

**SECURING TENURE RIGHTS IN INFORMAL
SETTLEMENTS**

**Submitted in partial fulfilment of the requirements of the Bachelor of Laws Degree,
Strathmore University Law School**

By

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MAY 2017

Declaration

I, MAKAU IRENE NDUKU, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

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This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:.....

Dr. David Sperling

ACKNOWLEDGEMENT

I would like to thank the Almighty for the blessings that I received that enabled me to complete this research. This dissertation would also have been a veritable maze if not for the guidance of my humble and dedicated supervisor Dr. David Sperling.

ABSTRACT

The Constitution of Kenya provides that every citizen has the right to property. The provision ensures that an individual or group of people that acquire land have the protection to own this property if acquired lawfully. Individuals living in informal settlements then have a right to have property when acquired through proper means.

Even though there are processes in progress to address the issue of securing tenure rights in informal settlements by the government. It is insufficient as there is a shift from many land laws to a more harmonized legal framework there is still a gap on addressing issues on informal settlements. The lack of security of tenure - in law and practice - makes protection against forced eviction very difficult, leaving the most vulnerable, such as inhabitants of informal settlements, at risk of a range of human rights violations. Therefore, this paper seeks to address how informal settlements can acquire security of land tenure through being categorized as a community. It analyses the theory of the tragedy of the commons and social contracts in relation to informal settlements. Finally, it establishes whether the community land act of 2016 shall be able to accommodate informal settlements to resolve the issue of land tenure.

LIST OF CASES

Pye (Oxford) ltd v. The United Kingdom (15 November 2005).

Sangor Osmanet al. v. Municipal Council of Garissa et al.

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CHAPTER ONE

1.0 BACKGROUND TO THE STUDY

Rapid urban growth throughout the developing world has outstripped the capacity of cities to provide adequate basic services, such as access to housing, for their citizens.¹ As rural-urban migration increases so does the population of informal settlements. These unprecedented rates of urbanization can be linked to massive migratory movements as well as to natural population growth.

Informal settlements, whether on public or private land, are different from squatter settlements: they are formed by the urban poor who lack the necessary funds to acquire housing in urban centres and so build shanty houses to sustain themselves on land they do not own.

Informal settlements and slums are caused by a range of interrelated factors, including population growth and rural-urban migration, lack of affordable housing for the urban poor and weak governance.² All these challenges result from rapid urbanization. In Kenya, a major structural change in urban development has taken place during the last 50 years whereby the growth of urban centres in 1962 has gone up from 31 to 91 in 1979 and more than 250 in 1999.³

According to, the UN-Habitat, the evidence from informal settlements shows a significant link that people living in poverty are trapped in their present situation because they are excluded from the rest of the society.⁴ Unfortunately, they are not empowered to allow them to make any significant contribution to community building, pushing the urban centres to the verge of sinking into abyss as the weight of mushrooming informal settlements takes its toll. Informal neighbourhoods usually lack, or are cut off from, basic services and urban infrastructure. Housing may not comply with current planning and building regulations, and is often situated

¹ Cohen, Barney. "Urbanization in developing countries: Current trends, future projections, and key challenges for sustainability." *Technology in society* 28.1 (2006): p.64

² 'Habitat III: Third United Nations Conference on Housing and Sustainable Urban Development' (2015) 9 Journal of Education for Sustainable Development. Issue Paper No. 22 p.2

³ Mireri C, Water and Sanitation Service Delivery in Kenya in *Environment & Sustainable Development: A guide for Higher Education in Kenya Vol II, 2007*. Eds. – Waswa, F., Otor, S., Olukoye, D., and Mugendi D., Downtown Printing Works: Nairobi. Pp 110

⁴ World Economic and Social Survey (2008). "Underdevelopment, urban squatting, and the state bureaucracy: a case study of Tanzania." *Canadian Journal of African Studies*, 16, (1): 67-91.

in geographically and environmentally hazardous areas.⁵ The low quality of housing and the general lack of basic infrastructure, especially sanitation, drainage, access to energy and clean water supply, result in poor social and environmental conditions, high levels of unemployment and low income gives rise to conflicts.⁶

Kenya is facing an increasing growth of informal settlements in urban centres. As rapid urbanization take its toll, so has the development and growth of informal settlements.⁷ More than 34% of the total population in Kenya lives in the urban areas and, of this, more than 71% is confined in informal settlements. The annual growth rate of informal settlements in Kenya is 5%, the highest rate in the world, and it is estimated that the rate is likely to double in the next 30 years if positive intervention measures are not put in place.⁸

Local governments tend to lack the required capacity to ensure the development and sustainability of rapidly growing urban centres. This situation is not helped by lack of supporting policies for effective urban planning and improvement at the level of national government.⁹ The absence of a sound urban planning component leads to social and environmental problems with far reaching effects.¹⁰ Although the Kenyan government has recently drafted strategic plan papers and policies recognizing the existence of informal settlements and the need to improve them, it has not addressed dynamics in land information management issues in the informal settlements and therefore fails to have a blueprint that can help with access to the most essential social services during the general city planning. Land tenure information management in urban informal settlements, for instance, has evolved in response to a need for alternative means of access to land and shelter for the urban poor.¹¹

⁵ 'Habitat III: Third United Nations Conference on Housing and Sustainable Urban Development' (2015) 9 Journal of Education for Sustainable Development. Issue Paper No. 22 p.1

⁶ United Nations, 2006 "Strategic monitoring for urban planning in developing countries: some guidelines from British and Dutch experience." International Journal of Information Management, 6: 17-28.

⁷ UN-Habitat, (2009). Planning in the Urban Fringe. World Bank.

⁸ World Economic and Social Survey (2008). "Underdevelopment, urban squatting, and the state bureaucracy: a case study of Tanzania." Canadian Journal of African Studies, 16, (1): 67-91.

⁹ United Nations, 2006 "Strategic monitoring for urban planning in developing countries: some guidelines from British and Dutch experience." International Journal of Information Management, 6: 17-28.

¹⁰ Beatley, 2000 "The urban planning system in Tanzania: what should be the strategic role of urban planning." The Journal of Building and Land Development, 4, (1): 23-26.

¹¹ Rakodi C. (2002). Politics and performance: the implications of emerging governance arrangements for urban management approaches and information systems. Habitat International, 2(4): 523-547, 2003.

1.1 STATEMENT OF THE PROBLEM

Informal settlements are residential areas where inhabitants have no security of tenure vis-à-vis the land or dwellings they inhabit, with modalities ranging from squatting to informal rental housing. The fact that residents of informal settlements in Kenya have no security of tenure over the land that they occupy or possess subjects them to the possibility of eviction and having to live in circumstances that are degrading to the human life. Securing land tenure rights in informal settlements is a problem that many third world countries face, not just Kenya. In Kenya, the government has focused on preventing evictions, arguing in favour of the right to housing, working towards upgrading the living conditions in informal settlements or the illegality of the title deeds held by the private right holders in slum dwellings.¹² None of the above actions ensures or promotes the establishment of secure tenure rights in informal settlements.

The Constitution of Kenya provides that every citizen has the right to property.¹³ The provision ensures that an individual or group of people that acquire land have the right to own this property, if it is acquired lawfully. Individuals living in informal settlements then have a right to have property when acquired through the proper means.

Even though there are processes under way to address the issue of securing tenure rights in informal settlements by the government, progress in resolving the problem is insufficient. Despite the shift from many land laws to a more harmonized legal framework there is still a gap on addressing issues on informal settlements. Also, there are various legal scholars, including Kenyans, who have written to the effect of addressing the issue of tenure rights in informal settlements but this has not changed the situation on the ground in Kenya.

As urbanization is still on the rise in the country then there is need to change from the old system to a new system to manage urbanization. This is closely linked to land tenure in informal settlements. Without the formulation of a clear urban policy the number of informal settlements will keep increasing as rapid urbanization continues. Therefore, an urban policy is urgently needed to cope with the challenges of urbanization and to address the tenure rights of people living in informal settlements.

¹² Kameri-Mbote P and Odote C, "Innovating Tenure Rights for Communities in Informal Settlements:" p.2.

¹³ Article 40 (1) of the Constitution of Kenya 2010.

1.2 STATEMENT OF OBJECTIVES

MAIN OBJECTIVE

1. To evaluate whether informal settlements can be communities under the categorization of land and to assess to what extent the legal framework and more specifically, the Community Land Act of 2016 can address the issue of securing land tenure rights for persons living in these settlements in accordance with Article 40 of the Constitution of Kenya.

SUB OBJECTIVES

2. To review the effectiveness of the legal framework in addressing the tenure rights of informal settlements.
3. To determine the extent to which the National Land Commission and other institutions have addressed the problem of land tenure in informal settlements.
4. To propose recommendations on how Informal settlements can acquire tenure rights through occupation or adverse possession, with specific reference to the Community Land Act of 2016.
5. To propose appropriate recommendations of best practice drawn from other jurisdictions regarding tenure rights in informal settlements.

1.3 RESEARCH QUESTIONS

QUESTION

1. To what extent can the Community Land Act of 2016 resolve issues of land tenure for residents of informal settlements, provided they can be members of and therefore to constitute a community?

SUB QUESTIONS

2. To what extent is the legal framework effective to address the tenure rights of informal settlements?
3. To what extent have the National Land Commission and other institutions addressed the problem of land tenure in informal settlements.
4. How can the informal settlements acquire tenure rights through occupation or adverse possession, with specific reference to the Community Land Act of 2016?

5. What can Kenya learn from other jurisdiction and reforms in establishing tenure rights to informal settlements?

1.4 JUSTIFICATION AND RATIONALE OF THE STUDY

Land plays a central role and is a vital resource for the livelihoods and national economy of a country. Through land people acquire other natural resources and engage in productive activities for their own benefit. Land also plays an important social role and has special cultural and emotional significance, for families, communities and nations. Sound management of land contributes to environmental stability and economic well-being, while misuse of land undermines ecosystems and livelihoods.

Establishing and clarifying land rights is a key issue in development policies to promote productive uses of land and ensure access to land-based services and resources.¹⁴ For many years the Government of Kenya has been battling without much success to resolve land issues such as the enactment of the Constitution of Kenya (2010) and the harmonization of the many land laws into one single statute has provided hope that at least some of the long-standing land issues can be resolved.

Among all the many legal issues related to land that are vexing the country, the question of land tenure rights for the tens of thousands of dispossessed persons living in informal settlements should be given priority.

1.5 HYPOTHESES

Securing land tenure rights in informal settlements is an issue that has not been adequately resolved by the current land laws in the country. The Constitution of Kenya has not fully recognized the rights of the residents of informal settlements and it does not provide as a law a way that informal settlements can gain ownership of land as it gives only a solution to private ownership. Therefore, my main hypothesis is that it is possible that the Community Land Act of 2016 could resolve the issue of land tenure in informal settlements, if the residents of those settlements can be categorized into or as communities.

¹⁴ Professor Patricia Kameri-Mbote, "Innovating Tenure Rights for Communities in Informal Settlements:" p.2.

1.6 SCOPE AND LIMITATION OF STUDY

The scope of study is limited to informal settlements which are due to rural-urban migration or poverty and, therefore does not include land settled on by squatters. Limitations that occurred during the study is such as that there is ambiguity in general of the law on the categorization of informal settlements.

1.7 CHAPTER SUMMARY

This chapter provides the context in which the study is set. It provides the basis and the structure of the study by outlining the background, research questions, hypotheses, justification and objectives of the study.

CHAPTER TWO

2.1 INTRODUCTION

This chapter introduces the historical concept of “tragedy of the commons” and its application to the present study as well as the social contract theory as a theoretical approach. It also looks at a broad range of relevant issues related to the security of tenure in informal settlements in Kenya. The chapter highlights the property and tenure regimes in these settlements. Further, it looks at the extra-legal administrative practices in such settlements in Kenya with a specific focus on Mukuru kwa Njenga slums.

2.2 LAND TENURE

According to the German International Technical Cooperation Agency, land tenure refers to the relationship between people and land that is embodied in land rights and restrictions. On the other hand, Payne defines land tenure as the mode by which land is held or owned, or the set of relationships among people concerning land or its product.¹⁵ The rules of tenure define how property rights to land are to be allocated within societies. They define how access is granted to rights to use, control, and transfer land, as well as associated responsibilities and restraints. In simple terms, land tenure systems determine who can use what resources for how long, and under what conditions.¹⁶

Land tenure is an important part of social, political and economic structures. It is a multi-dimensional, bringing into play social, technical, economic, institutional, legal and political aspects that are often ignored but must be considered.¹⁷

2.3 THEORETICAL FRAMEWORK OF LAND TENURE IN INFORMAL SETTLEMENTS.

Garrett Hardin argues that we abandoned the commons in food gathering, enclosing farm land and restricting pastures and fishing areas.¹⁸ This is the case for land tenure in informal

¹⁵ Payne (2004). "Property formalisation and guided land development." *Storia Urbana*, XXIV, (90).

¹⁶ Payne (2004). "Property formalisation and guided land development." *Storia Urbana*, XXIV, (90).

¹⁷ Payne (2004). "Property formalisation and guided land development." *Storia Urbana*, XXIV, (90).

¹⁸ G. Hardin, 'The Tragedy of the Commons' in G. Hardin and J. Baden (eds.) *Managing the Commons*, 16 (1977)

settlements whereby privatization of land tenure rendered many persons landless. Individuals whom could not afford access to land rights took it up to themselves to access it through different means which are illegal. The two types of illegal access to land rights are such as invasion or illegal purchasing of the land.

Informal settlements are a tragedy of the commons as they comprise persons who have an equal and open access to a resource even though acquired illegally. They have no formal structure of land regimes within the informal settlements and are, therefore, forced to come up with their own structure. In most cases, individual ownership of land gives rise to slumlords who take the advantage to abuse their tenants and extort money from them.

The development of informal settlements usually occurs because of rapid urbanization and lack thereof of urban policies. Therefore, individuals whom cannot afford the high rent of available houses are forced to seek lower standard accommodation.¹⁹ Settling on land that they do not have a legal claim on makes them to be vulnerable to evictions and lack of infrastructure. The high rate of rural-urban migration increases the chances of people settling on public or private land that has not been utilized.

A country should be able to use and maximise its resources without depleting it to enable future generations to enjoy the same resources. Land is a vital resource in society which we must be able to ensure as provided in the constitution is sustainably developed. In this case the tragedy of the commons as an historical event offers a theoretical framework within which to focus the study. This is that to be able to eradicate the issue of land tenure in informal settlements then a technical solution such as privatization or relocation might not be best for sustainable development might not be best. Communal ownership in this case can be best as it protects the rights of individuals within informal settlements of access to land.

2.4 PROPERTY REGIMES IN INFORMAL SETTLEMENTS IN KENYA

Informal property arrangements are majorly predominant in informal settlements in Kenya. Even though formal law has not recognized informal tenure, this category remains resilient and it caters for a majority of people in both urban and rural areas in Kenya. Informal tenure systems have emerged in response to a need for the establishment of an alternative means of access to

¹⁹ Pellikka, P., J. Ylhäisi & B. Clark (eds.) Taita Hills and Kenya, 2004 – seminar, reports and journal of a field excursion to Kenya. Expedition reports of the Department of Geography, University of Helsinki 40, 64-78. Helsinki 2004, ISBN 952-10-2077-6, 148 pp.

land and shelter especially for the urban poor.²⁰ According to Williamson, land tenure systems are structures and processes of delivering access and rights in land. The tenure systems are institutionally established and are usually dependent on the social, economic and political structures in place. The UN-Habitat has categorized the informal settlements into two categories;

- Squatter settlements-these are settlements where land and, or buildings have been occupied without the permission of the owner.
- Illegal land developments-these are settlements where initial occupation is legal but where unauthorized land developments have occurred.²¹

In order to access land rights, the inhabitants of the informal settlements use such methods as invasion, inheritance and illegal purchase. In Mukuru slums, for example, there exist cartels that deal in land and in order to operate, such groups must receive the blessing of the local administration in the area such as the Chiefs who also receive a cut out of the proceeds of these transactions.²² These groups are also the ones who authorize construction activities to be carried out within the slums and when one fails to seek their authorization before putting up a structure in the area, their structures are usually forcefully demolished.²³

Village elders in the slums also play a critical role in regulating transactions in land and they are usually tasked with informing the chief on any developments taking place in the area. A person who wants to acquire land can thus either approach the chief or the youth groups in the area and after this, a sale agreement is prepared where the chief or the group officials give consent to the sale.²⁴ Once the rights over land have been granted to a person in a place such as Mukuru slums, the right holder is guaranteed protection of their land rights and this is notwithstanding the fact that they lack full ownership of the land.

²⁰ World Economic and Social Survey (2008). "Underdevelopment, urban squatting, and the state bureaucracy: a case study of Tanzania." *Canadian Journal of African Studies*, 16, (1): 67-91.

²¹ UN-Habitat (2003). "Designing power: forms and purposes of colonial model neighbourhoods in British Africa." *Habitat International*, 27: 193-2004.

²² R.J.M. Swynnerton, *A Plan to Intensify the Development of African Agriculture in Kenya*, 1955

²³ R.J.M. Swynnerton, *A Plan to Intensify the Development of African Agriculture in Kenya*, 1955

²⁴ H.W.O Okoth-Ogendo, *Tenants of the Crown: Evolution of Agrarian Law and Institutions in Kenya* (ACTS Press, African Centre for Technology Studies 1991).

These extra-legal land administration mechanisms have thus devised record-keeping systems, which enable ease in land transactions and also in the identification of ownership. Examples of these are evident in Mukuru slums where upon completion of a transaction in land, a person is usually granted a document, which is used as proof of ownership.²⁵ This is usually done mainly by the chief who before allocating land to a person, has to verify the background of the person who in the end will pay a fee to the chief for the services that have been provided by the chief. Village elders with the assistance of youth in the area also play this role.²⁶ Structures have also been established in these informal settlements to ensure that the occupants of these areas are able to access basic services such as water, roads and electricity that are mainly provided in these areas by the existing cartels.²⁷

Land related disputes in these areas are usually subjected to the dispute resolution mechanisms that exist in the areas and this in most cases entails tasking the chief and village elders with adjudication of these disputes. Once these decisions have been made, mechanisms have been placed to ensure the enforcement of the decisions and everyone is expected to comply with the decision that has been arrived at.²⁸ Common types of land disputes in these areas relate to non-payment of rent by tenants, blockage of access routes and sale disagreements. From the foregoing, it can be seen that just like the inhabitants of areas with formal land titles, the occupants of informal settlements are able to access rights to land and the mechanisms that have been put to ensure this are accessible and acceptable to them. Through this, there is usually a perceived tenure security among them.²⁹

This is evident from the types of structures that have been put up in these areas as the owners of these structures are usually guaranteed of the inviolability of their land rights by the administrative structures that have been established in these areas. All these operate within the social contracts that are in place in these informal settlements, which are usually oblivious of

²⁵ Patricia Kameri-Mbote and others, *Ours by Right: Law, Politics and Realities of Community Property in Kenya* (Strathmore University Press 2013) 32.

²⁶ Patricia Kameri-Mbote and others, *Ours by Right: Law, Politics and Realities of Community Property in Kenya* (Strathmore University Press 2013) 32.

²⁷ Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 *Yale L.J.* 710 (1917).

²⁸ Syagga, P., Mitullah, W., and Karira-Gitau, S. (2001) *Nairobi Slums Upgrading Initiatives: Nairobi Situation Analysis Nairobi: GoK/UNCHS (Habitat)*.

²⁹ Payne, G. (2005) *Getting ahead of the game: A twin-track approach to improving existing slums and reducing the need for future slums*. *Environment & Urbanization*, 17(1), 135-145.

the requirements of the law.³⁰ Furthermore, to new occupants in these areas, these rules apply despite them having not indicated of their consent to be bound by these rules. What is thus important is the need for the new occupants to conform to the requirements imposed by these systems.

2.5 THE SOCIAL CONTRACT THEORY IN INFORMAL PROPERTY REGIMES IN KENYA

It is evident that once people are locked out of the formal property arrangements, they devise mechanisms that enable them to access land rights. The arrangements devised by these people are acceptable to them and have a binding character on those who subscribe to it.³¹ The arrangements for accessing property rights devised in these informal settlements are not unique to Kenya. De Soto notes that these systems are common globally and that they result from a combination of rules which are selectively borrowed from the official legal system, with certain improvisations, and locally accepted customs.³²

In Mukuru, the fact that the rights of those who have acquired land are recorded in a register kept by either the chief or the various youth groups is evidence of interactions of the informal systems with the formal systems. This system thus borrows from the formal system where rights to land are recorded in registers kept by government agencies. All the landowners in the slum are thus bound by this system failure to which punitive measures are enforced by the administrative agencies in the slum. According to De Soto³³, this represents the social contract that is upheld by the community members and enforced by the various authorities in the informal settlements. The land market in the informal settlements is thus vibrant with

³⁰ Otiso, K M (2000) The voluntary sector in urban service provision and planning in Nairobi City, Kenya, University of Minnesota, Minnesota.

³¹ Otiso, K M (2000) The voluntary sector in urban service provision and planning in Nairobi City, Kenya, University of Minnesota, Minnesota.

³² G. Hardin, 'The Tragedy of the Commons' in G. Hardin and J. Baden (eds.) *Managing the Commons*, 16 (1977)

³³ Hernando De Soto, *The Mystery of Capital: Why Capitalism Triumphs In The West and Fails Everywhere Else* (Black Swan 2001) 23.

transaction occurring on a daily basis and modifications being done to the land administration systems accordingly.³⁴

What is important in these areas is usually the devising of mechanisms that are able to be socially legitimate. Legitimacy is thus derived from the consent of the inhabitants of the informal settlements. Once the mechanisms adopted have gained acceptability among the members of the community, it matters not whether these mechanisms are extra-legal. What matters most to these people is that the mechanisms that have been adopted can deliver and make land rights accessible.³⁵

Kenneth Baynes argues that in order for property rights to be granted, it is required that there be united agreement of all which is represented in the idea of a social contract. The social contracts existent in this informal settlement should be the basis for the recognition of the land rights of the inhabitants of these areas by the formal property regimes. This is as a result of the failures that have been occasioned by the formal systems established by the government which has in turn resulted to the thriving of extra legality. It is within the scope of the social contract that the rights over property are secured.³⁶

This will however not be successful until the law is moulded to take into consideration the fact that it is a reality that extra-legal arrangements that have been devised to facilitate access to land and are widely acceptable to a majority of the populace. The only way that the laws that have been enacted to govern land can stay effective is by remaining in touch with the social contracts that have been pieced together by the real people on the ground.³⁷ The land

³⁴ Hernando De Soto, *The Mystery of Capital: Why Capitalism Triumphs In The West and Fails Everywhere Else* (Black Swan 2001) 23.

³⁵ Okoth-Ogendo, H. W. O., 2000. The tragic African commons: A century of expropriation, suppression and subversion. Keynote address delivered at a workshop on Public Interest Law and Community-Based Property Rights organized by the Lawyers Environmental Action Team, Tanzania and the Centre for Environmental Law, USA, in collaboration with the World Resources Institute, and the International Association for the Study of Common Property, Arusha, Tanzania, 1.4 August 2000.

³⁶ Brian Bix, *Jurisprudence: Theory and Context*, (Sweet and Maxwell 2012) 110.

³⁷ Fredrick Rauscher, 'Kant's Social and Political Philosophy', in Edward Zalta (ed) *The Stanford Encyclopedia of Philosophy* (Spring 2012 Edition)

legislations should thus contain provisions that refer to existing social contracts in the country. This will accordingly ensure equitable access to land by all in the country.³⁸

2.6 METHODOLOGY

This dissertation is a case study of informal settlements in Kenya. The methods used hereby include: library searches, online searches, primary sources such as newspaper articles. The library and online search helped me to be able to understand whether informal settlements can be categorized as communities under the Community Land Act. The observation of current affairs, considering articles and television segments is to highlight the current state of land tenure in informal settlements.

³⁸ Fredrick Rauscher, 'Kant's Social and Political Philosophy', in Edward Zalta (ed) The Stanford Encyclopedia of Philosophy (Spring 2012 Edition)

CHAPTER THREE

3.1 INTRODUCTION

This Chapter will examine and analyse the current legal framework such as the Constitution of Kenya 2010, the Community Land Act of 2016, The National Land Policy 2009 and The Land Act 2012, particularly with respect to how they might be mechanisms for providing secure land tenure in informal settlements in Kenya.

3.2 THE LEGAL FRAMEWORK IN KENYA

The recognition by the Constitution that all land belongs to the people of Kenya³⁹ and that the people can hold such land as communities⁴⁰ has sought to correct a historical fallacy that has existed in Kenya since the start of the colonial period. The laws and policies introduced by the Colonial Government preferred private land tenure arrangements while disregarding communal approaches. The justification for this approach was that communities were not legal entities capable of holding property rights in land and that the land could be mismanaged due to lack of sufficient control.

This is because the access to such community land would be unregulated and open to everyone. The resultant situation would be that of chaos and open access, what Garret Hardin referred to as the Tragedy of the Commons.⁴¹ On attainment of independence, the laws and policies on land continued with this approach, viewing private property as the most economical mode of holding land.⁴² The Constitution of Kenya 2010 and the National Land Policy adopted in 2009 sought to correct this error.

3.3 THE CASE FOR COMMUNITY LAND RIGHTS IN KENYA

The inclusion of communal tenure as a category of land ownership gives Constitutional recognition to communities and enables them to own and use land as communities.⁴³ However,

³⁹ Article 61(1) Constitution of Kenya, 2010.

⁴⁰ Article 63(1) Constitution of Kenya, 2010.

⁴¹ G. Hardin, "The Tragedy of the Commons" [1968] 162(3859) Science (New Series) 1243-1248.

⁴² J.M. Migai-Akech, Rescuing Indigenous Tenure from the Ghetto of Neglect (ACTS Press Nairobi, 2001) at p1;

B.D. Ogolla and J. Mugabe, "Land Tenure Systems and Natural Resource Management" in JB Ojwang and C Juma

(Eds.), In Land We Trust: Environment, Private Property and Constitutional Change (Initiative Publishers, Nairobi and

Zed Books, London) (1996) 85-116 at page 95.

⁴³ The Constitution of Kenya 2010

there are some hurdles that still need to be overcome to make community land rights a reality in Kenya.⁴⁴ One of the tasks is that of identifying and defining the “community” for purposes of vesting legal ownership. The Constitution of Kenya 2010 provides that a Community shall be identified on the basis of ethnicity, culture or similar community of interest. The difficulty arises where the three criteria sit side by side and lead to different results in terms of defining the community.⁴⁵

The law would have to specify how you reconcile such issues. In doing so it is important that the experience of different communities be taken into account. It is critical to note that on the issue of rights, the law should balance between communal rights and rights of individuals within the community. The law on community land rights must, therefore, protect both the rights of the community and those of the individuals within that particular community.⁴⁶

3.4 THE COMMUNITY LAND ACT 2016

The Ministry of Lands, in 2012, appointed a Task Force to develop a draft Community Land law as required by Article 63(5) of the Constitution of Kenya 2010.⁴⁷ The country adopted new land legislations in 2012 as part of the reforms and consolidation of land laws. However, the adopted legislation only governed private and public land only. The Community Land Act finally became law on 21st September, 2016. This is an Act of Parliament to provide for the recognition, protection and registration of community land rights; management and administration of community land; to provide for the role of county governments in relation to unregistered community land.⁴⁸

The law offers a clarification on the pertinent issues regarding the Constitutional provisions. First it defines who a community is.⁴⁹ The Constitution required that such communities be

⁴⁴ The Constitution of Kenya 2010

⁴⁵ H.W.O. Okoth Ogendo, *The Tragic African Commons: A Century of Expropriation, Suppression and Subversion* (Keynote Address to African Public Interest Law and Community-Based Property Rights Workshop- USA, River-Arusha Tanzania; published in CIEL/LEAT/WRI/IASCP); *Amplifying Local Voices for Environmental Justice: Proceedings of the African Public Interests Law and Community-Based Property Rights Workshop* (USA, CIEL, 2002) pages 17-29.

⁴⁶ P. Kameri-Mbote et al, *Ours by Right: Laws, Politics and Realities of Community Land Rights in Kenya* (Strathmore University Legal Press Nairobi, 2013).

⁴⁷ The Constitution of Kenya 2010

⁴⁸ The Community Land Act 2016

⁴⁹ The Community Land Act 2016

identified either on the basis of ethnicity, culture or similar community of interest.⁵⁰ The law details what this really means focusing on the category referring to a distinct and organized users of community land, who are citizens and who share listed attributes, including ancestry, geographical and ecological space, culture, socio-economic interests or ethnicity.⁵¹

Additionally, the law also restates the fact that interests in community land are of equal status to that of other categories of land. It addresses the important issue of registration providing a clear procedure for determining the name of the community that wants to own and be registered as owners of community land, the process of identifying the members of such a community, clarifying their rights, adjudication and finally registration.⁵² The Act emphasizes the principle of equality and provides for registration of all the members of the community and that all members of the community shall be allowed to benefit in equal measure.⁵³

The law also addresses the issue of the rights of individuals to community land. It provides that individuals can be allocated a portion of community land for their exclusive use and occupation. However, the consent of the community members must be obtained for this to happen. Further, the individual cannot be given a separate title to the portion of the land that has been allocated. This is out of the recognition that ownership of the community land belongs to the community as a collective entity.⁵⁴

⁵⁰ Article 63 of the Constitution of Kenya 2010

⁵¹ Act number 27 of 2016

⁵² Act number 27 of 2016

⁵³ Paul N. Ndungu, Tackling land related corruption in Kenya

http://siteresources.worldbank.org/RPDLPROGRAM/Resources/459596-1161903702549/S2_Ndungu.pdf.
Internet accessed June 8, 2013

⁵⁴ John Bruce, 2008. Kenya Land Policy: Analysis and Recommendations. A paper prepared for the United States Agency for International Development, Property Rights and Resource Governance Program under the Prosperity, livelihoods and Critical Ecosystems (PLACE) Indefinite Quantity Contract (IQC) Contract No. EPPI-00-06-00008-00, Task Order 002.

3.5 GIVING LIFE TO THE COMMUNITY LAND ACT 2016 IN INFORMAL SETTLEMENTS

The ambiguity in defining the “Community” for purposes of the Community Land Act leaves open its interpretation within the informal settlements setting.⁵⁵ While the slum dwellers could be defined as a community of socio-economic or other similar common interest, such definition would assume that they are a homogenous entity with similar aspirations. It would not be possible to reconcile the varying interests of stakeholders in the slum settlements to allow for tenure regularization.⁵⁶ It is, therefore, crucial for such communities to ingrain themselves a sense of purpose in the road to tenure regularization.

In discussing the tenure regimes in Mukuru, an informal urban settlement in Nairobi, Patricia Kameri Mbote and Collins Odote argue for the recognition of the slum dwellers as communities. According to Mbote and Odote, while the majority of the land in Mukuru is under private tenure, there are communal arrangements by communities in the slum region. The end result is a disjuncture between legality and legitimacy with each group claiming ownership of the land.⁵⁷ The authors argue that previous efforts at addressing the informal settlements have ignored the tenure aspects hence their unsustainability. They make case for adoption of communal tenure arrangements in informal settlements.⁵⁸

Based on the Constitution and the Community Land Act, they argue that there is a basis for vesting the land in community on residents of the areas based on a “community of interest.” However, such vesting should ensure that the residents have user rights, their right to sell get regulated while the governance of the land involve County Governments.⁵⁹

⁵⁵ Kameri-Mbote, P. and K. Kindiki, 2009, 'Trouble in Eden: How and Why Unresolved Land Issues Landed "Peaceful Kenya" in Trouble in 2008'. Forum for Development Studies, Oslo, Norway, Vol. 2, 2008 January 2009)

⁵⁶ Kieyah, j . and R Kivuti, 2009, 'Land Reform and Poverty'. Working Paper Series 17. Global Development Networks

⁵⁷ Kameri-Mbote P and Odote C, "Innovating Tenure Rights for Communities in Informal Settlements

⁵⁸ Kameri-Mbote P and Odote C, "Innovating Tenure Rights for Communities in Informal Settlements

⁵⁹ Kameri-Mbote P and Odote C, "Innovating Tenure Rights for Communities in Informal Settlements

3.6 THE NATIONAL LAND POLICY 2009

The National Land Policy 2009⁶⁰ is the first ever single and clearly defined land policy since independence in Kenya. Before that, while not articulated in a comprehensive national document, had been driven by a conviction that economic growth requires the transformation of customary land tenure to private ownership⁶¹. The successive governments pursued the privatization policy with remarkable consistency. The result was the privatization of the vast majority of commercial, residential and arable land in Kenya by a process of systematic first registration⁶². The Kenya National Land Policy adopted in 2009 followed a well-structured process of wide consultation and public participation.⁶³

The vision of the policy is to guide the country towards efficient, sustainable and equitable use of land for prosperity and posterity.⁶⁴ It addresses critical issues of land administration, access to land, land use planning, restitution of historical injustices, environmental degradation, conflicts, unplanned proliferation of informal urban settlements, outdated legal framework, institutional framework and information management.⁶⁵ The policy also significantly recognizes the need for security of tenure for all Kenyans. The policy is very important for community land rights in Kenya as it repudiates the long-standing priority of land administration in Kenya, the conversion of customary land tenure into individual ownership. It categorizes all land in Kenya into Public Land, Community Land and Private Land.⁶⁶

The policy also provides that all the land tenure category will receive equal recognition and protection by law in Kenya moving forward.⁶⁷ The Government, through the policy will ensure

⁶⁰ Sessional Paper No. 3 of 2009

⁶¹ Kameri-Mbote, P., Odote, C., Musembi, C. and Kamande, W., 2013. *Ours by Right: Law, Politics and Realities of Community Property in Kenya*. Strathmore University Press, Nairobi.

⁶² Kameri-Mbote, P., Odote, C., Musembi, C. and Kamande, W., 2013. *Ours by Right: Law, Politics and Realities of Community Property in Kenya*. Strathmore University Press, Nairobi.

⁶³ Republic of Kenya, 2009. Sessional Paper No. 3 of 2009 on National Land Policy

⁶⁴ Republic of Kenya, 2009. Sessional Paper No. 3 of 2009 on National Land Policy

⁶⁵ OKoth- Ogendo, "Formalising Informal Property Systems in Africa: The Problems of Land Rights Reform in Africa."

⁶⁶ C. Nyamu-Musembi, Breathing Life into Dead Theories about Property Rights: de Soto and Land Relations in Rural Africa (Brighton: Institute of Development Studies, Working Paper 272, 2006). <http://www.ids.ac.uk/files/Wp272.pdf>

⁶⁷ . Nyamu-Musembi, Breathing Life into Dead Theories about Property Rights: de Soto and Land Relations in Rural Africa (Brighton: Institute of Development Studies, Working Paper 272, 2006). <http://www.ids.ac.uk/files/Wp272.pdf>

that all land is put into productive use on a sustainable basis by facilitating the implementation of key principles on land use, productivity targets and guidelines as well as conservation.⁶⁸ It will encourage the multi-sectoral approach to land use, provide social, economic and other incentives and put in place an enabling environment for investment, agriculture, livestock development and the exploitation of natural resources. The National Land Policy 2009 categorizes the land rights in informal settlements and informal activities as one of the land related issues that deserve special attention.⁶⁹

The policy indicates that the essence of informal, spontaneous, or squatter settlements is the absence of security of tenure and planning. Many Kenyans live as squatters, in slums and other squalid places. Squatters and informal settlements therefore present a challenge for land planning and development in Kenya.⁷⁰ To deal with the challenges presented by squatters and informal settlements, the policy requires the Government to establish a legal framework and procedures for transferring unutilised land and land belonging to absentee land owners to squatters and people living in informal settlements.⁷¹

3.7 THE CASE FOR ADVERSE POSSESSION

In many jurisdictions, the rule is known that title to land can be obtained by adverse possession. This means that if a squatter remains in possession of land for a certain period of time then he will acquire ownership of the land.⁷² This would mean that inhabitants of an informal settlement could acquire ownership of the land they occupy. On the other hand, this rule interferes with the fundamental right to property of the original landowner.

Recently, in the case of **Pye (Oxford) ltd v. The United Kingdom (15 November 2005)**, the Court ruled that the rule of adverse possession in England and Wales indeed violates the landowner's right to peaceful enjoyment of his possessions.⁷³ This seems an important issue in

⁶⁸ National Land Policy 2009

⁶⁹ Sessional Paper No.3 of 2009

⁷⁰ Section 209 of the National Land Policy 2009

⁷¹ Section 209 of the National Land Policy 2009

⁷² Potsiou, C.A. and C. Ioannidis (2006), 'Informal Settlements in Greece: The Mystery of Missing Information and the Difficulty of Their Integration into a Legal Framework', fifth FIG Regional Conference, Accra, Ghana.

⁷³ Pye (Oxford) ltd v. The United Kingdom, 15 November 2005;

the possibility to acquire the rights to the land occupied by squatters, such as people living in informal settlements.⁷⁴

In Kenya, the law on adverse possession is found in the Limitation of Actions Act.⁷⁵ According to the Act, people can legally acquire free property they have, without interruption from the registered owner, occupied continuously for 12 years. Registered owners cannot hold to claim to such property. Courts of law often grant title to such land to the squatter on the premise that the registered owner slept on his ownership rights.⁷⁶ Adverse possessors must, however, prove to the court that they entered to the land adversely and without legal title. It must also be proved that the registered owner of the land was aware that the people had entered his or her land without title.⁷⁷ The other requirement is that the legal owner should not have interrupted the 12-year stay of the adverse possessor.

3.8 THE LAND ACT 2012

The Land Act 2012 is an Act of Parliament meant to provide for the sustainable administration and management of land and land-based resources.

It was enacted to achieve the following objectives:

- utilization of resources in land on a sustainable and efficient basis ;
- delivery of land services in an efficient and justifiable basis;
- promotion of efficient and sustainable use of resources such as forests, wildlife and mineral resources;
- advancement of organized and planned development of land resources;
- allocation of public land based on economic efficiency, equity, social justice and ecological sustainability;
- ensuring that land is accessed equitably by all persons protection of the rights of small land-holders and also pastoralist communities
- promotion of linkages among the various stakeholders;
- ensuring that the private sector also participate through the creation of an enabling environment for them.

⁷⁴ Pye (Oxford) Ltd v. The United Kingdom, 15 November 2005;

⁷⁵ Cap 22 Laws of Kenya

⁷⁶ Civil Appeal 56 of 2014

⁷⁷ Civil Appeal 56 of 2014

- promotion of participation by the community in the management of the resources attached to land.⁷⁸

The various forms of land tenure provided for in the Land Act 2012 are: freehold, leasehold, customary land rights and other forms which may be defined under the Act. It is provided that the Cabinet Secretary in charge of land has the responsibility of land management and administration. It is provided in this Act that the National Land Commission is the body mandated with the making of regulations to secure the land rights of the minority communities to individually or collectively access and use land and land-based resources.

3.9 THE EVICTIONS AND RESETTLEMENT PROCEDURES BILL 2012

Kenya currently has a Bill pending before Parliament that addresses security of tenure for informal settlements. Although not yet adopted, it provides a good example of a legislative framework dealing with tenuous tenure status, particularly in the context of informal settlements that are to be displaced. The Evictions and Resettlement Procedures Bill 2012 seeks to set out appropriate procedures applicable to forced evictions; to provide protection, prevention and redress against forced eviction for all persons occupying land including squatters and unlawful occupiers; and to provide for matters incidental and connected thereto.

International human rights law heavily influences the Bill, including in particular the International Covenant on Economic Social and Cultural Rights. For example, the definition of forced eviction is taken directly from General Comment No. 7 of the Committee on Economic, Social and Cultural Rights.⁷⁹ The Bill, however, does not apply to professional squatters or to disputes in the context of landlord-tenant agreements. Various provisions in the Bill would provide some degree of security of tenure to protect against forced eviction, including criminal sanctions to those carrying out unlawful forced evictions.⁸⁰

Part II of the Bill lays out these protections, including that no person shall be forcibly evicted without a Court order and that when an eviction is authorized, due process protections must be afforded including genuine consultation, adequate notice, creation of an adequate resettlement

⁷⁸ Act number 6 of 2012

⁷⁹ International Covenant on Economic, Social and Cultural Rights

⁸⁰ International Covenant on Economic, Social and Cultural Rights

action plan and the availability of legal redress to challenge the eviction.⁸¹ The Bill also requires environmental, economic and social impact assessments to be completed. In the case of development-based projects, an eviction assessment shall also be carried out that explores alternatives and strategies for minimizing harm to those evicted.⁸²

Cases dealing with forced evictions from informal settlements have begun to be taken under the new Constitutional framework in Kenya. For instance, the case of Ibrahim *Sangor Osman et al. v. Municipal Council of Garissa et al* involved the forced eviction of 1,122 persons by the local authorities.⁸³ While the community had been considered an informal settlement on public land, it had resided on the land since the 1940s, had constructed permanent housing and had close social ties to the area. The Court relied on the constitutional right to adequate housing as informed by the ICESCR (including General Comments No. 4 and No. 7) and the International Covenant on Civil and Political Rights in finding the forced eviction to be unlawful because it was carried out with no written notice, without a court order, and without consultation with the community.⁸⁴

The Court ordered restitution of the land, reconstruction of the homes, schools and other buildings that were destroyed, the provision of infrastructure such as water and sanitation, and awarded other damages amounting to US\$2.6 million. The Court also placed the relevant authorities on notice that they would be liable to process of contempt by committal, sequestration or otherwise as the High Court may direct for the purpose of compelling you to obey the same.⁸⁵

⁸¹ The Evictions and Resettlement Procedures Bill of 2012, Part IV, Section 10.

⁸² The Evictions and Resettlement Procedures Bill of 2012, Part IV, Section 10.

⁸³ Ibrahim Sangor Osman et al. v. Municipal Council of Garissa et al., Constitutional Petition No. 2 of 2011 (16 November 2011).

⁸⁴ Ibrahim Sangor Osman et al. v. Municipal Council of Garissa et al., Constitutional Petition No. 2 of 2011 (16 November 2011).

⁸⁵ Ibrahim Sangor Osman et al. v. Municipal Council of Garissa et al., Constitutional Petition No. 2 of 2011 (16 November 2011).

CHAPTER FOUR

4.1 INTRODUCTION

This chapter assesses how other developing countries such as South Africa and Brazil are dealing with the challenge of securing tenure rights in informal settlements to understand how the issue of tenure rights in informal settlements in Kenya might be resolved.

4.2 INFORMAL SETTLEMENTS IN SOUTH AFRICA

Informal settlements remain a major problem in major cities in South Africa. They consist of non-conventional housing built without complying with the legal building procedures in place in the country. The informal settlements in South Africa are usually built at the edge of the cities where there is cheap and neglected land.⁸⁶ The urban poor use materials such as wood, tins and corrugated iron to build these settlements. One major characteristic of these types of settlements is that the inhabitants have no security of tenure, lack basic services and city infrastructure such as water supply, sanitation, drainage, waste disposal and proper road access.⁸⁷

In South Africa, empirical studies have shown that rapid urbanisation over the past two decades has produced considerable challenges, namely; an ever-increasing urban housing deficit, social exclusion and the emergence and growth of informal settlements across the cities. These challenges are exacerbated by appalling wage levels, high rate of unemployment, increasing income inequalities, and extreme poverty, which are partly underpinned by past discrimination under apartheid, and its associated practice of “separate development” It is also on record that, the fall of apartheid in 1994 left a huge backlog of housing deficit, which subsequent governments have since battled to address.⁸⁸ Currently, there are approximately 2700 informal settlements across South Africa, containing about 1.2million households, who live without

⁸⁶ Cousins B., Cousins T., Hornby, D., Kingwill, R., Royston, L., and Smit, W. Land Rights for African Development: From Knowledge to Action. Collective Action and Property Rights (CAPRI) Policy Briefs. Available at: http://www.kw.undp.org/content/dam/aplaws/publication/en/publications/environment-energy/www-ee-library/sustainable-land-management/land-rights-for-african-development-from-knowledge-to-action/capri_brief_land_rights.pdf#page=29

⁸⁷ Cousins B., Cousins T., Hornby, D., Kingwill, R., Royston, L., and Smit, W. Land Rights for African Development: From Knowledge to Action. Collective Action and Property Rights (CAPRI) Policy Briefs. Available at: http://www.kw.undp.org/content/dam/aplaws/publication/en/publications/environment-energy/www-ee-library/sustainable-land-management/land-rights-for-african-development-from-knowledge-to-action/capri_brief_land_rights.pdf#page=29

⁸⁸ Department of Human Settlements. Simplified National Housing Code. 2009. The Republic of South Africa. Available at: http://www.dhs.gov.za/uploads/documents/1_Simplified_Guide_Policy_Con%20text/1%20Vol%201%20Part%201%20Simplified%20Guide%20to%20the%20National%20Housing%20Code.pdf

access to basic social services. This represents a remarkable increase, compared to just around 300 informal settlements in 1994.⁸⁹

The last two decades has seen increasing global attention on the need to tackle the emergence and growth of slums or informal settlements across the global cities. The third United Nations Conference in Istanbul in June 1996, which gave birth to the Istanbul Declaration on Human Settlements, marked a significant turning point in the global policy discourse on the need to ensure adequate shelter for all. The policy agenda was later given fresh impetus within the framework of the UN Millennium Development Goals (MDGs).⁹⁰ Goal 7 Target 11 provides for the improvement of the lives of over 100 million slum dwellers by the year 2020.⁹¹ Several countries across the developing world, such as Kenya, Brazil, India and Mexico, have initiated national programmes on the upgrading of slums in order to localise this global agenda.⁹² It is along this line that the South African government revised its housing policy to include a comprehensive national programme dedicated to the upgrading of informal settlements in the country in 2004.⁹³

The African National Congress government after coming to power in 1994 launched a national housing policy document, the 1994 White Paper on Housing, with a view to address the appalling housing situation. The policy later went through a dramatic change in 2004, leading to the promulgation of a new housing policy known as the Breaking New Ground. The new housing was the first one to include a programme specifically devoted to the Upgrading of

⁸⁹ Department of Human Settlements. Simplified National Housing Code. 2009. The Republic of South Africa. Available at: http://www.dhs.gov.za/uploads/documents/1_Simplified_Guide_Policy_Con text/1%20Vol%201%20Part%201%20Simplified%20Guide%20to%20the%20 National%20Housing%20Code.pdf

⁹⁰ The Presidency (Ed.) (2010): Annexure A For Outcome 8 Delivery Agreements: Sustainable Human Settlements and Improved Quality of Household Life. Available online at http://www.thepresidency.gov.za/MediaLib/Downloads/Home/Ministries/DepartmentofPerformanceMonitoring andEvaluation3/TheOutcomesApproach/D elivery%20 Agreement_Outcome%208.pdf, checked on 12/8/2012

⁹¹ The Presidency (Ed.) (2010): Annexure A For Outcome 8 Delivery Agreements: Sustainable Human Settlements and Improved Quality of Household Life. Available online at http://www.thepresidency.gov.za/MediaLib/Downloads/Home/Ministries/DepartmentofPerformanceMonitoring andEvaluation3/TheOutcomesApproach/D elivery%20 Agreement_Outcome%208.pdf, checked on 12/8/2012

⁹² Financial and Fiscal Commission (Ed.) (2011): Challenges and opportunities in housing finance in South Africa. Midrand.

⁹³ Financial and Fiscal Commission (Ed.) (2011): Challenges and opportunities in housing finance in South Africa. Midrand.

Informal Settlements.⁹⁴ The policy had an ambitious target to eradicate all informal settlements in the country by 2014.

4.3 THE STATUS OF HOUSING AND INFORMAL SETTLEMENTS IN SOUTH AFRICA

According to the World Bank Institute, the South African government has committed about ZAR 44.8 billion since 1994 in to a national housing subsidy programme that has benefited about 2.3 million households across the country. However, more effort is still needed to improve the housing deficit in South Africa in order to contain the emergence and growth of the informal settlements. According to Slum Dwellers International, the expansion of slums over the past two decades has been way above the efforts by the government to deliver adequate housing and to mitigate vulnerability.

4.4 HOUSING LEGISLATIVE AND POLICY FRAMEWORKS IN SOUTH AFRICA

South Africa is a party to the Millennium Development Goals which provides for the improvement of the lives of over 100 million slum dwellers by the year 2020 under Goal 7 Target 11. The country is also a signatory to various other declarations under the UN Habitat Programme that aim to alleviate the plight of people without access to adequate housing.⁹⁵ These include the Vancouver Declaration on Human Settlements (1976), the Istanbul Declaration on Human and Other Settlements (1996) as well as the Habitat Agenda (1996). At the national level, the provision of adequate housing and the upgrading of the informal settlements has a firm backing in the 1996 Constitution of South Africa and several other pieces of legislation.

Tissington argues that the South African Constitution is one of the most progressive in the world in terms of guaranteeing the socio-economic rights of individuals in relation to adequate

⁹⁴ Department of Human Settlements (DHS) (Ed.) (2015): Presentation to Portfolio Committee. National Upgrading Support Programme (NUSP). Available online at <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/150804nusp2.ppt>, checked on 6/20/2016

⁹⁵ Department of Human Settlements (DHS) (Ed.) (2015): Presentation to Portfolio Committee. National Upgrading Support Programme (NUSP). Available online at <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/150804nusp2.ppt>, checked on 6/20/2016

housing.⁹⁶ The right of the individual to adequate housing is guaranteed under Article 26 of the 1996 Constitution of South Africa. The Article provides that everyone has the right to adequate housing and the Article further requires the State to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of this right.⁹⁷

In effect, Article 26 of the Constitution provides the primary legislative framework from which all national programmes and policies on adequate housing including slum upgrading derive their support and legitimacy in South Africa. Article 26 of the Constitution is given effect by the Housing Act of 1997 and the revised Housing Code of 2009.⁹⁸ The Act lays down the general principles that should govern the processes in all spheres of government thus providing for a sustainable process of housing development.⁹⁹

4.5 THE BREAKING NEW GROUND (BNG) POLICY

The Upgrading of Informal Settlements Programme (UISP) was an offshoot of the Breaking New Ground policy document adopted by the South African government in 2004.¹⁰⁰ The aim of the policy document was to augment the delivery rate of well-located housing of suitable quality through various innovative, demand-driven housing programmes and projects. The policy document conceptualized the slums problem not merely as a housing problem but also as a product of an underlying socio-economic predicament that need to be addressed.¹⁰¹ The policy saw the housing as a way to achieve broader socio-economic goals such as job creation and poverty alleviation.¹⁰²

⁹⁶ Department of Human Settlements.2004. "Breaking New Ground," Comprehensive Plan for Housing Delivery, Department of Human Settlements, South Africa. DHS, Republic of South Africa <http://www.nwpg.gov.za/DDLG&TA/acts/Breaking%20New%20Grounds.pdf>

⁹⁷ Dawson, Hannah; McLaren, Daniel (2014): Monitoring the right of access to adequate housing in South Africa. An analysis of the policy effort, resource allocation and expenditure and enjoyment of the right to housing. Johannesburg: Studies in Poverty and Inequality Institute (SPII)

⁹⁸ The 1996 Constitution of South Africa

⁹⁹ The South African Housing Act of 1997

¹⁰⁰ The South African Housing Act of 1997

¹⁰¹ Department of Housing (DoH) (Ed.) (2004): "Breaking new ground". A comprehensive plan for the development of sustainable human settlements. Pretoria.

¹⁰² Department of Housing (DoH) (Ed.) (2004): "Breaking new ground". A comprehensive plan for the development of sustainable human settlements. Pretoria.

4.6 GENERAL OVERVIEW OF THE UPGRADING OF INFORMAL SETTLEMENT PROGRAMME

The programme offers grants to accredited municipalities to undertake sustainable housing development projects aimed at improving the conditions of slum communities. The main idea of the programme is to facilitate a phased in situ upgrading of informal settlements as against the relocation of slum dwellers to green fields. By this, the programme seeks to achieve three interrelated objectives: tenure security, health, and safety and finally, to empower the inhabitants of slum communities through participatory processes.¹⁰³ The programme recognises that an indirect approach that tackles the structural causes of slums formation, through a more holistic multi-sectoral alliance, holds the key to sustainable informal settlement eradication. The central part of the programme involves the participation of slum communities since its main aim is to empower slum dwellers through participatory slum upgrading.¹⁰⁴

4.7 THE PROGRESS OF IMPLEMENTATION

The Department of Human Settlements (DHS) began to operate with a modest target as from 2010. As at June 2011, about 206 informal settlements had been completely formalised and a further 335 were targeted for upgrading.¹⁰⁵ The Breaking New Ground policy prescribed in situ upgrading as the best way to address the structural causes underpinning the emergence and growth of informal settlements. The approach was preferred because it was seen to be responsive to poverty and vulnerability as well as leading to social inclusion. The method was also thought to better empower the slum communities, compared to relocation to new places.¹⁰⁶ Therefore, relocation of slum dwellers in South Africa was only recommended as a last resort, and under exceptional circumstances.

¹⁰³ Huchzermeyer, Marie (2011): Cities with 'slums'. From informal settlement eradication to a right to the city in Africa. Claremont, South Africa: UCT Press.

¹⁰⁴ National Upgrading Support Programme (NUSP) (Ed.) (2009): Assessment Report For National Department of Housing and Cities Alliance. Available online at http://www.citiesalliance.org/sites/citiesalliance.org/files/CAFiles/Projects/NUSP_Final_Assessment_Report.pdf, checked on 5/21/2016.

¹⁰⁵ National Upgrading Support Programme (NUSP) (Ed.) (2009): Assessment Report For National Department of Housing and Cities Alliance. Available online at http://www.citiesalliance.org/sites/citiesalliance.org/files/CAFiles/Projects/NUSP_Final_Assessment_Report.pdf, checked on 5/21/2016.

¹⁰⁶ National Upgrading Support Programme (NUSP) (Ed.) (2009): Assessment Report For National Department of Housing and Cities Alliance. Available online at http://www.citiesalliance.org/sites/citiesalliance.org/files/CAFiles/Projects/NUSP_Final_Assessment_Report.pdf, checked on 5/21/2016.

The relocation was also to be carried out in accordance with international best practices and only after a meaningful engagement with the residents. It has to be responsive to the peculiar circumstances and needs of the affected communities. The upgrading program also recognized the need to involve the local communities in the process. The experience in the country has shown that lack of public involvement can also pose a challenge to speedy and successful project implementation.¹⁰⁷ The situation has been witnessed in the case of the N2 Gateway housing development pilot project, started by the government South Africa in 2005. At the onset of the project, the government resolved to minimise the amount of consultation and public involvement for ensuring speedy implementation. However, as at 2012, public resistance stalled the project.

In situ slum upgrading, as envisaged under the Upgrading Informal Settlement Programme, is an instrument that promises to promote empowerment, integrated urban development, and social cohesion. This is more compelling against the backdrop of the ever-increasing urban unemployment, poverty and widening socio-economic inequalities.

4.8 INFORMAL SETTLEMENTS IN BRAZIL

The national legislation in Brazil has enshrined most housing rights provided for in international human rights standards.¹⁰⁸ Since the collapse of its National Social Housing System in 1996 and the approval of the new democratic Constitution in 1998, Brazil has experienced new policies and programmes aimed at promoting the right to housing of the population living in informal urban settlements.¹⁰⁹ It has been widely recognised that the process of intensive urbanisation in Brazil has been a process of social exclusion and spatial segregation.¹¹⁰

¹⁰⁷ Topham, Steve (2013): Informal Settlements- Towards a 20-Year Review. Background Note. Draft 10 January 2013

¹⁰⁸ Santos, B. (1984)“The State, the law and the urban issue.” In Falcão J. (Org.) Conflicts of Property Rights: urban invasions. Forense, Rio de Janeiro, pp. 1–73.

¹⁰⁹ COHRE(Centre on Housing Rights and Evictions) (2000) “Enforcing Housing Rights in the Americas: Pursuing Housing Rights Claims within the Inter-American System of Human Rights ”, pp. 5–25.

¹¹⁰ Osorio, L.M. and J. Menegassi (2002) “The re-appropriation of the cities in a globalizing world” In Osorio, L. M. (Org.). The City Statute and Urban Reform: new perspectives for the Brazilian cities. Fabris, Porto Alegre, pp. 39–58.

About 80% of the population in Brazil lives in urban areas where the vast majority are living in very precarious material, social and environmental conditions. The lack of affordable and adequate housing options has brought about a proliferation of irregular and illegal forms of land use and development.¹¹¹ Full formal tenure is virtually non-existent to the people who live in the irregular and illegal settlements. The *favela* dwellers in Brazil are the most vulnerable groups as far as security of tenure is concerned. Having the same legal and socioeconomic difficulties, they also have been more directly exposed to forced eviction.¹¹²

4.9 THE CONTEXT OF LAND TENURE POLICIES IN BRAZIL

The urbanisation process in Brazil started in 1930s and reached its peak in 1970s.¹¹³ The economic restructuring process has brought some changes in the pattern of urban management. This has been done by providing affordable and secure access to land and housing for the urban population.¹¹⁴ Consequently, important tenure policies have been formulated in some cities within the context of regularisation programmes aimed at upgrading and legalising *favelas*.¹¹⁵ A fundamental change in the orientation of tenure policies has become evident in many cities. After decades evicting the communities living in illegal settlements, or denying them services, the local state has increasingly come to tolerate them in different manners and to different degrees. There have also been proposals of the improvement of tenure conditions and the legal and technical regularisation of such areas and communities.¹¹⁶

¹¹¹ Osorio, L.M. and J. Menegassi (2002) “The re-appropriation of the cities in a globalizing world” In Osorio, L. M. (Org.). *The City Statute and Urban Reform: new perspectives for the Brazilian cities*. Fabris, Porto Alegre, pp. 39–58.

¹¹² Osorio, L.M. and J. Menegassi (2002) “The re-appropriation of the cities in a globalizing world” In Osorio, L. M. (Org.). *The City Statute and Urban Reform: new perspectives for the Brazilian cities*. Fabris, Porto Alegre, pp. 39–58.

¹¹³ Fernandes, Edesio (2000a) “Law and the production of urban illegality: urban development in Brazil” in Faundez, Julio, Footer, Mary E. & Norton, Joseph J. (eds) *Governance, Development and Globalization*, London: Blackstone.

¹¹⁴ Fernandes, Edesio (2000a) “Law and the production of urban illegality: urban development in Brazil” in Faundez, Julio, Footer, Mary E. & Norton, Joseph J. (eds) *Governance, Development and Globalization*, London: Blackstone.

¹¹⁵ Assies, Willem (1994) “Reconstructing the meaning of urban land in Brazil: the case of Recife (Pernambuco), in Jones, Gareth & Ward, Peter M. (eds) *Methodology for land & housing market analysis*, London: UCL Press.

¹¹⁶ Allegritti, Giovanni (2001) “Informality as a culture of dialogue: three Mayors of Porto Alegre face to face”, in *Plurimondi/PluralWorks 3*.

4.10 INNOVATIVE EXPERIENCES OF TENURE REGULARISATION

The legal-political formula supporting tenure policies adopted in Belo Horizonte has been reproduced in several cities in Brazil. However, the situation is still difficult given the conservative, still dominant legal provisions that have long favoured economic exchange values and the interests of land owners and economic groups to the detriment of the principle of the social function of property.¹¹⁷ In many cities, the action of judicial power has also significantly reduced the scope for state intervention in the domain of individual property rights, even in situations where the land occupation has been consolidated for a long time.¹¹⁸

The tenure policies being currently in Porto Alegre and Recife have been based on the assumption that, even if it may create individual security of tenure in more immediate terms, the mere attribution of individual property rights does not necessarily achieve the main goal of most tenure regularisation programmes. The policies have also been based on the principle that tenure regularisation policies have to be reconciled with the need to improve conditions of socio-political citizenship.¹¹⁹ The policymakers and public administrators in those cities have tended to view the social obligation of the state to be in terms of providing adequate and affordable housing rights and not exactly providing property rights. The new tenure policies in Porto Alegre and Recife have supported the notion that the recognition of social housing rights does not entail the privatisation of public land.¹²⁰

The case study of Brazil indicate that it is fundamental that the recognition of urban and tenure rights takes place within the broader, integrated and multi-sectoral scope of city and land use planning, and not as an isolated policy, to prevent distortions in the land market and thus minimise the risk of eviction of the traditional occupiers.¹²¹ There must be a proper integration between the tenure policies and laws supporting regulation programmes and the overall urban

¹¹⁷ Allegretti, Giovanni (2001) "Informality as a culture of dialogue: three Mayors of Porto Alegre face to face", in *Plurimondi/PluralWorks* 3.

¹¹⁸ Allegretti, Giovanni (2001) "Informality as a culture of dialogue: three Mayors of Porto Alegre face to face", in *Plurimondi/PluralWorks* 3.

¹¹⁹ Santos, Boaventura de Sousa (1998) "Participatory Budgeting in Porto Alegre", in *Politics and Society* 26, 4 (December):461-510.

¹²⁰ Maia, Maria Leonor (1995) "Land use regulations and rights to the city: squatter settlements in Recife, Brazil", in *Land Use Policy* 12, No. 22, pp. 177-180

¹²¹ Maia, Maria Leonor (1995) "Land use regulations and rights to the city: squatter settlements in Recife, Brazil", in *Land Use Policy* 12, No. 22, pp. 177-180

legislation in force. Moreover, such experiences show that it is important to reconcile the objectives of providing housing options, recognising security of tenure and promoting socio-spatial integration. The fact is that housing rights are not, and should not, be restricted to individual property rights.¹²²

¹²² Goldsmith, William W. & Vainer, Carlos B. (2001) "Participatory Budgeting and Power Politics in Porto Alegre", in *Land Lines*, January: 7-9.

CHAPTER FIVE

5.1 INTRODUCTION

This is the last chapter of this study and provides a summary of the findings, conclusions on the issue of security of tenure in the informal settlements in Kenya. The chapter further provides a number of recommendations. These findings and conclusions are discussed below.

Security of tenure is a central component of the right to adequate housing. Any initiative related to housing, whether in the context of urban renewal, land management or other development-related projects, or in dealing with recovery after conflicts or disasters, will inevitably have tenure security implications. The lack of security of tenure - in law and practice - makes protection against forced eviction very difficult, leaving the most vulnerable, such as inhabitants of informal settlements, at risk of a range of human rights violations.

5.2 SUMMARY OF FINDINGS AND CONCLUSIONS

Below is a summary of the findings and conclusions from the previous chapters of the study.

The findings of this study have indicated that land is man's most valuable resource, supporting basic and critical needs of food, shelter and business. This is particularly true for Africa where economies heavily rely on agriculture, livestock production, tourism and the exploitation of natural resources. In Kenya, dependence on land is evident in the high percentage of persons, who rely on agriculture and pastoralism,

And in the fact that the country's top foreign exchange earners are agriculture (including horticulture) and tourism, both based on land. The manner in which land is allocated, accessed and managed is therefore central to Kenya's aspirations to alleviate poverty and create wealth.

Kenya is facing an increasing growth of informal settlements in her urban centres. As rapid urbanization takes its toll, so has the development and growth of informal settlements. More than 34% of Kenya's total population lives in urban areas and, of this, more than 71% is confined in informal settlements. This number will continue to increase unless a serious and concerted action by all relevant stakeholders is undertaken. Kenya's annual informal settlements growth rate of 5% is the highest in the world and it is likely to double in the next 30 years if positive intervention measures are not put in place. According to the UN-Habitat, the experience in these informal settlements show a significant link that people living in poverty are trapped in their present situation because they are excluded from the rest of the

society. Unfortunately, they are not empowered to allow them to make any significant contribution to community building, pushing the urban centres to the verge of sinking into abyss as the weight of mushrooming informal settlements takes its toll.

These unprecedented rates of urbanization can be linked to massive migratory movements as well as to natural growth but most important is the challenging urban planning component, which causes environmental problems with far reaching effects. Informal property arrangements are majorly predominant in informal settlements in Kenya. Even though formal law has not recognized informal tenure, this category remains resilient and it caters for a majority of people in both urban and rural areas in Kenya. Informal tenure systems have emerged in response to a need for the establishment of an alternative means of access to land and shelter especially for the urban poor.

Though information on the existing land tenure systems was recorded subjectively for lack of time, the findings indicate that informality is a reality, this phenomenon is particularly worse when it comes to land holding. Urban areas in Kenya continue to witness massive urbanization that is coupled with increased demand for land. For the urban poor, this result to them being forced to move into/establish informal settlements. Informal settlements are thus a common feature in urban areas in Kenya forming an eyesore in these areas. Despite the many initiatives that have been undertaken in these areas, much is to be seen when it comes to the improvement of the lives of the inhabitants of the informal settlements. The government has over the years adopted the approach of formalizing tenure in these areas and upgrading the housing units occupied by the inhabitants. This approach has however not yielded much as the number of informal settlements continue to increase and the existing informal settlements also continue to expand.

The recognition by the Constitution that all land belongs to the people of Kenya¹²³ and that the people can hold such land as communities¹²⁴ has sought to correct a historical fallacy that has existed in Kenya since the start of the colonial period. The laws and policies introduced by the Colonial Government preferred private land tenure arrangements while disregarding communal approaches. The inclusion of communal tenure as a category of land ownership

¹²³ Article 61(1) Constitution of Kenya, 2010.

¹²⁴ Article 63(1) Constitution of Kenya, 2010.

gives Constitutional recognition to communities and enables them own and use land as communities.¹²⁵ However, there are some hurdles that still need to be overcome to make community land rights a reality in Kenya.¹²⁶ One of the tasks is the identifying and defining the “community” for purposes of vesting legal ownership. The Constitution of Kenya 2010 provides that a Community shall be identified on the basis of ethnicity, culture or similar community of interest. The difficulty arises where the three criteria sit side by side and lead to different results in terms of defining the community.¹²⁷

The ambiguity in defining the “Community” for purposes of the Community Land Act leaves open its interpretation within the informal settlements setting.¹²⁸ While the slum dwellers could be defined as a community of socio-economic or other similar common interest, such definition would assume that they are a homogenous entity with similar aspirations. It would not be possible to reconcile the varying interests of stakeholders in the slum settlements to allow for tenure regularization.¹²⁹ It is, therefore, crucial for such communities to ingrain themselves a sense of purpose in the road to tenure regularization.

The National Land Policy 2009 indicates that the essence of informal, spontaneous, or squatter settlements is the absence of security of tenure and planning. Many Kenyans live as squatters, in slums and other squalid places. Squatters and informal settlements therefore present a challenge for land planning and development in Kenya.¹³⁰ To deal with the challenges presented by squatters and informal settlements, the policy requires the Government to establish a legal framework and procedures for transferring unutilised land and land belonging to absentee landowners to squatters and people living in informal settlements.¹³¹

¹²⁵ The Constitution of Kenya 2010

¹²⁶ The Constitution of Kenya 2010

¹²⁷ H.W.O. Okoth Ogendero, *The Tragic African Commons: A Century of Expropriation, Suppression and Subversion* (Keynote Address to African Public Interest Law and Community-Based Property Rights Workshop- USA, River-Arusha Tanzania; published in CIEL/LEAT/WRI/IASCP); *Amplifying Local Voices for Environmental Justice: Proceedings of the African Public Interests Law and Community-Based Property Rights Workshop* (USA, CIEL, 2002) pages 17-29.

¹²⁸ Kameri-Mbote, P. and K. Kindiki, 2009, 'Trouble in Eden: How and Why Unresolved Land Issues Landed "Peaceful Kenya" in Trouble in 2008'. *Forum for Development Studies*, Oslo, Norway, Vol. 2, 2008 January 2009)

¹²⁹ Kieyah, J. and R Kivuti, 2009, 'Land Reform and Poverty'. Working Paper Series 17. Global Development Networks

¹³⁰ Section 209 of the National Land Policy 2009

¹³¹ Section 209 of the National Land Policy 2009

5.3 RECOMMENDATIONS

Below are the recommendations on how to resolve issues of land tenure for residents of informal settlements in Kenya.

From the above findings and conclusions, the study makes the following recommendations, which will go a long way to help secure land tenure rights in informal settlements in Kenya.

1. A thorough study to be undertaken at national level to ascertain the prevailing land tenure systems in all the informal settlements in Kenya. This will serve to inform and direct the two main informal settlements in Kenya that include the Kenya Slum Upgrading Project and Kenya Informal Settlements Improvement Project. Committing of funds directly towards improvement of housing and other infrastructural facilities may not bring about the expected results in these programmes. The principal aim of KENSUP is the improvement of the livelihoods of people living and working in slums and informal settlements in the urban areas of Kenya through the provision of security of tenure and physical and social infrastructure, as well as opportunities for housing improvement and income generation. As much as this is a noble goal, it may never be realized if the perennial sabotage and interference from outsiders who have interests in these settlements are not arrested through formulation of appropriate policies and legislation. These policies and legislations will in turn require thorough understanding of the existing tenure relationship.
2. Many informal settlements were built on unalienated and unplanned public land. Though most of this land remains public, some of it was allocated in the 1990s in disregard of the occupation by the informal settlements. These allocations have affected many settlements, for example, Mukuru Kwa Njenga. Therefore, the residents in these should not be evicted because they established their rights on the land earlier before the government gave out leasehold right to other parties. The government should revoke the lease allocation and design a way of compensating the new allottees. This would make the land in Mukuru kwa Njenga and other informal settlements available for insitu upgrading.
3. There should be an amendment of the Land Act 2012 to include alternative and innovative tenure systems that can cater for the interests of the poor in the urban areas and make documentation of rights to land easy, cheap and simple to understand. The rights of tenure of those occupying public land in the informal settlements should be respected by invoking the Bill of Rights, which gives them a right to hold property and

a right to shelter. The definitions of a community under the Community Land Act 2016 should be broadened to include the residents of the informal settlements under the community of interest category. This would aid in the development of community ownership rights paradigms.

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