relative, including the grandparents, the grandchildren, and stepparent.

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<sup>146</sup> Ss. 35, 36, 37 and 40

<sup>147</sup> S. 3 (2) and (3)

As a last resort the property goes to the State as unclaimed property, which is paid to the consolidated fund, 12 years after closing the file if no relative is found.

It is noteworthy under the law that the recognised dependents of the deceased (whom the deceased was maintaining before death) are entitled to maintenance. So if the deceased's mother were living with the family, she would be entitled to share in the property. Former or separated wives are also entitled to inherit if they were being maintained by the deceased at the time of death, and even if the couple were not married, the woman could still apply to the court for a declaration that there was a marriage (under the presumption of marriage provision) to entitle her to inherit.<sup>148</sup>

## 5.4 Probate and the Grant of Letters

Another important aspect of the Act is the procedure for probate and grant of letters.

A person who writes a will should normally name an executor therein. The executor is tasked with the duty of distributing the property according to the deceased's wishes and paying off the deceased's debts. He is duty bound to go to court, file the will, and prove its validity before he is issued with *certificate of probate*. The person appointed as an executor can also decline the appointment orally in court or in writing, where after the court will appoint an *administrator* in his stead.<sup>149</sup>

In interstate succession, interested persons including the surviving spouses, children of the deceased who are over 18 years of age, other beneficiaries, the public trustees and the creditors can apply for *letters of administration* (to supervise the distribution of the deceased's properties. Those to whom these letters are granted are called 'administrators.' (The grant of administration cannot be made to more than four persons or by a body corporate except in case of public trustees or other trusts.)

The administrators have a duty to apply some of the deceased's estate for the reasonable funeral expenses, pay his/her debts and collect all the money owed to the deceased and to do all the paperwork on the deceased's estate and is answerable to the court.

Before the court grants the letters of administration, it must examine the applicant under oath and gather evidence of the validity of the will and the rights of the dependents among other things. The court must ascertain that there are no other persons with a reason to object to the application by placing a notice of application in the Kenyan gazette for a minimum of 30

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<sup>148</sup> See *Chelanga v Juma*, Probate and Administration Cause, No. 2258/1996, (2002) 1 KLR, p. 339

<sup>149</sup> S. 59

days. The court has to ensure that only competent persons are granted the letters. This cannot be granted to minors, to person of unsound mind, or to those adjudged to be bankrupt by a court of competent authority.

Once the court has dealt with any dispute that might arise from the deceased's estate, it issues the letters of administration (in a process referred to as 'the grant of letters'). A grant by the administrator to any legatee only takes effect after the grant of letters by the court.

After six months of the grant of letters, the administrator has to apply for confirmation of the grant, naming all the beneficiaries and the share of bequest they get, and once the letters have been confirmed, the administrator can then transfer the property to the different beneficiaries, and can even sell of some of the properties to pay off the debts owed by the deceased.

Thus, the administrator is tasked under law to do the following acts:

1. To provide and pay for the reasonable funeral expenses for the deceased,
2. To consolidate the deceased's assets and settle his liabilities,
3. To provide a list of inventories and accounts within six months after the grant of administration,
4. To distribute to the legal heirs or retain in trust all assets remaining after payment of all debts and all other reasonable expenses,
5. To produce to the court a full and accurate account of complete administration within six months after the date of confirmation of the grant or as the court may permit,
6. To take all legal action or represent in all cases of the deceased or issues arising out of his death or property, and
7. He/she may sell off assets of the deceased to pay off the creditors or carry out the duties of the under the grant.

Therefore, it is noticeable that an extensive procedural aspects under the succession Act that seeks to uniformly apply rules in the passage of property of the deceased to his legal heirs and debtors, has been made. These rules have gone a long way in clarifying certain legal anomalies that were related to the colonial structures that were applicable immediately after independence.

However, there is still some inconsistency in the law pertaining to application of personal and customary laws, which have repeatedly returned to haunt the application of law in the courts

# 6 The Jurisprudence on Passage of Land in Succession

## 6.1 Introduction

The law as applied by the court involves the interpretation of the diverse Acts and applying to the cases, other existing legal principles that by their very nature are quite complex.

To elaborate on this complexity, this chapter focuses on some rules established in practice and some of the precedent-setting case-laws that have been determined by the superior court of record that are thus binding to other lower courts in the country.

## 6.2 The Operation of Land laws in Passage of Property

Land rights are a bundle of rights with various associated rights encompassed under it. These rights include the right of possession, the right of sale, the right of usufructs, the right of lease, and the right to create and change easement.<sup>150</sup>

The owner may temporarily part with one of his several rights, say in favour of the lessee, but alienation remains the basic right of the owner, as long as when it is done, it does not interfere with those rights under which the property is encumbered. It is however arguable that the absolute and complete ownership of land vests only on the State; that when a granter of fee simple estate dies and leaves no heir, the land reverts and vests in the State as *bona vacantia*.

Ownership of land can be in the nature of *joint tenancy* or *tenancy-in-common*. Under joint tenancy, two or more persons are treated as one owner. As between themselves, they have separate rights, but in the eyes of law, their shares in the joint estate cannot be apportioned between them.

This tenure is distinguished from the *tenancy-in-common* by the right of ownership under the principle of *jus-accrescendi*, which creates the right of survivorship. Therefore, when a one joint tenant dies, the survivor becomes the sole owner of the whole interest in the land.

The rules of intestacy do not apply to *joint tenancy*, and one owner cannot dispose of his rights in the joint estate under a will. If for example a husband

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<sup>150</sup> Nalo *op. cit.*, at p. 18

and wife are the joint owners of a piece of property, and the husband predeceases the wife, other heirs cannot claim against her under the law of succession in respect of the property registered in their joint ownership, as it becomes her absolute property. Under *joint ownership*, the survivor(s) remain(s) the exclusive proprietor(s) of the property, and upon the registration of the death certificate, the conveyance is complete. This is the position under all the Acts in Kenya with respect to joint ownership.

In *common proprietorship*, on the other hand, the property owned by two or more persons together can be willed away by any of the owners individually, as there does not exist a right of survivorship. In the example, of a husband and wife owning a property and registered as common proprietors, when the husband dies, the wife retains the ownership of her registered share of the property. On the remaining portion, she has to share with the rest of the successors, under the provision of the law of succession or under the Muslim law of inheritance (whichever is applicable to them).

The Land Registration Act, (LRA) recognises the ownership of land either jointly or in common. Therefore, the registration giving effect to possession of land has to show whether such persons are joint proprietors or are only proprietor in common.<sup>151</sup> Where the property is registered under the tenure of proprietorship in common, the register has to indicate the portion that each individual proprietor shares.

Pursuant to a practice note of the Chief Land Registrar issued in 1984, where there is interstate transmission and succession, the widow who applies for the letters of administration, must join a male relative of the husband.

### **6.3 Validity of Marriage in Succession Decisions**

Since a valid marriage entitles a person to inherit on the property of the deceased spouse, some grey areas have arisen in the role that is played by marriage in succession to land and immovable properties of the husband by the wife as both statutory and customary norms govern marriages in Kenya.

Under the statutory law, marriage is registered as an evidence of its existence, either conducted in a Christian ceremony or as a civil marriage at the Attorney General's chambers with the grant of a marriage certificate.

In case of Muslim, marriage is done according to Islamic laws, and for other groups, customary rites of the communities involved validate the marriage. Thus, in the Muslim and African traditions, cultural norms permit polygamy in the matrimony, which is thereby sanctioned under the law in Kenya.

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<sup>151</sup> Under s. 101(1)

Thus, when a case of passage of property contains within its ambit the issue of validity or legality of marriage, the court has to first determine the legality of the marriage before it can delve into the substance of the division of the property in question. For example, in the case of *Atemo v Imujaro*,<sup>152</sup> the court took judicial notice of African customary laws of all communities in Kenya that no marriage could be validated without payment of dowry as a consideration for the marriage.<sup>153</sup>

In *Re: Estate of Kittany*,<sup>154</sup> the deceased had two wives. He had contracted the first marriage under the statutory ceremony, and later on had another marriage with another woman done under customary law. The question arose before the court as to whether both wives, for the purpose of succession were entitled to be administrators of the estate.

Here, the court held that where it is proved that the deceased contracted a previous customary marriage and then subsequently contracted a statutory marriage; both wives would inherit on the estate. The court was of the opinion that for the *purposes of succession Act only*, where a person had contracted a statutory marriage and then later had a customary marriage with another woman, both women would be considered as his wives. In this case however, the court found that the second woman was not a legal wife even within the flexible criteria adopted, and was therefore not entitled to succeed to the deceased. Nevertheless, it was held that her children were entitled to inherit to their father's estate under section 3(5) of the Law of Succession Act.

In the *Chelanga* case,<sup>155</sup> the issue arose as to whether the widow and her brother were entitled to the grant of letters of administration and whether the mother of the deceased, his illegitimate daughters and brothers were entitled to a share of the deceased's estate. This was compounded by the protest from the objectors of the grant asserting to the effect that the widow had never returned and was also unlikely to return to her husband's ancestral home. But it was held that the petitioner in her capacity as the widow of the deceased, was entitled to be issued with a grant of letters of administration interstate as petitioned, irrespective of whether she returned to her husband's ancestral home or not.

The court also ruled that a brother-in-law of the deceased, under the provisions of the Law of Succession and under Islamic Law, which was applicable in this case, would be entitled to be appointed as a co-administrator of the deceased's estate. It was also held that the mother of the

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<sup>152</sup> 2003 1 EA Law Reports, Nairobi Court of Appeal, Case No 274 of 2001 at p 4

<sup>153</sup> But in this case the court found that in Teso custom, (from which the parties came) a marriage could be validated by the payment of dowry after the death of the spouse, before burial. Thus, a Letters of Administration to the deceased's property was granted to the two "wives" of the deceased.

<sup>154</sup> Succession Cause No 11/2001, (2002) 2 KLR

<sup>155</sup> *Chelanga v Juma, Op. cit.*, Probate and Administration Cause No 2258/1996, (2002) 1 KLR, p. 339

deceased was entitled to a share of his estate under Islamic law, and also as a dependent of the deceased.

In another case (*of Priscilla Gitwande*)<sup>156</sup> that involved a traditional concept of same sex marriages, it was established that under Kikuyu customary law, where a husband dies leaving a childless widow, who is past childbearing age; the widow may marry a wife. This was indeed investigated by Eugene Cotran<sup>157</sup> who was at the time a member of a Presidential commission on customary law and a respected legal scholar, who then attempted to explain this kind of marriage:

"Where a husband dies leaving a childless widow, who is past child-bearing age, the widow may marry a wife. The widow pays *zuracio* (dowry) to the family of the woman selected, and arranges for a man from the deceased husband's age-set to have ... her. Children resulting from such [union] are regarded as those of the deceased husband."<sup>158</sup>

Therefore, in the *Gitwande* case, it was ascertained that Priscilla, a woman of Kikuyu ancestry, had died in 1994, and had been apparently in that kind of same-sex marriage arrangement with Salina Njoroge. Upon Priscilla's death, Salina had successfully petitioned the magistrate's court for letters of administration entitling her to be the administrator of Priscilla's property. However, it was revealed that Priscilla was not a childless widow and her biological daughter, Wairimu Ndolo felt that, being a blood daughter of Priscilla, she was better placed than her mother's "traditional wife" to represent her mother's estate. She thus challenged the issue of letters to Salina.

In the appeal, the judge took shelter in the aforementioned passage from Cotran's book and noted the author's explanation that children of such a union are, for all intents and purposes, regarded as those of the woman's deceased husband to entitle her to inherit.

An interesting recognition of the contribution of women in the family's matrimonial property can now be seen in the court's recent interpretation of law in a precedent setting decision in *MSK v MSK* in 2005.<sup>159</sup> Here, the High Court in Nairobi held that marriage is an institution of trust and the wife does not go daily to record the work she has done to contribute to the marriage. The contribution that she makes in looking after the house and the children is substantial and must be taken into consideration when dividing the matrimonial properties.<sup>160</sup>

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<sup>156</sup> In the estate of Priscilla Nduta Gitwande, [2006] eKLR ([www.kenyalaw.org](http://www.kenyalaw.org)) H. Court at Nairobi (Lady Justice K.H Rawal), May 30, 2006

<sup>157</sup> In his 1969 book, *Restatement of African Law*

<sup>158</sup> Michael Murungi, "Can One Inherit in Same Sex Marriage?" *The Nation* (Nairobi), 18 Sep. 2006,

<sup>159</sup> High Court of Kenya, Nairobi 10/5/05, (2005) eKLR

<sup>160</sup> See report on the Outlook Magazine in the Daily Nation Newspaper 15/8/05 at p 12

## 6.4 Procedural Aspects in Succession Proceedings

The decisions of the courts clearly indicate that procedural aspects in the respective statutes are essential to the success of a petition made in inheritance cases. The petitioner has to first have the standing to bring a case, and this standing is found in relation to the provision of the law of succession and other laws governing the property in question.

In *Willie v Muchuki and two others*,<sup>161</sup> the question arose whether succession proceedings are suits as envisaged under the Civil Procedure Act (cap 21) and as such, whether the doctrine of *res judicata* applied to them. It also involved the question as to whether where a party seeks to file a suit on behalf of the estate of the deceased; it was necessary to first obtain letters of administration.

The court held that succession proceedings could not be ordinarily termed as suits as envisaged in the CPA. However, in those instances where there were disputes in succession proceedings that were to be settled by the court before the matters of devolution of property could be determined, the doctrine of *Res judicata* would apply. It was also held that it was necessary, where a person sought to file a suit on account of the estate of the deceased, that he/she should first obtain the letters of administration from the court. Without this, the applicant would have no *locus Standi*.

In *Re, Estate of Mangeche*,<sup>162</sup> the respondent obtained the letters of administration, however before they could be confirmed, and without asking for the revocation of the grant, the objector filed his objection, seeking to be enjoined as a beneficiary and co-administrator in order to safeguard his interest as a purchaser of the portion of land in question. It emerged that both the objector and the deceased had, pursuant to the sale of land in question by the deceased to him, signed an application for the consent of the Land Control Board (LCB), but the deceased died before the application could be presented.

The Judge held that since the application for the consent of the LCB to the sale had not been presented to the board, and therefore the consent of the LCB had not been obtained, the sale could not be enforceable to the administrator under the Act. It was held that the application for consent became void upon the lapse of 6 months before it is presented before the board, and therefore the anomaly in the claimant's petition could not be cured.

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<sup>161</sup> Civil suit no 163 of 2004 (OS), (2004) 2 KLR p 357

<sup>162</sup> Succession Cause No 2237/1999, (2002) 2 KLR, p. 399

In *Mamau v Kirima*,<sup>163</sup> the plaintiff was the son of the second deceased, Kamau Njoroge, and the nephew of the first deceased Kirima Wambora. The second deceased was the sole administrator of the estate of the first deceased, his brother. The defendant in the case was the wife of the first deceased.

It emerged that before his death, the second deceased had, as the administrator given himself three acres of land and allocated the remaining eight acres to the widow of the first deceased. The defendant (the widow of first deceased) had not been satisfied with the division and had filed summons for revocation of issue of grant, while the second deceased also went to court praying assertion to the transfer. He died before this the cases were settled. The son of the second deceased sought to bury him in the three acres he had allotted to himself, which move the widow of the predeceased resisted, thus giving rise to this case.

The court held that after the death of the second deceased (who was the administrator of the estate in question); the correct move would have been for the representative to apply to court to be made the administrator. The second deceased could only be buried in the three acres after the court's consent to the application by the new administrator was granted.

## **6.5 The Protection of the Property of the Deceased**

The Law of Succession Act (LSA) stipulates for protection of the deceased's property before the bequests have been effected under it. Section 45 indicates that except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under the Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

The court has a responsibility to protect the estate of the deceased from destruction or misapplication before the grant of letters and appointment of administrator(s).

In *Kinyanjui v Republic*,<sup>164</sup> the question arose as to how the law could protect the estate of the deceased where no letters of administration had been obtained. The court was clear to emphasise that the fact that letters of administration had not been obtained could not preclude the law from protecting the property of the deceased. It therefore ruled that even where a complainant has not received a letter of administration, they still have the capacity to lodge a criminal complaint under section 137 (c) (2) of the Cr.PC. The Lordship ruled that even when letters of administration have not been obtained for the estate of the deceased person, the court had to protect

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<sup>163</sup> Civil Case No 286/2002, (2002) 2 KLR, p172

<sup>164</sup> Cr.A No 544/1999 (2004) 2 KLR, p 364

the properties, more so against the criminal action of an individual, in order to ensure that nothing would occasion any miscarriage of justice against the legatees.<sup>165</sup>

## 6.6 The Complexity of Ancestral Land under the Registration Regime

Ancestral claims over land create another issue of complexity in determining the rights held on land.

In the case of *Muriuki Marigi v Richard Marigi Muriuki and 2 others*,<sup>166</sup> three sons of Marigi sued him in the high court to compel him to equitably subdivide the parcel of land registered under his name under the Registered lands Act, fearing that the father intended to subdivide the land in a manner that would disadvantage them.

The Court of Appeal found that the claim of the son was based on customary law rights, which were excluded under sections 27 28 and 29 of the Registered Land Act. According to the court, the effect of sections 28 and 29 of the RLA is that the rights of a registered proprietor of land under the Act are absolute and indefeasible and can only be subject to rights and encumbrances noted in the register, or overriding interests which are set out in section 30.”<sup>167</sup> This court therefore found that the evidence adduced did not indicate whether the Kikuyu customary rights of the parties were noted in the Land Register, in the absence of which the court could not infer or imply that the rights were in the register.

The court took the same line as in *Marigi case* in *Esiroyo v Esiroyo and Another*.<sup>168</sup> Here, a father who was a registered owner of a parcel of land, wanted to exclude his two sons from it, while the sons relied on the Luhya customary law to lay their claim to the land as an ancestral land. In this case also, the court ruled that the customary right over land was extinguished by registration under section 28 and 30 of the RLA.

In *Mukangu v Mbui*<sup>169</sup> however, the court took a different path as to whether registration of land under the LRA extinguished the rights under customary law. Here again, the property in suit was an ancestral land, which had been subsequently registered under the Act in the name of the father, whereas the sons were in occupation of the land since their birth, carrying developments in it. The appellant in this case sought for the determination of the court that the sons’ occupation of the land gave rise to a case of trust, and as such, they could be evicted from the land. Their father on his part argued that the

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<sup>165</sup> Ibid, p 382

<sup>166</sup> Court of appeal in Nyeri No. 189/96(Unreported)

<sup>167</sup> Reported in (1973) EA 388

<sup>168</sup> (1973) EA 388

<sup>169</sup> CA Nyeri, Dec 10/2004, (2004) 2 KLR, p. 256

respondent could only claim rights to their ancestral land on the basis of customary law, but the application of this law was extinguished upon the registration of the land.

The Lordships in their ruling found that the very purpose of subjecting land held under customary tenure to the process of consolidation, under the Land Consolidation Act (LCA) and the Land Adjudication Act (LAA) and subsequently to register it under the LRA was to *ipso facto* change the tenure System. The assumption being that the rights and interests of a person in the land subjected to such a new system would have been ascertained and recorded before the registration.<sup>170</sup> The rights under customary law are subject to the rights under written laws, (and in this case are excluded under the clear language of sections 27 and 28 of Registered Land Act (RLA) with the effect that customary laws rights are extinguishes by registration of land.

However, most important, in the Court's opinion was, since the Act recognises trusts in general terms, without specifically excluding trusts originating from customary law, and since customary laws in Kenya have the notion of trust inherent in them. Wherefore, if a person holding land in a fiduciary capacity under any customary law in Kenya is registered under the Act with the relevant instruments of acquisition either describing him, or not describing him in that fiduciary capacity, that registration signifies recognition of the consequent trust. "Such recognition does not relieve a proprietor from any duty or obligation to which he is subject to, as a trustee." The court thus to a level overturned the ruling in the *Marigi* and *Esiroyo* cases

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<sup>170</sup> Ibid, at para 35 (p.257)

# 7 The Affected Rights

## 7.1 Introduction

Shortcomings within the various laws associated with land rights and passage of property in Kenya come as a result of their diversity and lack of uniform application, as a result of which certain groups in the society have remained largely unprotected in the enjoyment of their rights.

Insufficient effort has been undertaken to balance out individual tenure policies as inherited at independence vis-à-vis a fair distribution of land taking into consideration the communal poverty still prevalent in the country. This has created a scenario where certain groups in the society have found themselves disempowered by the existing framework of law, the custom, and the practices.

Whereas the law was set in place to secure the rights of all citizens and ensure equitability in allocation and utilisation of common resources, the practice has not been successful in establishing the desired results.

This chapter undertake to look at some selected groups, whose rights of ownership, possession, and enjoyment of land have not been realised under the law.

## 7.2 The Rights of Women

From time immemorial in most African societies, women have been discriminated against by men when it comes to land ownership, despite providing the majority of farm labour and producing much of the food. Traditionally, the position of women in the society was always subservient to those of the men under the setting of the African customary system, where ancestral property automatically devolved to the men within the family structure.<sup>171</sup>

This was further retrogressed by the changes in the economic setup of the community during the colonial period. The expansion of agricultural activities to commercial cultivation and the growing of food crops for sale during and after the II world war period ensured that those men who were becoming wealth were those who had access to land and labour. Husband looked to their wives' households to find both.

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<sup>171</sup> See Patricia Kameri Mbote, *The Law of Succession in Kenya: Gender Perspectives in Property Management and Control*, Women and Law in East Africa, Nairobi 1995) International Environmental Research Centre, at pp 3-4

As the demand for land grew in the African settlements, the men increased their land space into the lands that were previously being cultivated by their womenfolk for food, and cultivated them into cash crops. Women labour was then utilised in these endeavours, for digging, weeding and harvesting. The wives' labour was also utilised for the preparation of food and for the brewing of beer, for those working in their husbands' cash crop fields.<sup>172</sup>

The disempowerment of women did not just take the direct nature of physical dispossession of land, though these other types also critically affected the distribution of property. For example, the colonial legal changes that allowed customary adjudication by the community elders deeply affected and compromised the rights of women and their status before the courts and in the society in general where marriage and matrimonial issues were further tilted in favour of the men by the male dominated systems.<sup>173</sup>

In matrimonial causes, brought before the adjudicating tribunals by the husbands, what mattered was not the marriage *per se*, but was reserving for themselves what a wife could provide. This extended not just to the sexual companionship, but also to the agricultural labour, to reproduction, to the completion of burdensome daily household chores, and to her presence in the household, which formed the basis for the man's status in the society.<sup>174</sup>

Through the new hybrid legal dispensation the physical mobility of women was regulated, making them more and more dependent on the patriarchal dispensation thus created. This system was also inherited and carried into the postcolonial era, thus affecting the right of women to date.<sup>175</sup>

Land matters in Kenya are complicated by customs. Prior to the colonial era, property in Kenya was controlled at clan level. Land could not be transferred without approval of the clan elders, who were always men. Women's access to most property was through male relatives — usually husbands, fathers, brothers, or sons.

Therefore, the patriarchal customary norms and policy-making bodies have continued to favour men. Traditional leaders and government authorities have often ignored women's property claims. This has also been the case when the courts with customary inclination have interpreted family property and succession laws.

Research reveals that 80 per cent of female-headed households are either "poor or very poor" in part due to their limited ownership of and access to

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<sup>172</sup> Brett L Shale, "Bride wealth and Female Consent: Marriage Disputes in African Courts, Gusiland, Kenya," *Journal of African History*, 44 (2003), pp 241-62, at p. 243

<sup>173</sup> Brett L Shale, *ibid.*, at p. 246

<sup>174</sup> *Ibid.*, at p 248

<sup>175</sup> See Leslie Gray & Michael Kevane, 'Diminished Access, Diverted Exclusions: Women and Land Tenure in Sub Saharan Africa,' *African Studies Review*, Vol. 42 No. 2, (Sept., 1999) pp. 15-39

land.<sup>176</sup> Land ownership is largely a men's affair with women accounting for only five per cent of registered landowners nationally, despite their enormous contribution to agriculture production.

Jommo Kenyatta, (the founding father of the nation)'s book is quite informing as to the attitude of Kenyans as regards land right accorded to men and women in an African society:

In relation to the (Kikuyu) tribe, a man is the owner of his land and there is no official and no committee with authority to deprive him of it ... insofar as he is cultivating a field for the maintenance of himself, his wives and his children, he is the undisputed owner of that field and all that grows on it.

In the same way, a woman is the owner of her land and her hut as far as outside people, even her husband's other wives are concerned, and in her management of her property she expresses her initiative as well as contributes to the family budget. But her ownership is not irresponsible; her chief function in the group is to bring up her own children and it would not occur to that the land was hers for any other purpose.<sup>177</sup>

The wife's role has largely remained on provisional ownership of land as a mode of sustenance to the family as a whole, while husbands have retained the power to dispose off all the land held in their name. Though, some recent developments are encouraging in attempts to secure the rights of the women, a case in point being the jurisprudence in *Karanja v. Karanja*, where it was held that:

“The fact that property acquired after marriage is put into the name of the husband alone and that the husband has evinced no intention that his wife should share in the property does not necessarily exclude the imputation of a trust nor preclude the wife in appropriate circumstances from obtaining a declaration that the property acquired by virtue of a joint venture is held on trust for them both.”<sup>178</sup>

## 7.3 The Rights of Children

The rights of the children are often negated by their lack of legal capacity to contract and thereby, in any way, deal with land and immovable property. According to the Infant Relief Act (1874) of England that applies to Kenya

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<sup>176</sup> The Kenya Economic Survey 2002

<sup>177</sup> Jomo Kenyatta, 'Facing Mount Kenya: The Tribal Life of the Kikuyu,' Random House inc., New York, Vintage Books Edition, Oct. 1965.

<sup>178</sup> *Karanja v Karanja*, (1976) K.L.R. 307

as a Statute of general application, infants/minors can own property and can enter into contracts for their necessities, but cannot own real property.

Under the Indian Transfer of Property Act (TPA),<sup>179</sup> no transfer can be made to a person legally disqualified to be a transferee.<sup>180</sup> Section 7 of the Act ties the competence to transfer or receive immovable property, to capacity to contract, thereby disqualifying minors (who are persons under the age of 18) from transferring property on account of being incapable to contract under the law of contract.

Although this does not imply that the law prohibits land from being transferred to a minor's estate by settlement, sale, or by gift, during the age of minority of the infant, his/her estate can only be vested on a trustee, who has to act on his/her interest.

For children born out of wedlock, the Law in Kenya puts parental responsibility in the first instance on the mother.<sup>181</sup> Though the Children's Act stipulates that a child shall have a right to be cared for by his/her parents, yet its application evades practicalities in the country.<sup>182</sup> The Act itself provides that in case of unmarried couples, a father only acquire parental responsibilities when he makes an application to the court for declaration of parental rights, or when both parents arrive at a parental responsibility agreement, or where the father has acknowledged paternity or has been maintaining the child. He would also be made responsible when subsequent to the birth; he lives together as husband and wife with the child's mother, for a period of not less than 12 months.

Therefore, the rights of the child to enjoy ownership of land have been made to depend on the good will of the trustee upon whom the land is vested on his/her behalf. The trustee, it is presumed would have the best interest of the child at heart. That may not be the case, in which case the child him/herself cannot sue in court to protect his/her interest when the trustee fails, for lack of standing.

In the case of children born out of wedlock, the provisions of law would easily be interpreted to disinherit them altogether, unless they have concrete evidence to prove paternity. This they cannot do unless their mothers are tied to the suit.

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<sup>179</sup> Applicable in Kenya as part of the Laws of Kenya according to the rules established under s. 3 the judicature Act.

<sup>180</sup> At s. 6

<sup>181</sup> Section 24 of the children's Act, no. 8 of 2001

<sup>182</sup> In Part II

## 7.4 The Rights of the Minorities and Claims by the Indigenous Holders

Minorities and indigenous groups' rights have universally created a headache for governments as it has always been tied with obligations that they find difficult to fulfil.

In the Philippines in *Cruz v Secretary of DENR*,<sup>183</sup> the Supreme Court of that country joined the issue of human rights and economic development within the context of indigenous people's right to their ancestral domain.<sup>184</sup> It was perceived by the court that land rights entailed the right of the Indigenous peoples to develop lands and natural resources and to be involved in the control and supervision in their development and exploitation.

The indigenous and minority communities possess certain peculiar qualities in that they have, for a long time, inhabited certain land and areas and have established a pattern of life that remained unaffected by changes for a long time, until the colonial reorganisation brought some displacement to them without necessarily unsettling their way of life.

An example of an indigenous claim in Kenya has been that made by the Maasais. At the time of independence, the Maasais were leading a recognisably traditional way of life, moving seasonally with their animals across the plains of central and southern parts of the country in search of pastures.

However, from the 1950s, some developments began to threaten their way of life. Increasing numbers of outsiders began to settle in their ancestral lands, which had high potential of agricultural productivity, and some of the other progressive Maasais began to enclose large areas of fertile grazing land to form their own individual properties, forcing the majority of the population to the driest parts of the territory, incapable of supporting their livestock.

With the introduction of the land adjudication tenure, it was clear that the introduction of individual tenure would be out of question for social and economic reasons. Thus, the Mission on Land Consolidation and Registration in Kenya reported that it would be wise to establish group ranches in these areas.<sup>185</sup> The Land (Group Representative) Act, of 1968 was passed in order to give effect to this proposal, and group ranches were established in Narok, Kajiado and other Maasai Districts in Kenya.

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<sup>183</sup> *Isagani Cruz & Cesar Europa v Secretary of Environment and Natural Resources et al.*, G.R. No. 135385, (Dec. 2000)

<sup>184</sup> See, Human Rights and Economic Relations, Governance, proceedings of the 5th Informal ASEM Seminar On Human Rights, Osaka-Bangkok-Lund, at p186 (at the Lib)

<sup>185</sup> Republic of Kenya, Report of the Mission on Land Consolidation and Registration in Kenya, 1965-66 (Nairobi, 1966), para 106

However, the adjudication authorities made no effort to ensure that the boundaries of the group ranches fell within the traditional units of cattle management, which was normally a Kraal constituting of several independent polygamous families that joined together by common interest over the land.

The adjudication authority relied on the convenience of natural boundaries, with the ranches established crossing the customary migration routes of other groups. This has occasioned many clashes between the communities as well as with the government.

Only recently, the National Security Minister asserted that the government would continue to evict the members of the (Samburu) pastoralist community in a particular area of the country who were non-resident, but who claim that these areas were part of their ancestral grazing land. He was reported to have stated that those who claimed that the resident in the area were settled on their ancestral land were mistaken since no such land existed anywhere in the country because under the Constitution of Kenya, land was categorised only into three tenures: Private, Local Authority and Central Government land.<sup>186</sup>

When the Consolidation Act created the group ranches, another shortcoming of the system established arose based on the elective representatives for the administration of the ranches. This was very alien to the traditional way of life, with the elected leaders possessing no traditional legitimacy. The system failed to realise that the property-owning group were usually a social unit living in an area with defined boundaries under their own system of authority.<sup>187</sup>

Thus even in the initial investigations made by scholars over the management of these ranches, it was found that there was little collective responsibility among those elected to run these ranches.<sup>188</sup> A sense of group identity was never realised on these establishments.

To date, the running of ranches is bedevilled with issues of legitimacy. On August 13 2006, it was reported in the press that the government had disbanded all group ranches' committees in Kajiado district over corruption allegation and financial impropriety, citing the case of Ewaso-Kedong and Nkama ranches as being the most corrupt in that district.<sup>189</sup>

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<sup>186</sup> "A house Divided," The Standard, Oct. 4<sup>th</sup> 2006, at,

[http://www.eastandard.net/hm\\_news/news.php?articleid=1143959130](http://www.eastandard.net/hm_news/news.php?articleid=1143959130)

<sup>187</sup> Okoth-Ogendo, "The tragic African commons: A Century of Expropriation, Suppression and Subversion." *Occasional paper No. 24*, (2002), Cape Town: Programme for Land and Agrarian Studies (PLAAS), University of the Western Cape.

<sup>188</sup> See Simon Coldham, *op. cit.*, at 624

<sup>189</sup> See "Officials sacked," News article on the Standard Newspaper on 30/8/06 at p 10

On minorities' rights, since their political impact in the country is negligible, successive governments have made little efforts to solve their land problems.

In a recent development, the members of hundred thousand-strong Nubian community have had to take the Government to the African Commission seeking compensation for loss of their ancestral land in Kibera. They accuse the Government of violating some provisions of the AU charter that deal with land, citizenship and human rights as spelt out in the Constitution. On account of Government violations, the community claims that its members have been subjected to cruel, degrading and inhuman treatment contrary to sections 5, 6, 13 and 14 of the ACHPR. The case is scheduled to be heard during the 40th Ordinary Session of the Commission in Banjul, Gambia.

The members of the Nubian community were settled in Kibera and allocated land by the colonial government on arrival from Sudan in 1820s. Over time, that land has been disposed from them and currently, a very small portion remains in their hands, with the rest having been alienated by successive governments and allocated to institutions and other people.<sup>190</sup>

In other situations of minority rights violation, where the government had relented to grant the Ogiek communities right to certain land, investigations have revealed that these parcels of land had not gone to benefit, those to whom it was intended. In a report by the Kenya National Commission on Human Rights (KNCHR) and the Kenya Land Alliance (KLA), it has been revealed that billions of shillings worth of land was illegally acquired in Kiptagich Forest by powerful individuals in the (former government under the) KANU regime. This included (former and current) MPs, permanent secretaries and parastatal chiefs who were the prime beneficiaries of the land in the forest, which became part of a settlement scheme in 1997. On the records, this land was meant to benefit the Ogiek community.<sup>191</sup>

## 7.5 Rights in Adoptive Relations

With the current system in Kenya, as indeed in most of Africa it is very difficult in the case of persons in adoptive relations with the testator to inherit from their adoptive parents, on account of the customary traditions, even though the law has tried to ameliorate the situation.

Adoption is governed under the Children's Act of 2003, which repealed previous legislations addressing children's issues that included the

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<sup>190</sup> Amos Kareithi, "*Nubians sue over land*," The Standard, 5th Oct. 2006

<sup>191</sup> "Unjust Enrichment: The Making of Land Grabbing Millionaires." report by KNCHR and KLA, yet to be published. See "Ogiek shunted aside as the rich go on a stealing spree," News at Nationmedia.com, publication on 25/9/2006, at [http://nationmedia.com/dailynation/nmgcontententry.asp?category\\_id=1&newsid=82100](http://nationmedia.com/dailynation/nmgcontententry.asp?category_id=1&newsid=82100)

Children's and Young Person's Act, the Guardianship of Infants Act, and the Adoption Act.<sup>192</sup>

Under the Children's Act:

Where, at any time after the making of an adoption order, the adopter or the adopted person or any other person dies intestate in respect of any property (other than property subject to an entailed interest under a disposition made before the date of the adoption order), that property shall devolve in all respects as if the adopted person were the child of the adopter born inside marriage and were not the child of any other person.<sup>193</sup>

In addition, the Act provides that in any disposition of property made, whether by instrument *intervivos* or by will, any reference (whether express or implied) to the child(ren) of the adopter are to be interpreted as including, a reference to the adopted person(s).

Therefore, it is observed that the adopted persons are accorded all the rights of children born in the adopting family, under the Act. This position was upheld in *Re: Estate of Muchai (Deceased)*,<sup>194</sup> in an application to be declared a child of the deceased for the purpose of succession by the applicant. Here, the court held that a child could be the biological offspring or one whom the person has assumed permanent responsibility and as such is entitled to a share from the estate of the deceased.

However, in one situation highlighting the problems faced by the adopted persons, a woman by the name of *Gituere Wanjiru Wanda* is on the verge of losing property she got from her father because of her adopted status.<sup>195</sup> Ever since she got a bequest for two acres of land, and even with the support of the adoptive mother, the 30-year-old lady has had to face both physical and psychological violence meted on her by her siblings, who believe that she does not deserve to get a share of the family property because she is a 'collected woman.'

Irrespective of the fact that she has been in the family ever since she was adopted when she was just a few days old, her siblings perceive that a bequest to her is culturally untenable; since she is "*mwanamke wa kuokotwa*" (a collected woman) she is undeserving of any property from the homestead.

In fact, the property in question possesses a history of conflict, based on traditional patterns of passage of land. Gituere's married sisters, who

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<sup>192</sup> Under s. 200 of the Act

<sup>193</sup> S. 174. (1)

<sup>194</sup> Succession Cause No 578 of 1999, (2004) 2 KLR

<sup>195</sup> "The Tragedy of Being an adopted daughter," *The Standard*, online edition, Sept 23, 2006, at <http://www.eastandard.net/mag/mag.php?id=1143958409&catid=176>

claimed for inheritance rights alongside their brothers, have already filed a property suit at the High Court.

Still, the conflict between the culture and the statutes play a big role in the life of the average people in the rural areas and city slums as illustrated by this example. For now, Gituere says that her life has become unbearable because even when she reports assaults to the local administrators, they are reluctant to take action on account of the complexity of the claims.

## **7.6 The Rights of the Poor and the Illiterate persons**

The biggest obstacle in Kenya to the enjoyment of human rights is given rise by poverty. Though the recognition of these rights aim at upholding equality and preserving the dignity of all people before the law, poverty and illiteracy have given rise to various conditions that negate the capacity of all people to enjoy human rights to the full extend.

According to Saitabo Ole Kanchory, poverty “afflicts million of Kenyans and makes the enjoyment of fundamental rights practically impossible, besides depriving one of basic dignity. Poverty is a rubric for marginalization, hopelessness, isolation and disempowerment. Poor people are vulnerable to right abuses; they lack the means to access justice through the normal processes.”<sup>196</sup>

The United Nation Committee on Social Economic and Cultural rights in 2001, defined poverty as “a human condition, characterised by sustained or chronic deprivation of resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights.”<sup>197</sup>

Now there is an acceptance of the approach that defines poverty as the absence or inadequate realization of certain basic freedoms, such as the freedoms to avoid hunger, disease, illiteracy, and so on.<sup>198</sup>

In Kenya, statistics by the Central Bureau of statistics, released by the minister of planning in October 2003, indicated that majority of Kenyans leave below the thresholds of poverty.

Since a monetary denominator pervades every area of life, including the access to courts and administrative machineries for which a fee would be payable, poverty creates a big drawback to the access to the enforcement

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<sup>196</sup> See Outlook Magazine on the Daily Nation Newspaper 15/8/05, at p 14, Making law to help the poor

<sup>197</sup> See Poverty and the International Covenant on Economic, Social and Cultural Rights: 10/05/2001, Committee on Economic, Social and Cultural Rights, E/C.12/2001/10

<sup>198</sup> See OHCHR, Human Rights and Poverty Reduction: A Conceptual Framework, New York and Geneva, 2004, HP/PUB/04/1, at pp. 6-7

mechanisms when the rights are violated. An example, on the effect of poverty on right to property can be sighted. A procedure for grant of letters of probate and administration has been given in the Law of Succession Act that would entail a move to the court for the grant. Nevertheless, time and monetary denominator and the bureaucratic bottlenecks encountered discourage an average citizen to pursue the procedure. It is time-consuming, and it requires money to travel to the seat of the court.

Further, court fees are payable on these proceedings as well as for the registration of the bequest giving rise to unwillingness by common citizen to adhere to the process. For the poor, these procedures are extremely unaffordable and may lead to disinheritance for non-compliance with the provisions of the law; this has become the ultimate violator of the rights over land.

According to the World Bank, strengthening poor people's land rights and easing barriers to land transactions can set in motion a wide range of social and economic benefits including improved governance, empowerment of women and other marginalized people, increased private investment, and more rapid economic growth and poverty reduction.<sup>199</sup>

The poor are often left out of decision-making because of illiteracy and lack of knowledge of their land rights; some processes supported by agencies are top-down, not bottom-up, thus failing to address problems facing those bellow.

As local dialects are not always used in official engagements, the illiterate people are left out of access to information, and the community representatives are not consistently involved in project-related committees.

When it comes to adjudication and consolidation, because of the nature of the claims, communal land have at times become private properties, because the rich and educated people in the groups put up claims for individual ownership over the group land, which are not challenged. Unequal opportunity among individuals, caused by poverty, illiteracy and ignorance, make such claims possible.<sup>200</sup>

Moreover, due to fear of violence, discrimination and corruption, a suspecting member may not approach the local authorities to claim their rights.

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<sup>199</sup>Claus Deininger, *Land Policies for Growth and Poverty Reduction*, A co-publication of the World Bank and Oxford University Press, June 2003

<sup>200</sup> See generally the Unjust Enrichment Report, *op. cit.*

# 8 The Application of Human Rights in Aspects of Land Law and Succession

## 8.1 Introduction

Since international law recognizes human right as inherent in all persons, it is therefore imperative for the state to create a legal, as well as, practical framework that endeavours to oversee that all people enjoy their right to the maximum extent possible.

In Kenya, certain structures in the legal framework have worked quite adversely to some of the rights of the people relating to the passage and ownership of immovable/landed properties.

The Constitution, outlaws discrimination, and provides that all Kenyans are entitled to fundamental rights and freedoms, whatever their sex<sup>201</sup> and article 82 prohibits any law that is discriminatory either in itself or in its effect.<sup>202</sup> However, the constitution itself is equivocal on the application of customary laws. In matters of adoption, marriage, divorce, burial, and devolution of property on death, it stipulates that personal laws are applicable, (and in practice in some cases) even overriding the written law. This stands with respect to the application of personal laws to the members of particular races (like in case of the Kenyan Indians to whom Hindu law is applicable).

Sanctified discrimination can also be observed under the provisions of section 82(6) of the constitution which stipulates to the effect that if an official body controlling transactions in agricultural land (*such as Land Control Board*) gives or withholds consent to a transaction within its jurisdiction, its decisions are not deemed as being discriminatory.

Furthermore, violations of land rights are not entirely attributable to the provisions of the statutes. Some good laws in the statute books, have been overtaken by retrogressive practices that have persisted to an extent that they have attained the force of law; overriding the texts of the statutes.

A case in point is the law of Succession, where the Act, grants equal rights of inheritance to boys and girls in the event of their parents dying interstate. The Act extends similar privileges to widows and widowers. Nevertheless, the girl child and widows lose their rights based on customary practices.

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<sup>201</sup> In s.70

<sup>202</sup> Art. 82(3) defines discrimination to include those made on account of sex

These ambiguities in the law, resulting from conflicting norms, do not conform to international standards and principles highlighted in the UDHR, the ICCPR and ICESCR as well as on the ICERD, CEDAW and CRC among other instruments, which the governments has acceded either in principle or as a signatory to the respective treaties.

The guiding framework under the Istanbul Declaration on Human Settlements and the Habitat Agenda,<sup>203</sup> is quite informing on the ideals that states ought to aim for with respect to settlement of people. In the conference in Istanbul, the governments undertook to, provide legal security of tenure and equal access to land to all people, including women and those living in poverty. Under the framework, the states bound themselves to ensure transparent, comprehensive and accessible systems in transferring land rights and legal security of tenure.

The governments also undertook to provide legal protection and redress for forced evictions that are contrary to law. In the case of unavoidable evictions, they pledged to create a framework to give human rights considerations to the process by ensuring that alternative suitable solutions are provided to the affected individuals.

Nonetheless, the progressive provisions that are encompassed in the international system have not been articulated with the same zeal in the national system, and the country has continued to grapple with shortcomings that are inherent in the statutes and customs.

This part will try to highlight some of the shortfall in the legal system in the country.

## **8.2 Shortcomings of the System**

For a long time, huddles in the application of human right norms have pervaded the operation of rules on land and ownership of immovable properties.

The colonial administration was divided about the desirability of granting individual titles to African farmers, and concentrated their efforts on persuading them to plant cash crops, and where necessary, to consolidate their holding, to optimise the productivity.<sup>204</sup> The East Africa Royal Commission advocated for the adjudication and registration of individual titles of land in suitable areas of the colony,<sup>205</sup> and as a result of its report, a system of registration of titles based on the English model was adopted.<sup>206</sup>

This system provided for a situation where once the process of adjudication and consolidation of land was completed, and the title of the owner was entered into the land register, the land ceased to be controlled under the

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<sup>203</sup> Endorsed by the United Nations Conference on Human Settlements (Habitat II), held in Istanbul in 1996

<sup>204</sup> Simon Coldham, "Land-Tenure Reform in Kenya: The limits of the Law," *Journal of Modern African Studies*, 17: 4 (Dec 1979) pp. 615-627, at 615

<sup>205</sup> East Africa Royal Commission, 1953-54, *Report (London, 1955)*, Cmd. 9475, ch. 23

<sup>206</sup> Report of the Working party on African land Tenure, 1957-58 (Nairobi 1958)

customary tenure and would instead be regulated under the complete code of substantive law.<sup>207</sup>

The Arguments advanced in favour of the consolidation and registration of individual titles over land included the proposition that the system was designed to put to an end boundary disputes, and make titles secure. It was also averred that the system would introduce a safe, simple, and cheap system of conveyancing, which would encourage investment of labour and capital in improving productivity, and enable the registered owner of these titles to secure loans towards these endeavours.<sup>208</sup> It was hoped that because of the established land adjudication programme, the former uncertainties of customary law, would be replaced by a secure title and safe conveyancing.

However, the system failed to realise most of these objectives, as certain groups became more marginalised under the new dispensation. Women, children, minorities and the indigenous claimants over ownership of certain lands, people in adoptive relations, and the poor and uneducated in the society have, to date, remained outside the protective frameworks of the law.

This has occurred either through statutory shortcomings, or due to the misapplication of the rules, and because of customary practices that have attained the force of law as *communis error facit jus*.

Human rights violations are prevalent because the written law has failed to socially engineer an irreversible movement from communal tenure to individual tenure. Neither has the jurisprudence developed by the courts succeeded in extinguishing customary land rights, let alone to regulate it.<sup>209</sup> Diverse weaknesses are therefore witnessed in the realization of the rights of the vulnerable groups in the society in terms of the laws because of the land tenure established

### 8.2.1 Discriminatory Laws

Foremost, the legal system in the country is biased against the marginalized groups. Justice Vitalis Juma has criticised the law of succession, which he sees as being discriminatory against women.<sup>210</sup> Women are granted only

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<sup>207</sup> Codified under the Registered Land Act, 1963; this regulation of land under the Act was with the exception that customary law would continue to exist with regards to interstate succession.

<sup>208</sup> R. J Swynnerton, "A plan to intensify the development of Agriculture in Kenya," (Nairobi, 1954), sec. 13

<sup>209</sup> Odeda Lumumba, "Land related Conflicts in Kenya: Policy and Legal Implications," in African Centre For Technology Studies, *Report of the Conference on Land Tenure and Conflict in Africa: Prevention, Mitigation and Reconstruction*, 9th - 10th December 2004 at p. 42

<sup>210</sup> Justice Juma of the high court of Kenya was speaking at the Destiny Ministries Ladies Luncheon in Thika where he gave a public lecture on the Role of Succession, see The Standard Newspaper on 19/4/05 at p 14

temporary rights in property, preventing them from absolutely deal with land under their charge or alienate it even in cases of adverse emergency.

The Law of succession is impeachable for failing to grant women absolute rights over land. It gives widows rights of use, but denies them the power to sell or mortgage the land, which might even have been secured through joint efforts with their husbands. The Act also disentitles widows from their inheritance when they remarry, disregarding their contribution to the development of the property while under their charge.

In addition, a multiplicity of statutes, lead to violation of some rights. In *Chelanga v Juma*,<sup>211</sup> the Court held that where the deceased died a Muslim, Islamic law applicable to property devolution would be the one, which would govern the passage of the deceased's property. However, the Succession Act relating to the administration of property would also be applicable where they were not inconsistent with the Islamic Laws.

In the case, the court found that the illegitimate children could only inherit from their mothers and were not entitled to the deceased's estate. It was held that in view of section 82(4) of the constitution, the two illegitimate daughters of the deceased could not "be heard to say that the application of personal law governing interstate succession of the deceased which is Islamic law was discriminatory against them and inconsistent with the constitution."

Another case in point where possible conflicts in interpretation arise is on the issue of compulsory acquisition. The Constitution, the Land Acquisition Act, and the Local Governments Act, all stipulate for acquisition of private land in the interest of town and country planning.

Without harmonisation, the underlying rules in these statutes, creates a conflict in application. Procedural aspects, that the courts strictly adhere to are capable of negating the rights of a legitimate claimant, since affected persons could have a remedy under one Act but get disqualified by the procedures established in another law.

## **8.2.2 Customs and Biased Societal Attitudes**

Some of the problems associated with the issue of land are due to societal attitudes, which have largely remained unaffected by the changes in the laws. Customary laws have continued to determine the way in which a father or other household heads divide land among the family, and as land has continued to be the main source of wealth in many families, this custom has survived.

In this dispensation, a single piece of registered land may be subdivided on the ground between the registered proprietors and his sons, with such

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<sup>211</sup> *Op. cit.*, *Chelanga v Juma*, Probate and Administration Cause No 2258/1996, (2002) 1 KLR, p. 339

transactions never being submitted to the land control board (LCB) for its consent and to the registrar of lands for certification. This negates any claims by the womenfolk, who cannot formally challenge such transactions.

These customary norms are based on patriarchal traditions in which men inherited and largely controlled ownership of land and other property, while granting women lesser property rights.<sup>212</sup> Most societies do not recognise the daughters' right to inheritance, in contrast to equal rights given to both sexes under the Succession Act. This custom still holds strong and women have not been able to inherit from their parent's land under customary tenure.

Furthermore, protection is still accorded based on notions of marriage and its validity under customs, disregarding the contribution to maintenance of the property by the women. In *Mary Njoki v John Kinyanjui and others*, the appellant's claim to the deceased's property was rejected despite her cohabitation with him. The court was of the view that cohabitation and repute alone were not enough to constitute a marriage. It was necessary in the court's view, that such cohabitation be accompanied by an attempt to carry out some ceremony or ritual required for any marriage or by customary law<sup>213</sup>

It is doubtless that the few statutes that could advance women's property rights differ from religious and customary laws, which privilege men over women. Nevertheless, customary law -largely unwritten but influential- still allows local norms to co-exist with formal law.

Simon F. Coldham has argued in this regard that, "if the people continue to deal with land according to customary law instead of as required by the Registered Land Act, then clearly the system is not operating effectively...Unregistered land will continue to operate de facto, at least until challenged by someone prepared to assert his strict legal right."<sup>214</sup>

### **8.2.3 Inaccessibility to courts, and Maladministration of Justice**

Remedies against violations are normally sought from the courts of law. However, for various reasons, to the majority of citizens, courts are beyond their reach:

First, the cost of filing fees is prohibitive to many an affected individual. A poor person who is divested of rights over land cannot afford to pay the court fees, which would enable him to access the places of justice.

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<sup>212</sup> "Double Standards: Women's Property Rights Violations in Kenya," Human Rights Watch report

<sup>213</sup> *Mary Njoki v John Kinyanjui and others*, Unreported Civil Appeal Case No. 71 of 1984

<sup>214</sup> See *op. cit.*, Simon Coldham, "Land-Tenure Reform in Kenya: The limits of the Law," at p. 617

Second, the delays in determining the cases have had the effect of further increasing the cost of litigation. The time it takes to pursue property claims, especially in court, where case backlogs have ensured that cases cannot be expedited, discourages even those capable of paying the litigation costs. For a common folk, it is expensive to attend the court sessions, which might drag on for months on end and would require regular appearance of the parties. Where the court is situated a long distance from the place where the subject matter lies, it becomes even more hopeless.

Third, the cost of hiring a lawyer to defend one's case is prohibitive and raising advocates fees is almost impossible in the backdrop of widespread poverty in the country, more so for the most vulnerable categories.

Another view held by women rights activists is that Kenya's courts are biased against women. This is most common in cases succession and marriage, where customary practices and social stereotypes still hold strong.

For example, some judges are openly hostile to the idea of requiring a man to leave the matrimonial home upon separation or divorce. Thus in the ruling in *Agness Wanjiku Mbugua v James Mbugua Macharia*, the judge making the ruling wrote:

I will pause here and deal with this issue of husbands vacating matrimonial homes for the wives. Of late a number of applications have been filed in this court seeking orders that husbands vacate the matrimonial homes for the wives. In a Kenyan context, this issue has to be approached with extreme caution. We should not blindly ape the English as we have done in almost all our laws. It should be remembered that a wife is married into the husband's clan. The matrimonial home in most cases lies within the clan land. It would therefore not be in keeping with our culture for the husband to be made to vacate the clan land for the wife.<sup>215</sup>

Lawyer Ann Njogu therefore argues that the courts and judiciary have become strong arms to disinherit women.<sup>216</sup>

This opinion does not apply just to cases of rights of women. In a typical Kenyan scenario, Mr. Sebastian Kanga complains that he is a registered owner of land where his neighbour is his stepbrother who trespasses on his land claiming ownership. He sued the brother in a court of law, which instead of making a determination referred it to a panel of elders.<sup>217</sup>

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<sup>215</sup> In *Agness Wanjiku Mbugua v James Mbugua Macharia*, Separation Cause No. 50 of 1997, High Court of Kenya at Nairobi, Cited from Ingunn Ik Dahl *et al*, 'Human rights, formalisation and women's land rights in southern and eastern Africa,' Studies in Women's Law No. 57, Institute of Women's Law, University of Oslo

<sup>216</sup> Human Rights watch, 'Double Standards: Women's Property Rights Violations in Kenya,' HRW, Vol. 15, No. 5 (A), March 2003

<sup>217</sup> The Outlook magazine, 'Your questions' column of the Daily Nation newspaper, on 3/5/05 at p 9

This clearly raises a question of the legal standpoint under which the case was referred to the panel of elders (usually chaired by a district officer). Under the law, the elders are empowered to look into a matter of trespass to land but not on matters of dispute as to ownership, that arose in the above case.

Moreover, ineffectiveness of remedies provided by the law has been enhanced by cases of its maladministration of justice by the courts.<sup>218</sup> Cases of corrupt judges and magistrates, ill trained or incompetent officers of the courts and land tribunals have dominated the discourse for review of the Judiciary.<sup>219</sup> In 1998, the then Chief Justice (Kwach) led a Commission of Inquiry on administration of justice. Its report, highlighted on the shortcomings of the system:<sup>220</sup>

The Kwach Commission had received allegations of “actual payment of money to judges and magistrates to influence their decisions”. While most of those who made such allegations were unwilling to name names, “the Commission was given several names in confidence of those known to be corrupt”.

In the purge on corruption in the Judiciary, carried out after the 2002 general election, about 20 Judges and over 70 magistrates were dismissed on allegations of engaging in corruption or professional malpractice.

Although the general feeling was that the process was flawed, it was felt that this was necessary, as the first step toward a more transparent and trusted judiciary. Whether the purge created a better judicial institution remains to be seen, but the maladministration of justice has made the essence of effective remedy illusory.

Erik Mose has argued that the existence of national remedies is one aspect of the general substantive obligation of states to implement human rights in domestic level.<sup>221</sup> Under article 8 of the UDHR, everyone has a right to an effective remedy, by a competent national tribunal for acts violating the fundamental rights.

The effectiveness of the remedy can only be gauged by its efficiency in deterrence of violation of human rights. Where the remedies are prescribed by the law but are put beyond the reach of those affected by the violations, it is clearly not effective.

The Kwach Commission wrote in 1998:

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<sup>218</sup> See generally Makau Mutua, ‘Justice under Siege: The Rule of Law and Judicial Subservience in Kenya,’ *Human Rights Quarterly*, 23 (2001), Johns Hopkins University Press, pp. 96–118

<sup>219</sup> See Nadine Robitaille, ‘Rehabilitating Kenya’s Judicial System’ IDRC Reports. See also ‘Kenya: Delay in Land Cases Due to Corruption, Karua Says’ Daily Nation News, 26/10/2006

<sup>220</sup> Republic Of Kenya, Report of the Committee on the Administration of Justice: Summary of Recommendations 24 (1998)

<sup>221</sup> G. Alfredsson & A. Eide, ‘*The Universal Declaration of Human Rights: A common Standard of Achievement*’ 1999 Kluwer, at p. 203

The Kenyan Judiciary has experienced, in the recent past, lengthy case delays and backlog, limited access by the population, laxity in security, lack of adequate accommodation, allegations of corrupt practices, cumbersome laws and procedure, questionable recruitment and promotional procedures and general lack of training, weak or non-existence of sanctions for unethical behaviour and inequitable budget.<sup>222</sup>

Unfortunately, this state of affairs still persists despite the purge of corruption in the judiciary undertaken in 2003.

#### **8.2.4 The Problem of Application of the Registered Land Act**

Unregistered sales pose a big problem to the system envisaged under the registered Land Act, as unscrupulous proprietors sell land to people without registration of the sale and then resell the same parcels of land to innocent third parties. When such transactions are later registered, then the title becomes unimpeachable to the earlier purchaser, even with the evidence of the transaction existing in the form of the deed of sale.

The problems of non-compliance with the rules on registration are more extended when it comes to the passage of registered land. Conveyancing and transactions made over these properties are mostly never registered. This is due to the complexity of the procedure that exist under the 1963 Act for the ascertainment of heir and the registration of successions.

Under that procedure, when the registrar is informed of the death of the registered proprietor and is satisfied of the death, and that the passage of the property is subject to customary law, he has to apply to the magistrate's court for the determination of beneficiaries, after consulting those affected. Afterwards, he then has to send the certificate of succession concerning the details of the beneficiaries to the registrar who would then make entries into the Land register. If such land is to be divided between two or more heirs, then also the consent of the Land control Board (LCB) would be required.

The procedure is long and cumbersome to the heirs, and given the complexity and expense thereby incurred. Unless there exists a dispute over the land, the heir would normally not bother with the registration, until a dispute arises which would then require the intervention of the courts.

Customary institutions like redeemable sale among the local communities continues to exist and thus customary rules and procedures governing the transfer or inheritance of land continue to be observed. These customary rules in most cases collide with the regime that has been set up by the registration of Lands Act. But they still hold strong.

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<sup>222</sup> *Op. cit.*, Kwach Commission; the Report of the Committee on the Administration of Justice

## 8.2.5 Executive Misapplication of the Law

Although generally, the title of the registered proprietor of land is unimpeachable, and no person dealing with him is concerned to go behind the land register,<sup>223</sup> the government has shown little inclination to respect the titles of some holder over which, because of corruption, irregular allocation were made and registration of parcels of land received.

Some of these lands are those that have over time, changed hands and acquired new holder who have bought them in good faith and without notice of any irregularities. No procedures have been established to look into these cases of innocent purchasers of land, which had manifestly good titles at the time of purchase.

In some cases, claims of title have been brought before the courts for determination before an eviction, and the court has had to give a temporary stay in the eviction until the case is finally determined, but the executive arm of government have gone ahead to flout court injunctions, and dispossessed these people of the land.

It is noteworthy than in a land dispute, the minister of land is reported to have claimed that title deeds to the land that were granted by the government were just “pieces of paper,” which he went on to disregard as he ordered the eviction of persons from the Mau forest area in 2003.<sup>224</sup>

## 8.2.6 Illiteracy and Ignorance

Literacy can be applied in two contexts: First as it relate to the general standard of formal education obtained by the group being assessed. On the other hand it may also be applied in determining the ability of individuals to understand a particular process.

In both contexts of literacy, various factors have excluded people from ensuring that human rights are enjoyed by all and in the cases of violations, that effective remedies have been availed by them.

The complexity of the laws in Kenya has disabled a common person from complying with it. Procedural requirements have made it difficult for the people who would otherwise have utilised the system, not to do so. To most people, there is a difficulty in understanding the way the laws operate. Even for those with high levels of education and access to information, the pluralistic legal system is complex and confusing, and therefore beyond their comprehension.

This has necessitated the services of lawyers and legal experts and has disadvantaged the people who must rely on their own skills and resources to

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<sup>223</sup> Simon Coldham, *op.cit.*, “Land-Tenure Reform in Kenya: The limits of the Law,”

<sup>224</sup> This has been discussed in chapter III of this work under the subtitle on Eviction.

access the justice, be it through the courts or one of the many administrative tribunals.

Those who represent themselves often do not understand the legal system, the role of courts and tribunals, or the law. When these self-represented litigants also suffer from low literacy skills, the challenges for them and the justice system are compounded.

Moreover, research has established just how unreliable land laws in Kenya (especially as has been created under the regime for registration of lands) have been.<sup>225</sup> It is futile to expect that people will change their behaviour just because there is a stipulation to that effect in the statute books. Other conditions need also to be satisfied in order to make these laws work: The law must be effectively communicated to the people to whom it is directed, and they must be made aware of the changes in behaviours so desired by the law. The people must be able to see the advantage in favour of adopting the new system, for which they must perceive to outweigh the disadvantages.<sup>226</sup>

From the experience in the Maasai Ranches, it is clear that the African custom of inviting friends and relatives, sometime as a kind of insurance to come and stay with them for as long as they wish, was contrary to the policy behind the Land (Group Representative) Act. This law had anticipated that each family belonging to a group would stay and settle permanently with its herd in the land demarcated for them.<sup>227</sup>

The traditional hospitality is still strong, and the attempts made to get rid of the trespassers have proved to be very difficult and has resulted into a problem of squatters. The Maais continued with their nomadic way of life; moving from place to place, irrespective of this system created, and coupled with political incitement, never really got to support the legal constructions that were a creation of an ideology that stressed on the importance of development without taking into account the need of the pastoralist communities.

### **8.2.7 The Coexistence of Diverse Legal Regimes**

As it relates to the general system established in recognition of customary tenure existing alongside statutory laws, various shortcomings are also noteworthy.

Okoth-Ogendo has observed that, the primary defect of the customary system retained in the tenure lay in the fact that these systems were

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<sup>225</sup> See discussion on the imbalance of the system in Simon Coldham, "Land-Tenure Reform in Kenya: The limits of the Law," *Journal of Modern African Studies*, 17: 4 (Dec 1979) pp. 615-627

<sup>226</sup> *Ibid*, at p. 626

<sup>227</sup> See *supra*, Simon Coldham, "Land-Tenure Reform in Kenya: The limits of the Law," *Journal of Modern African Studies*, 17: 4 (Dec 1979) pp. 615-627, at 623

communal, meaning that all the attributes of “ownership” were thought to reside in the “tribe”.<sup>228</sup>

From this flowed certain inherent problems, namely, that African tenure systems were:

- (a) Incapable of providing security for land development since, among other things, title could not be marketed or otherwise negotiated;
- (b) Generators of fragmentation and eventually sub-economic parcelation by reason of the fact that every adult member of a given unit was always entitled to some land; conditions that led to diseconomies of time, labour utilisation, and scale;
- (c) A source of incessant disputes by reason of diffuseness of rights and lack of clear title and thus a disincentive to long-term investments; and
- (d) By reason of land being “communal,” fraught with externalities that land deterioration was inevitable.

### 8.3 Observation

A complex mix of cultural, legal, and social factors underlying property rights abound in Kenya. Many rightful owners of land do not have title deeds for the property especially those received from an estate of the deceased.

The courts have failed because one might have to wait for justice for a long time, after a suit is instituted in a court of law, and the provincial Administration is unable to help settle disputes in the family.

If the land cases in court are settled expediently, the social issues, which though still difficult, could then remain the core theme to be addressed.

Consequently, there have arisen quite a number of conflicts related to land. Both gender and intersocietal. Mr Odeda Lumumba has defined land-related conflict to include “contest, disagreement, argument, dispute or quarrel; a struggle, battle or confrontation; a state of unrest, turmoil or chaos over land.”<sup>229</sup> Family members including spouses, brothers and kinsmen have found themselves in confrontation against each other, creating a barrier to the very threads of societal stability.

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<sup>228</sup> Okoth-Ogendo, *op.cit.*, ‘Agrarian reform in sub-Saharan Africa: An assessment of state responses to the African crisis and their implications for agricultural development,

<sup>229</sup> Odeda Lumumba, “Land related Conflicts in Kenya: Policy and Legal Implications,” in African Centre For Technology Studies, *Report of the Conference on Land Tenure and Conflict in Africa: Prevention, Mitigation and Reconstruction*, 9th - 10th December 2004 at p. 42

Conflicts are also widely observed in the so-called land clashes. The country has had a long history of ethnic conflicts sparked by disputes over land, stirred by political incitement. In the Rift Valley region, land clashes led to the death of hundreds of and displaced thousands of people in 1992. In the Njoro area, the clashes in 1999 also left more than one hundred people dead and displaced many more. The same was also experienced in the coastal area of Kenya.<sup>230</sup> In January of 2005, in the Rift Valley Province, more than 20 people were killed in two weeks of violence.<sup>231</sup>

Unless the land issue is comprehensively settled, these clashes will persist on any little incitement.

## 8.4 Recommendations

The law in Kenya has been inefficient to address the problems that have adversely affected the land tenure system in the country and the passage of immovable/landed properties especially in cases of succession.

There is therefore, now a need to consolidate the existing laws, including, where manifested, to remove the inconsistencies, in order to ensure that human rights are enshrined in the law and respected by the people in place of dominance, in order to create a balance where natural wealth is equitably shared by the whole nation. Such regime will ensure the optimisation of progressive realisation of economic, social and cultural rights in the country, as is obligated under the ICESCR.

In addressing this, it is important to note that land tenure regimes, inherited from the colonial rule, are still a major source of land-related conflicts, which need to be addressed as a cause of the historical injustices, which manifest themselves in the form of squatters, absentee landlordism, land clashes and all manner of lingering land claims.

Building capitalism on the basis of disputed land rights will remain as a major drawback in Kenya, because it has failed to address the issue of social justice, thereby retrogressing from the ideals regime under the ICESCR.

Creating and vesting of land rights through the law alone does not address historical injustices and obstacles to development. The law as has been structured today serves to protect gains of unfair and illegal acquisition since colonial settlement and later on by the African nobility at independence and has served to maintain the *status quo* that has always disfavoured the disempowered.

To quote Mr. Lumumba:

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<sup>230</sup> African Unification Front, AUF POLICY ON LAND REFORM,

<sup>231</sup> See, 'Water Rights Dispute Sparks Ethnic Clashes in Kenya's Rift Valley' VOA News at <http://www.voanews.com/english/archive/2005-03/2005-03-21-voa28.cfm>

“Customary land rights cannot be transformed into individual land rights successfully by simple adjudication of land rights as a legal and political process without appraisal of ecological and traditional land use system in varied areas of the country. New land dispute resolution mechanisms need to be thought-out to address too many land disputes to ameliorate future land-related conflicts, without resorting to multiplicity of land law systems that are in themselves an obstacle to development.”<sup>232</sup>

This is imperative since the consequence of property rights violations has been widespread poverty and destitution.

The ongoing National Land Policy Formulation Process, need to address the many problematic aspects to in land tenure, that requires clear discussion from a policy point of view. The land policy will need to address practical aspects of the nature and effects of land-related conflicts. It needs to clarify the many legal questions that have arisen in possessory of land issues over time.

The wide structural inequities between the people who own land and those who do not on account of dispossession is a major cause of poverty and also of land-related conflicts, as agriculture remains Kenya’s economic mainstay. An all-inclusive, comprehensive, realistic programme of resolving historical injustices on a long-term and permanent basis is imperative.

The position of customary tenure and land rights deriving therefrom within Kenya’s legal system need to be clearly stated in the new Constitution, when it finally comes into being.

In addition appropriate amendments to existing laws clarifying the nature of customary land rights should be enacted.

The government should establish a mechanism for resettling all people who have been displaced from their lands due to the land clashes.

Education programmes targeting the dissemination of information on the usefulness of peaceful co-existence between communities and the empowerment of women, children and the minority group for the benefit of the society, to heal the wounds of historical injustices and restore confidence in new legal regime would be handy after the stage of legislative amendment. This should be accompanied by a broad-based land claims mechanism for mediating any future land-related disputes.

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<sup>232</sup> *Op. cit.*, Odeda Lumumba

## 8.5 Conclusion

Toulmin and Quan note, “A new paradigm is emerging which does not prescribe a specific approach to land reform.” The paradigm is based on pluralism and the imperative of African national, regional and local governments, tribal groups, villages, communities, and civil society organisations negotiating their own solutions to securing access to land.<sup>233</sup>

This paradigm that supports gradual changes of indigenous tenure systems has been favoured by some authors<sup>234</sup> who have argued that indigenous tenure arrangements are dynamic and evolve to meet new needs, and therefore customary land tenure systems have an important role to play in land tenure reform.

New laws based on a human rights reasoning are required. Indeed, Ellis asserts, “There is no guarantee that laws and customs with distant historical roots are efficient in the sense of optimal resource allocation, or that they are fair in terms of the way access rules are applied to different types of people.”<sup>235</sup>

The Kenya National Commission on Human Rights has commented that with regards to land tenure reforms, there is [a] need to come up with a radical change rather than just attempting to resolve the problems within the current legal frameworks, which are basically discriminative and mutually exclusive. Individualization of land ownership as it stands today is not a panacea to communal land problems.

The Commission thus suggested an alternative borrowing from the example of a model called Community Land Trust (CLT) that was developed in America in 1960s that proved to be a success story in alleviating problems of homelessness:

The key element was community planning, which was separated from other planning based on profits and commercial interests. Housing projects on community-owned land, which were anchored on social principles in which market concepts at most have [a] useful but subordinate role, enable majority of people to have their own cost-effective houses among the relatively poor communities in America.<sup>236</sup>

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<sup>233</sup> Toulmin and Quan (eds.) *Evolving land rights, tenure and policy in Sub-Saharan Africa*, London, 2000: Department for International Development, International Institute for Environment and development and Natural Resources Institute

<sup>234</sup> Bruce, Migot-Adholla, and Atherton, *Searching for Land Tenure Security in Africa*, Dubuque, Iowa: Kendal/Hunt Publishing Company (1994)

<sup>235</sup> Ellis, *Rural Livelihoods and Diversity in Developing Countries*, Oxford: (2000) Oxford University Press.

<sup>236</sup> Communication to COHRE, Jan. 2005.

It may not be necessarily for that kind of model in Kenya, but a similar strategy and approaches may be used to ensure durable solutions to the problems.

It is noteworthy that the government is now taking steps to implement a land policy to even pre-empt the new constitution, which has been delayed on account of political disagreements. The government has now launched a comprehensive land policy that is expected to pave way, among other issues, for the ownership of land by women, squatters and the marginalised communities.

The national land policy would see the harmonisation of all land laws and provide guidelines on the utilisation, ownership and development of land in the country as it seeks to address the controversial issues of private land, rights of minority communities, gender, matrimonial and inheritance property, sell and mortgage of family land and absentee landlords.

The land policy will provide institutional framework that, is hoped to be able to ensure devolution of power and authority, participation, justice and susceptibility.

Under it, three institutions will be set up: the National Land Commission, the district land boards, and community land boards in order to compound effective management of land, and a land court and district land tribunal established alongside the National Land Trust to mobilise finances, according to this policy

It is hoped that the reforms thus stirred would lead to land reforms that adheres to the principles of redistribution, restitution, resettlement, land adjustment and taxation in order to secure the land rights of all Kenyans. The proposed law also advocates that women be allocated land.

The policy maintains the three categories, which include public land, community land and private land and still recognises and protects customary rights to land. It also recognises and protects private land rights and provides for derivative rights from all categories of land rights holding.

# Supplement A



*Cartoon from the Daily Nation on Oct. 4, 2006.*

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