RESOLVING COMMUNITY LAND DISPUTES USING TRADITIONAL JUSTICE SYSTEMS IN KENYA

Ng'etich, Raphael Kipkoech

Adm. No. 070257

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DEDICATION

To God for His grace and my Mum for her inspiration, sacrifice and prayers which have followed me all my life.

ACKNOWLEDGMENTS

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DECLARATION

I declare that this dissertation is my original work and has not been submitted for the award of a degree or any other award in any other university.

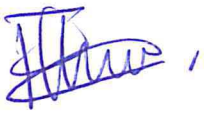
Signature:  Date: 5th April 2016

Ng'etich, Raphael Kipkoech

Adm. No. 070257

Supervisor

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

Signature:  Date: 5th April 2016

Mr Francis Kariuki

Strathmore Law School

ABSTRACT

Community land is not adequately catered for in policy, law and practice in Kenya. Disputes relating to the ownership and use of community land, for example, have not found an appropriate forum for resolution in the formal justice system. Traditional justice systems were used by communities in the pre-colonial period but were phased out with the introduction of laws based on western models of ownership. This study investigated the suitability of traditional justice systems in resolving community land disputes, the factors impeding the application of traditional justice systems and came up with recommendations on ways in which traditional justice systems can be restored in the resolution of community land disputes.

The study took a qualitative approach in examining the literature review on traditional justice systems and community land. It established that customary law and consequently traditional justice systems are perceived as inferior in the juridical system. Through case studies of traditional justice systems in other jurisdictions, the study was able to bring out the prominent features of traditional justice systems that make them most appropriate for resolving community land disputes. The informal and community inclusive nature of traditional justice systems and resolution of disputes in the pursuit of restorative justice provide the best forum for resolution of community land disputes. This is due to the fact that community land ownership is characterized by a web of interests and relationships. Land rights are held by different individuals with diverse interests. The relationships, therefore, need to be preserved for the communities to live harmoniously.

In order to ensure that community land disputes find an appropriate forum, the study recommends that the barriers hindering the application of customary law be removed. It also proposes the recognition and encouragement of indigenous traditional justice institutions and allowing them to operate without interference from the formal system. It proposes that human rights and due process concerns can be addressed by developing a traditional justice systems policy. In the end, the study makes the finding that traditional justice systems are the most appropriate for resolving community land disputes.

LIST OF ABBREVIATIONS

CJ	Chief Justice
NLC	National Land Commission
TJS	Traditional Justice Systems

LIST OF CASES

Ernest Kinyajui Kimani v Muiru Gikanga and Another [1965] EA 735.

Kamanza s/o Chiwaya v Manza w/o Tsuma Unreported High Court Civil Appeal No. 6 of 1970.

Lolkilite ole Ndinoni v Netwala ole Nebele [1952] 19 EACA.

Maria Gisege Angoi v Macella Nyomenda Civil Appeal No. 1 of 1981.

Nyali Ltd v Attorney General [1955] 1 A.E.R. 646.

R v Amkeyo [1917] 7 EALR 14.

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CHAPTER ONE
INTRODUCTION TO THE STUDY

1.1 Background

Land in pre-colonial Africa was communally owned. However, this was not to last for long. The colonialists introduced English land ownership systems which focused on individual ownership. This resulted in a dualist system of law under which customary law was subjugated to English law. The Swynnerton Plan, for example, recommended individual land holding and intended to convert community land to private land to be held in accordance with English laws.[1]

After independence, the subjugation continued: statutory law determined the validity and applicability of customary law.[2] However, the individualistic approach to dispute resolution, the pursuit of retributive ends, high costs, complex procedures and inaccessibility in all parts of the country does not allow the statutory system to facilitate access to justice for all. These factors contribute to the continued existence of customary law despite the earlier deliberate effort to eliminate it. It is in this regard that Okoth-Ogendo compares customary law to a dangerous weed that goes underground and continues to grow despite the overlay of statutory law designed to replace it.[3] Kariuki notes that,

> *traditional dispute resolution mechanisms have remained resilient despite the onslaught by the formal legal system. Communities continue to apply remnants of traditional justice systems in settling disputes in Kenya.*[4]

The formal justice systems dominated land dispute resolution due to weak legal pluralism. However, their inefficiency, inefficacy and inadequacy often result in delay and even denial of justice.[5] The formal systems have a preference for rule-oriented disputes.[6]

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[1] Swynnerton R, *The Swynnerton report: A plan to intensify the development of African agriculture in Kenya*, 1955.
[2] See, for example, Section 3(2), *Judicature Act* (Chapter 8, Laws of Kenya).
[3] Okoth-Ogendo H, 'The tragic African commons: A century of expropriation, suppression and subversion' 1 *University of Nairobi Law Journal* (2003).
[4] Kariuki F, 'Applicability of traditional dispute resolution mechanisms in criminal cases in Kenya: Case study of Republic v Mohamed Abdow Mohamed [2013] eKLR' 2 *Alternative Dispute Resolution Journal*, 1 (2014), 203.
[5] Republic of Kenya, *Judiciary Transformation Framework, 2012 – 2016, 20.*
[6] Elechi O, *Doing justice without the state: The Afikpo (Ehugbo) model,* Routledge, New York, 2006.

Community land disputes do not always fit in this group.[7] The Njonjo Land Commission, in pointing out the dissatisfaction with the formal process, stated that:

> *The public has lost faith and confidence in the existing land dispute settlement mechanisms and institutions, because they are characterised by delays.....and unnecessary bureaucracy especially when there is a low participation of the local people in land dispute resolution mechanisms.*[8]

Community land tenure is neglected due to the overemphasis on private ownership of land.[9] The lack of proper protection and administration of community land was intended as a perverse incentive to move away from community land rights to private land rights.[10] A misconception characterising the pre-2010 approach to community land was viewing community land as *res nullis*[11] (open access) yet it is *res communis*.[12] This invoked the move to have it converted to private land. However, community land tenure continued to survive. As observed by Kameri-Mbote *et al*, "*...the more policy and law sidelined customary tenure systems, the more resilient these systems became...*"[13]

The formulation of the National Land Policy[14] and the promulgation of the Constitution of Kenya, 2010 ushered in a new dawn for community land and traditional justice systems (hereinafter TJS). They have been expressly recognised and there are also efforts to enact a law on community land. However, the emphasis on the formal justice systems continues to date. The Constitution mandates Parliament to enact a statute to establish a court with the status of the High Court to entertain disputes relating to the environment and land.[15] Parliament has, in fulfilment of this duty, enacted the Environment and Land Court Act, 2011.[16] The continued emphasis on formal mechanisms fails to realize that, *"every society...has its own methods, procedures, or mechanisms for*

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[7] Kariuki, 'Applicability of traditional dispute resolution mechanisms in criminal cases in Kenya', 206.
[8] Republic of Kenya, *Report of the Commission of inquiry into the land law system of Kenya on principles of a national land policy framework constitutional position of land and new institutional framework for land administration*, 2002, 78.
[9] Migai J, *Rescuing indigenous tenure from the ghetto of neglect: Inalienability and protection of customary land rights in Kenya*, ACTS Press, Nairobi, 2001.
[10] United States Agency for International Development, *Kenya secure project: Legal review of the draft legislation enabling recognition of community land rights in Kenya*, 2012, 9.
[11] *Res nullis* literally means 'nobody's property'. It is used to describe things which do not have an owner.
[12] Okoth-Ogendo, 'The tragic African commons', 4. Res communis literally means 'thing of the (entire) community'. It is used to describe things that belong to an entire community or mankind as a whole.
[13] Kameri-Mbote P, Odote C, Musembi C, Kamande M, *Ours by Right: Law, Politics and Realities of Community Property in Kenya*, Strathmore University Press, Nairobi, 2013. 43.
[14] Republic of Kenya, *Sessional paper No. 3 of 2009 on National Land Policy*, 2009.
[15] Article 162(1), *Constitution of Kenya* (2010).
[16] Chapter 12A, Laws of Kenya.

dealing with or resolving disputes".[17] Traditional African communities have their own unique cultures which have since been central in resolving disputes.

1.2 Statement of the Problem

TJS have been expressly recognised in the Constitution as one of the legal means of dispute resolution in Kenya. However, they have not been adopted in the dispute resolution policy and practice. They have been portrayed as backward and retrogressive. The existing formal and individualistic dispute resolution system does not encourage the use of TJS. However, the formal systems are inefficient and are loaded with complex procedures in resolving community land disputes. This is what has prompted this study. The study also makes recommendations on measures to be taken in restoring the place of TJS in community land dispute resolution in Kenya.

1.3 Research Objectives

i. To investigate the suitability of TJS in resolving community land disputes;
ii. To examine the factors impeding the application of TJS in resolving community land disputes; and
iii. To make recommendations on the measures necessary to ensure that TJS are applied in resolving community land disputes.

1.4 Research Questions

i. What attributes make TJS the most appropriate mechanisms in resolving community land disputes?
ii. What factors hamper the application of TJS in resolving community land disputes?
iii. What are the most suitable measures to take in order to restore the place of TJS in resolving community land disputes?

1.5 Justification and Scope of the Study

TJS have been greatly neglected in the legal system in Kenya while the ability of formal processes to resolve disputes has been overemphasised. However, the problem intended to be cured continues to persist. There is still lack of access to justice for all. The formal processes have in their quest to deliver justice, led to delay or even denial of justice. The litigation process, for example, has through the technicalities, costs and case backlogs impeded access to justice. This continues despite the moves undertaken to transform the

[17] Dzivenu, S, 'The politics of inclusion and exclusion of traditional authorities in Africa: Chiefs and justice administration in Botswana and Ghana' 2 *Political Perspectives,* 1 (2008), 2.

Judiciary. There is, therefore, a need to ensure that the applicability of TJS is restored in order to ensure wider access to justice. This research focuses on the appropriateness and the constraints hindering the application of TJS in resolving community land disputes in Kenya.

1.6 Hypothesis

TJS are the most appropriate dispute resolution mechanisms for resolving community land disputes in Kenya.

1.7 Theoretical Framework

This study employs the structural functionalism theory in investigating the appropriateness of TJS in resolving community land disputes. The theory has its origins in the works of Emile Durkheim and Herbert Spencer, who undertook to investigate order and stability in society.[18] It advocates for the maintenance of the status quo and works on the premise that people cooperate to ensure social order.[19] According to this theory, the way a society is structured determines the way in which various societal functions are ordered.[20] The patterns of social ordering determine the forms of dispute resolutions applicable.[21] For example, conflict resolution mechanisms in a communal society are determined by the shared communal values. This implies that disputes arising from communally held land can best be resolved using communal mechanisms. The suitability of TJS in resolving community land disputes can, therefore, be premised on this school of thought since the communal nature of African societies necessitates mechanisms which are community inclusive and aim at restoring the relationship between the disputants.

The study is further informed by the African commons theory advanced by Okoth-Ogendo in explaining the communal ownership of land in traditional African societies. He posited that the African commons are organised and managed by a social hierarchy in the form of an inverted pyramid with the family at the tip, the clan at the middle, and the community at the base. Decision making in each of these levels is done in reference to the internalised communal values and principles.[22] This communal aspect, therefore, has implications on land dispute resolution.

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[18] Macionis J, *Society: The basics*, 8 ed, NJ: Pearson/Prentice Hall, Upper Saddle River, 2006, 12 – 13.
[19] Macionis, *Society*, 12 – 13.
[20] Macionis, *Society*, 12 – 13.
[21] FIDA Kenya, 'Traditional justice systems in Kenya: A study of communities in coast province of Kenya' 2008, 2.
[22] Okoth-Ogendo, 'The tragic African commons', 2.

Furthermore, land in traditional African communities is not merely an economic or political resource: *"...it is, first and foremost, the medium which defines and binds together social and spiritual relations within and across generations."*[23] And as noted by one Nigerian Chief, *"land belongs to a vast family of which many are dead, few are living, and countless members are still unborn."*[24] It is in this regard that *"Issues about its ownership and control are therefore as much about the structure of social and cultural relations as they are about access to material livelihoods."*[25] It is, therefore, necessary to develop *"socially reconstructive dispute processing mechanisms..."*[26] TJS can best fulfil this role since they are anchored on communal values and seek to preserve the relationships between the disputants.

1.8 Literature Review

This research reviews existing literature thematically. The study seeks to counter the notion in the existing literature that TJS is backward and inferior. The themes covered are: community land; TJS and customary law; and TJS and access to justice.

a) Community Land

Land ownership during the pre-colonial period in traditional African communities was communal. The setting in of colonization saw the focus of land laws and policies on private land ownership. The African form of land ownership was perceived as being inferior. In examining land laws and policies in colonial Kenya, Ghai and McAuslan state that:

> *"For the greater part of the colonial period,* ***agrarian policy was concerned to create and maintain two separate and unequal systems of administration, the African system existing to serve in a subordinate capacity the European one.*** *The dominant economic role of the settlers which this policy was designed to produce was complemented by their dominant political role in the Government of Kenya. Together* ***they dictated not only the substance but the form of the law of agrarian administration, for the settlers were in a position to ensure that they played a major part in administering the law applying to them and that the administration of the law applying to Africans should reflect their assumptions about the place of Africans in Kenya****...there was a correlation between the form of the law, and the*

[23] Republic of Kenya, *Report of the Commission of inquiry into the land law system of Kenya*, 19.
[24] Republic of Kenya, *The report of the Mission on land consolidation and registration in Kenya*, 1966.
[25] Republic of Kenya, *Report of the Commission of inquiry into the land law system of Kenya*, 19.
[26] Republic of Kenya, *Report of the Commission of inquiry into the land law system of Kenya*, 79.

method of its administration, and both the wielders of political power and the policies that they adopted which were in turn reflected in the substance of the law. As with the legal origins of the acquisition of Kenya, so here; ***the law and its administration had no inherent values, but derived both values and form from the predilections of the dominant political and economic groups in society.***"[27] (Emphasis added).

The intention of introducing private land ownership was manifested in the commissioning and implementation of the Swynnerton Plan of 1954 which advocated for land consolidation, adjudication and registration.[28] Parcels of land were registered to individuals with the aim of giving incentives for development. This, however, resulted in land crisis and conflicts: a large portion of communally owned land was converted to individual land through questionable processes.[29]

After independence, land tenure was classified into three categories: customary; government; and private tenure.[30] Customary land was held and managed according to the customary laws and practices of various traditional communities.[31] They were held in form of group ranches and trust lands where individuals were registered as the holders in place of the community. However, they were prone to abuse and at many instances there were illegal and irregular conversions to private land.[32]

The Constitution of Kenya, 2010 has had positive implications on community land. It states that: *'All land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals.'*[33] It further provides that the classification of land in Kenya includes community land which shall vest in and be held by communities and goes ahead to state what constitutes community land.[34]

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[27] Ghai Y and McAuslan J, *Public law and political change in Kenya: A study of the legal framework of government from colonial times to the present,* Oxford University Press, Nairobi, 1970, 124.
[28] Swynnerton, *The Swynnerton report.*
[29] O'Brien E, 'Irregular and illegal land acquisition by Kenya's elites: Trends, processes, and impacts of Kenya's land-grabbing phenomenon' International Land Coalition, 2011, vii.
[30] Republic of Kenya, *Truth, Justice and Reconciliation Commission of Kenya, Final Report*, Volume IIB (3 May 2013 Version), 250.
[31] Republic of Kenya, *Truth, Justice and Reconciliation Commission of Kenya*, 250.
[32] Hornsby C, *Kenya: A history since independence*, IB Tauris, London, 2012, 314.
[33] Article 61, *Constitution of Kenya* (2010).
[34] Article 63, *Constitution of Kenya* (2010).

b) TJS and Customary Law

TJS are founded on the traditions and customary practices of various tribal communities. Their functioning and viability is, therefore, greatly determined by the legal status and application of customary law.[35] As observed by Kariuki,

> *At the heart of these mechanisms is the fact that they are embedded in African customary laws. They are thus anchored on traditional norms and values of Africans...*[36]

Customary laws have been greatly side-lined in the legal process in Kenya. The colonial government set the stage for their relegation by imposing English laws on traditional African communities which had their own systems of law and governance. As the Njonjo Land Commission points out, "*...African customary property laws were ignored and separate colonial laws were made to govern areas occupied by Africans.*"[37] This led to the emergence of a weak pluralist system of law '*which persists even today under which customary law is seen as being inferior 'law'*.[38]

Case law,[39] before and after independence, depicts that this results in relegation of customary law in the legal system. In *R v Amkeyo,*[40] for example, a woman married under customary law was held not to be a legal wife or spouse and was consequently compelled to testify against her husband. In giving the decision of the court, Hamilton CJ observed that:

> *"In my opinion, the use of the word 'marriage' to describe the relationship entered into by an African native with a woman of his tribe according to tribal custom is a misnomer which has led in the past to considerable confusion of ideas. I know of no word that correctly describes it; 'wife-purchase' is not altogether satisfactory, but it comes much nearer to the idea than that of 'marriage' as generally understood among civilised peoples."*

Apart from viewing customary law as inferior, the colonial judiciary also failed to adapt the English laws to the circumstances of the communities living in the colony as required

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[35] International Commission of Jurists Kenya, *Interface between formal and informal justice systems in Kenya*, 2011, 32.
[36] Kariuki, 'Applicability of traditional dispute resolution mechanisms in criminal cases in Kenya', 203.
[37] Republic of Kenya, *Report of the Commission of inquiry into the land law system of Kenya*, 89.
[38] Kariuki, 'Applicability of traditional dispute resolution mechanisms in criminal cases in Kenya', 206.
[39] See also *Lolkilite ole Ndinoni v Netwala ole Nebele* [1952] 19 EACA, *Kamanza s/o Chiwaya v Manza w/o Tsuma* Unreported High Court Civil Appeal No. 6 of 1970 and *Maria Gisege Angoi v Macella Nyomenda* Civil Appeal No. 1 of 1981.
[40] [1917] 7 EALR 14.

under the proviso to the East Africa Order in Council.[41] They also ignored the call by Lord Denning in *Nyali Ltd v Attorney General,*[42] where he stated that:

> *"The next proviso says, however, that the common law is to apply 'subject to such qualification as local circumstances render necessary'. This wise provision should, I think, be liberally construed. It is a recognition that the common law cannot be applied in a foreign land without considerable qualification. Just as with an English oak, so with the English common law. You cannot transplant it to the African continent and expect it to retain the tough character which it has in England. It will flourish indeed but it needs careful tending. So with the common law. It has many principles of manifest justice and good sense which can be applied with advantage to peoples of every race and colour all the world over: but it has also many refinements, subtleties and technicalities which are not suited to other folk. These off-shoots must be cut away.* ***In these far-off lands the people must have a law which they understand and which they will respect. The common law cannot fulfil this role except with considerable qualifications****. The task of making these qualifications is entrusted to the judges of these lands. It is a great task. I trust that they will not fail therein."* (Emphasis added).

After independence, the country inherited the formal laws and continued the subjugation of customary law to the formal systems.[43] The Judicature Act[44] provides the evidentiary basis of this claim. It provides that customary law shall be applied as long as it *"is not repugnant to justice and morality..."* The application of this provision occasions grave consequences on customary law. The content of the repugnancy clause is not defined by the Act. It is, therefore, left open for the courts to interpret.[45] Customary law also has to be proven in order to be regarded as law.[46] The result is that *"...African customary law has suffered tremendous usurpations on the juridical front."*[47] This has led to the undermining of TJS as they derive their basis from customary law.

However, the promulgation of the new Constitution on 27 August, 2010 ushered in a new dawn for customary law and TJS. Customary law is now expressly recognised as a

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[41] Cotran E, 'The development and reform of the law in Kenya' 27 *Journal of African Law*, 1 (1983), 44.
[42] [1955] 1 A.E.R. 646, 653.
[43] Ambani J and Ahaya O, 'The wretched African traditionalists in Kenya: The challenges and prospects of customary law in the new constitutional era' 1 *Strathmore Law Journal* 1, (2015), 49.
[44] Section 3(2), *Judicature Act* (Chapter 8, Laws of Kenya).
[45] Kariuki F, 'Customary law jurisprudence from Kenyan courts: Implications for traditional justice systems' http://www.kmco.co.ke/attachments/article/137/TDRM%20and%20Jurisprudence.pdf on 6 March 2015, 7.
[46] *Ernest Kinyajui Kimani v Muiru Gikanga and Another* [1965] EA 735.
[47] Ambani and Ahaya, 'The wretched African traditionalists in Kenya', 49.

source of law.[48] This provision can be interpreted to have two implications for customary law. Firstly, the express mention of customary law by the supreme law implies that it is a legitimate source of law and now has a legal standing in the country's legal system. Secondly, the requirement that customary law be applied in a manner consistent with the Constitution provides a safeguard against any customary law and practice that does not adhere to the Constitutional and human rights principles.

The Constitution further recognises the crucial role of culture in the country. It depicts culture *as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.*[49] On the principles of land policy, it provides that land management shall have regard to principles including the *encouragement of communities to settle land disputes through recognised local community initiatives consistent with this Constitution.*[50] The exercise of judicial authority is to be guided by principles including the use of alternative forms of dispute resolution and traditional dispute resolution mechanisms.[51] It can, therefore, be reasonably stated that the legal status of customary law and TJS has been elevated.

c) TJS and Access to Justice

The right to access to justice is guaranteed under Article 48 of the Constitution, 2010 which requires the state to ensure access to justice for all.

Access to justice may refer to a situation where individuals are able to obtain affordable, accessible, comprehensible, just, efficient and expeditious solutions from the legal system.[52] It could also refer to the removal of the barriers hindering access to the formal systems and structures so that every member of society can access legal services.[53] It further includes the use of informal dispute resolution mechanisms to ensure access to justice.[54] This is the perspective taken in this research.

TJS can better guarantee access to justice in Kenya. This is because they do not bar individuals and communities through webs of procedural rules, legal principles and justice professionals. It instead allows them to have a direct contact.[55] And as noted by the Njonjo

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[48] Article 2 (4), *Constitution of Kenya* (2010).
[49] Article 11(1), *Constitution of Kenya* (2010).
[50] Article 60(1), *Constitution of Kenya* (2010).
[51] Article 159(2), *Constitution of Kenya* (2010).
[52] Ladan M, 'Access to justice as a human right under the ECOWAS community law' (Commonwealth Regional Conference, Abuja, April 2010).
[53] Global Alliance Against Traffic in Women (GAATW) *http://www.gaatw.org/atj/* on 5 February 2015.
[54] Kariuki, 'Applicability of traditional dispute resolution mechanisms in criminal cases in Kenya', 210.
[55] Christie N, 'Conflicts as property'17 *British Journal of Criminology,* 1 (1977)

Land Commission, it is necessary to develop an efficient and cost effective land dispute resolution mechanism devoid of delays.[56]

1.9 Design and Methodology

This study approaches the subject matter through literature review on TJS. It describes and conducts qualitative analysis in the course of dealing with the subject matter. It uses primary and secondary sources in the review. The Constitution of Kenya 2010, statutes and policies constitute the primary sources which are significant for laying down the legal position in relation to the subject matter in Kenya. Books, journal articles, conference papers and online journals comprise the secondary sources. The secondary sources document the studies on TJS by various scholars.

1.10 Limitations

This study is limited by the following factors. First is the time constraint. This study is part of the course work for the requirements for the award of the degree of Bachelor of Laws. The study, therefore, has to be conducted and submitted within the prescribed period. Secondly, the research design and methodology chosen does not incorporate collection of data on the subject matter. This implies that the study is limited to the aspects of community land and TJS that can be deciphered through qualitative analysis.

1.11 Chapter Breakdown

a) Chapter One – Introduction to the Study

This chapter provides an introduction to the study, the statement of the problem, the literature review, the objectives and questions, the hypothesis, the conceptual framework and the design methodology of the study.

b) Chapter Two – Manifestations of TJS in Kenya

This chapter explores the ways in which TJS manifest themselves in the legal system. This chapter seeks to elaborate the genesis of the problem stated in the introductory chapter.

c) Chapter Three – Comparative Study on TJS Practices

This chapter looks to TJS practices in other jurisdictions to see whether there are lessons that Kenya can learn. The jurisdictions examined are Ghana and South Sudan.

d) Chapter Four – Suitability of TJS in Resolving Community Land Disputes

[56] Republic of Kenya, *Report of the Commission of inquiry into the land law system of Kenya*, 89.

This chapter draws the best practices from local TJS practices and those of other jurisdictions. It seeks to establish the features that make TJS most suitable in resolving community land disputes.

e) Chapter Five – Findings and Recommendations

This chapter makes the conclusions of the study and comes up with recommendations on measures to restore the place of TJS in resolving community land disputes. It draws from the findings of Chapter Two, Three and Four.

CHAPTER TWO
MANIFESTATIONS OF TJS IN KENYA

2.1 Introduction

This chapter examines the manifestations of TJS in Kenya. It seeks to interrogate whether the existing laws, policies and practices promote TJS. It looks at some of the past and present manifestations of TJS.

2.2 Past Manifestations

a) Native Courts Regulations, 1897

The Native Courts Regulations[57] established a court system for native Africans. Article 2(b) of the Regulations recognised the existing power of councils of elders and local chiefs to adjudicate disputes in the native communities. They applied customary law in resolving disputes relating to natives.[58]

b) East African Native Courts (Amendment) Ordinance, 1902

The East African Native Courts (Amendment) Ordinance[59] introduced special courts with full civil and criminal jurisdiction over natives in districts. The courts were to apply laws prevailing in the Protectorate including customary law. Section 20 of the Ordinance provided that:

> *In all cases civil and criminal to which natives are parties, every court (a) shall be guided by native law so far as it is applicable and is not repugnant to justice and morality or inconsistent with any Order in Council, Ordinance or any Regulation or Rule made under any Order in Council or Ordinance; and (b) shall decide all such cases according to substantive justice without undue regard to technicalities of procedure and without undue delay.*

This provision became one of the major steps in subjecting the validity and application of customary law to statutory provisions.[60] The substance of this provision was later reproduced in Article 7 of the Kenya Colony Order in Council of 1921 as follows:

> *In all cases to which natives are parties, every court shall be guided by native law so far as it is applicable and not repugnant to justice or morality or inconsistent with the*

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[57] No. 15 of 1897.
[58] Kariuki, 'Customary law jurisprudence from Kenyan courts', 2.
[59] No. 31 of 1902.
[60] Ochich G, 'The withering province of customary law in Kenya: A case of design or indifference?' in Fenrich J, Galizzi P and Higgins T (eds), *The future of African customary law*, Cambridge University Press, Cambridge, 2011, 106.

provisions of any Order of the King in Council or with any other law in force in the colony.

The substance of Article 7 of the Order in Council continues to remain as part of Kenyan laws up to date as reflected in Section 3(2) of the Judicature Act.[61]

c) Native Lands Registration Ordinance, 1959

During the 1950s, more attention was directed towards customary laws on land.[62] The aim of the Native Lands Registration Ordinance[63] was to effect registration of individual ownership of land previously held under customary tenure. The Ordinance established a committee to hear and determine land claims in line with customary law. The provision was framed as recognition of customary land rights but the true intention was to mount *"...another form of assault on customary law as it sought to transform customary land rights into an entirely different crop of rights, namely modern land tenure based on principles of English property ownership."*[64]

2.3 Present Manifestations

a) The Constitution of Kenya, 2010

The promulgation of the Constitution of Kenya, 2010 appears to have ushered in a new dawn for TJS in Kenya. The repealed constitution did not deal with TJS. It was a matter left for other sources of law. The recognition, therefore, by the supreme law seems to assert the place of customary law in the legal system and, consequently, that of TJS in dispute resolution. The following Articles of the Constitution have implications for TJS:

Supremacy of the Constitution

Article 2(4) provides for the supremacy of the Constitution over all other laws in the country. The Constitution, as noted by Lumumba and Franceschi, is the most important part of the basic law of a state.[65] This Article goes ahead to recognise customary law as a source of law. It states that: *"Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid."* However, the recognition is in a negative

[61] Chapter 8, Laws of Kenya.
[62] Ochich, 'The withering province of customary law in Kenya', 106.
[63] No. 2 of 1959.
[64] Ochich, 'The withering province of customary law in Kenya', 106.
[65] Lumumba P and Franceschi L, *The Constitution of Kenya, 2010: An Introductory Commentary*, Strathmore University Press, Nairobi, 2014, 66.

perspective[66] and therefore does not significantly uplift the place of customary law in the juridical system.

Culture

There has been an attempt in the constitution making process to ensure respect for ethnic and regional diversity and the right of communities to manifest their cultural identities.[67] This was realized in the inclusion of Article 11 on culture. The Article *"recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation."* This approach by the Constitution seeks to encourage cultural diversity and to protect and promote culture.[68] The repealed constitution did not have specific provision dedicated to culture. Article 11 is an attempt to depart from the notion, originating in the colonial period, which views traditional African cultures as backward, primitive and immoral. It imposes a positive duty on the state to promote all forms of national and cultural expressions and requires Parliament to enact a law to ensure that communities are compensated for the use of their cultures. TJS are embedded in the customs, norms and values of traditional African cultures.[69] The promotion, therefore, of the traditional cultural practices has a positive impact on TJS.

Access to justice

Access to justice can be examined from various perspectives. It may be taken to be the availability of affordable, efficient, just and expeditious resolution of disputes,[70] the removal of hindrances in the formal process[71] or the use of informal dispute resolution systems.[72] The third perspective ties in with the application of TJS in resolving community land disputes. TJS do not bar disputants as does the formal processes by imposing procedures and rules instead of addressing the substantive issues. TJS allows the disputants to have direct contact with the dispute resolution systems.[73] TJS can, therefore, be used to realize Article 48 on access to justice by ensuring that communities especially in rural areas are able to get an affordable, easily available and easily comprehensible forum for dispute resolution. TJS apply the customs and traditions of various communities and it will, therefore, not be alien to the communities. Furthermore, TJS processes are conducted

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[66] Lumumba and Franceschi, *The Constitution of Kenya,* 2010, 71.
[67] Constitution of Kenya Review Commission, *Final draft,* 2005, 55 – 56.
[68] Constitution of Kenya Review Commission, *Final draft,* 92.
[69] Kariuki, 'Applicability of traditional dispute resolution mechanisms in criminal cases in Kenya', 203.
[70] Ladan, 'Access to justice as a human right under the ECOWAS community law'.
[71] Global Alliance Against Traffic in Women (GAATW) *http://www.gaatw.org/atj/* on 5 February 2015.
[72] Kariuki, 'Applicability of traditional dispute resolution mechanisms in criminal cases in Kenya', 210.
[73] Christie, 'Conflicts as property', 1.

in the local languages. This makes it very easy for the parties to easily comprehend the proceedings, respond appropriately and not require legal representation.

Principles of land policy

The principles on land policy listed in Article 60 guide the manner in which land administration and management are conducted in the country. These principles have to be adhered to by the policy and legal formulations on land. The application of TJS to resolve community land disputes can help realize these principles. The principle of security of land rights can be realized through the implementation of TJS. TJS provides an easily available, cost effective and easily comprehensible forum for resolution of community land disputes. This also achieves the principle of cost-effective administration of land law. Transparent administration of land is also realized as communities are given the opportunity to settle disputes over land using their own customs, traditions and local community initiatives in line with the Constitution. This also goes hand in hand with some of the objects of devolution of giving powers of self-governance to communities and recognising and promoting their right to manage their own affairs and to further their own development.[74]

The National Land Commission (NLC)

The Constitution establishes the NLC in order to prevent abuses of the land management and administration processes. One of the functions assigned by the Constitution to the NLC is to encourage the application of traditional dispute resolution mechanisms in land conflicts.[75] NLC is, therefore, one of the bodies charged by the Constitution with ensuring that TJS are applied in the land dispute resolution process.

Exercise of judicial authority

Judicial authority has previously been exercised by the courts and tribunals but no law had alluded to the fact that it is derived from the people. The Constitution mentions this in order to emphasize the important point that all sovereign power comes from the people of Kenya and that the Constitution is the medium through which this power is transmitted to those charged with governance.[76] Article 159 outlines the use of traditional dispute resolution mechanisms as one of the principles guiding the exercise of judicial authority. This provision goes a long way in bolstering the overall objective of recognising that sovereign power comes from the people. It also contributes to the realization of the

[74] Article 174 (c) and (d), *Constitution of Kenya* (2010).
[75] Article 67(2)(f), *Constitution of Kenya* (2010).
[76] Article 1(1), *Constitution of Kenya* (2010).

other principles, for example, that justice shall not be delayed and that it shall be administered without undue regard to procedural technicalities.

Article 159 also places restraints on the use of traditional dispute resolution mechanisms. They are not to be applied in a manner that contravenes the Bill of Rights, repugnant to justice and morality or inconsistent with the Constitution or any written law. The restriction as to repugnancy to justice and immorality is vague. This is because neither the Constitution nor statutes define what constitutes repugnant to justice and morality. This is left for the courts to determine and provides room for undue restriction of traditional dispute resolution mechanisms.

Furthermore, Article 159 places the mandate of promoting traditional dispute resolution mechanisms on the judiciary. It states *"In exercising judicial authority, the courts and tribunals shall be guided by the following principles..."* This reduces their viability in guaranteeing access to justice. Access to justice is provided for under Article 48 which mandates the state to *ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.* The courts are expensive, slow in settling the matter, the parties have no control and it does not go into the root cause of the conflict. The court is, therefore, not in a position to ensure an effective implementation and promotion of traditional dispute resolution mechanisms in guaranteeing access to justice.

b) National Land Commission Act, 2012

The Constitution establishes the NLC in order to prevent abuses of powers conferred on land administration institutions. The National Land Commission Act[77] enacted in 2012 seeks to further the provisions of Article 67(2). Section 5 of the Act provides for additional function of the Commission as provided in the Constitution. One of the functions is the encouragement of the application of traditional dispute resolution mechanisms in resolving land conflicts. The Commission should, therefore, take up this mandate and ensure that TJS is promoted. TJS has a better chance of survival than it being under the judiciary.

c) Environment and Land Court Act, 2011

The creation of the specialized courts, for example the Environment and Land Court, is a feature unique to the Constitution of Kenya, 2010. The Environment and Land

[77] Chapter 5D, Laws of Kenya.

Court Act[78] has been enacted pursuant to Article 162(2)(b). Section 20 of the Act provides that the Court may apply traditional dispute resolution mechanisms on its own motion, with the agreement or the request of the parties. It further provides that where the application of TJS is a condition precedent to any proceedings, the Court has to stay proceedings until the condition is met.[79] The objective of the Act, as outlined in Section 3, is to enable the court to facilitate just, expeditious, proportionate and accessible resolution of disputes. This objective will not be realized if TJS are placed under the Court. TJS will end up being like the litigation process which has in an attempt to guarantee access to justice, led to delay and even denial of justice.[80]

d) Land Act, 2012

Section 4 of the Land Act[81] outlines the values and principles guiding land management and administration. The values bind all state organs and officers, public officers and all persons engaged in the enactment, application or interpretation of the provisions of the Act or making or implementing public policy decisions. One of the principles listed therein is that communities are to be encouraged to settle land disputes through local community initiatives. The proper implementation of this principle by applying TJS will help realize the other principles, for example, security of land rights, transparent and cost effective administration of land, democracy, inclusiveness and participation of the people.

Section 128 provides that any disputes under the Act may be referred to the Environment and Land Court.

e) Land Registration Act, 2012

Section 101 of the Land Registration Act[82] provides that any disputes arising under the Act are to be referred to the Environment and Land Court.

f) Judicature Act, 1967

Section 3(2) of the Judicature Act[83] provides that customary is to be applied as long as it *"is not repugnant to justice and morality..."* This provision is what has long hindered the application of customary law and TJS. The Act does not define what constitutes

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[78] Chapter 12A, Laws of Kenya.
[79] Section 20(2), *Environment and Land Court Act* (Chapter 12A, Laws of Kenya).
[80] Republic of Kenya, *Judiciary Transformation Framework, 2012 – 2016,* 20.
[81] Chapter 280, Laws of Kenya.
[82] No. 3 of 2012.
[83] Chapter 8, Laws of Kenya.

repugnancy to justice and morality. The vagueness must have been intended to weaken the position of customary law, and consequently TJS, in the legal system due to their perception as backward and retrogressive.

g) Magistrates' Court Act, 1967

The Magistrates Court Act vests jurisdiction on magistrates to listen to claims under customary law.[84] It defines a 'claim under customary law' to include those concerning land held under customary tenure.[85]

h) Commission on Administrative Justice Act, 2011

Section 8 of the Commission on Administrative Justice Act[86] states the mandate of the Commission to include working with different public institutions to promote alternative dispute resolution in handling complaints on public administration. This empowers the Commission to employ TJS in resolving disputes relating to the administration of community land.

i) National Land Policy, 2009

The National Land Policy[87] recognises the need to ensure that there is access to timely, efficient, affordable dispute resolution mechanisms in order to facilitate efficient land markets, tenure security and investment stability in land.[88] On community land, the Policy states that one of the effects of individualization of tenure was to undermine traditional resource management institutions.[89] The Policy recognizes that TJS has a role to play in guaranteeing access to justice in the land sector.

2.4 Challenges Faced in Resolving Community Land Disputes

The resolution of community land disputes using the formal justice system has posed various challenges. Community land is held and managed according to the different cultures of traditional African communities. However, it must be noted that the cultures vary across communities and, therefore, the phrase 'African customary law' does not imply the existence of a single custom applicable to all the communities.[90] Each community *"...has its own methods, procedures, or mechanisms for dealing with or resolving*

[84] Section 9, *Magistrates' Court Act* (Chapter 10, Law of Kenya).
[85] Section 2, *Magistrates' Court Act* (Chapter 10, Law of Kenya).
[86] No. 23 of 2011.
[87] Republic of Kenya, *Sessional paper No. 3 of 2009 on National Land Policy.*
[88] Republic of Kenya, *Sessional paper No. 3 of 2009 on National Land Policy*, section 169.
[89] Republic of Kenya, *Sessional paper No. 3 of 2009 on National Land Policy*, section 64.
[90] Ndulo M, 'African customary law, customs and women's rights' *Cornell Law Faculty Publications*, Paper 187 (2011), 87.

disputes."[91] Applying a form of justice system that does not recognise the diversity in culture is to fail to appropriately resolve the dispute in question. Diversity in culture necessitates diversity in dispute resolution,[92] a principle the drafters of the 2010 Constitution realized in drafting Article 159(2)(c).[93]

The resolution of community land disputes using the formal justice system has not borne fruit since it represents power of self-governance taken from communities. The communities are not able to decide on matters affecting them. The Constitution recognizes this and provides that some of the objects of devolution of government are to give powers of self-governance to the people and *"to recognise the right of communities to manage their own affairs and to further their development"*.[94]

Another challenge derives from the lack of community land legislation. Community land is held according to the customs of the various communities. Customary law is not documented and this has the effect that the rights and obligations over land are not documented as well.[95] The formal justice system is, therefore, unable to appropriately resolve disputes relating to such land since courts require proof of ownership of land and yet communities do not possess title deeds.[96]

TJS terminology also poses a challenge. The laws deal with community, customary and traditional justice systems as if they are similar.[97] The legal framework uses these terms interchangeably.[98] The implementation of TJS laws is, therefore, bound to face terminological difficulties since the use of different terms implies that the mechanisms are different.

2.5 Conclusion

The past manifestations of TJS in policy and law show that the applicability of customary law in juridical system has been subjugated to statutory provisions. This has

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[91] Dzivenu, 'The politics of inclusion and exclusion of traditional authorities in Africa', 2.
[92] Kinama E, 'Traditional justice systems as alternative dispute resolution under Article 159(2)(c) of the Constitution of Kenya, 2010' 1 *Strathmore Law Journal,* 1 (2015), 23.
[93] Kinama, 'Traditional justice systems as alternative dispute resolution under Article 159(2)(c) of the Constitution of Kenya, 2010', 23.
[94] Article 174(d), *Constitution of Kenya* (2010).
[95] Knight R, 'Statutory recognition of customary land rights in Africa: An investigation into best practices for lawmaking and implementation' *FAO Legislative Study* 105, 2010, vii.
[96] Knight, 'Statutory recognition of customary land rights in Africa', vii.
[97] Kariuki F, 'Community, customary and traditional justice systems in Kenya: Reflecting on and exploring the appropriate terminology', 1 http://kmco.co.ke/index.php/publications/148-community-customary-and-traditional-justice-systems-in-kenya-reflecting-on-and-exploring-the-appropriate-terminology on 2 March 2015.
[98] See, for example, *Constitution of Kenya* (2010); and *Environment and Land Court Act* (Chapter 12A, Laws of Kenya).

not, however, been resolved in the present manifestations as the application of customary law is still subjected to the repugnancy clause. One can only take comfort in the fact that the place of culture, customary law and TJS in the nation has been acknowledged by the Constitution. There is, therefore, a need to ensure that the implementation of these provisions is done rightly in order to curb the policy and legal challenges being encountered in resolving community land disputes.

CHAPTER THREE
COMPARATIVE STUDY ON TJS PRACTICES

3.1 Introduction

This chapter examines TJS practices in other jurisdictions and seeks to explore the lessons that Kenya can draw from these jurisdictions in harnessing TJS in resolving community land disputes. Ghana and South Sudan are examined.

3.2 Ghana

The land tenure system in Ghana, a former British colony just like Kenya, is dualistic in nature – consisting of customary and state tenure systems.[99] Traditional land ownership prevails to date. The social and religious beliefs characterising this form of ownership have profound implications on land tenure norms and practices. For example, the Akan tribe regard land as a supernatural feminine spirit.[100] Land is treated as a heritage given to the community to use and preserve for future generations.[101] It is held in trust by the head of the community. For example, the family, the chief or the clan head, holds the land in trust for the other members.[102] This is because land belongs to the entire family, village or community and not to the individual.[103] The Constitution of Ghana has also recognized this fiduciary duty by providing that: *"all stool lands in Ghana shall vest in the appropriate stool on behalf of, and in trust for the subjects of the stool in accordance with customary law and usage".*[104]

Land is classified into public and customary land. Customary land falls under the 'stool,' 'skin,' 'clan' and 'family' heads, all characterized by communal ownership.[105] Communally held land in Ghana is about 80 percent.[106]

The various levels of land holding, as shown in Figure 1, also serve as dispute resolution structures. Dispute resolution begins from the land owners/users through the community, to the paramount chief. Level 2 to level 4 also serve an appellate function. The disputes that cannot be resolved in level 1 are dealt with in the next level, all through to

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[99] Danso E, 'Peri-urban land tenure in Ghana (Accra): Case study of *Bortianor*' Masters of Geomatics Engineering Thesis, University Of Calgary, January 2013, ii.
[100] Elias T, *The nature of African customary law*, Manchester University Press, Manchester, 1956, 62.
[101] Danso, 'Peri-urban land tenure in Ghana (Accra).'
[102] Ollenu N, *Principles of customary land law in Ghana*, Sweet and Maxwell, London, 1962, 16.
[103] Bentsi-Enchil K, 'The traditional legal systems of Africa' in Lawson F (ed), *Property and trust*, International Encyclopedia of Comparative Law VI, (1975), chapter 2, The Hague, 68 – 101.
[104] Article 276(1), *Constitution of Ghana* (1992).
[105] Ministry of Lands and Forestry, *Emerging land tenure issues*, Ghana, 2003.
[106] Antwi A and Adams J, 'Rent seeking behaviour and its economic costs in urban land transactions in Accra, Ghana' 40 *Urban Studies*, 10 (2003), 2083 -2098.

level 4. The institutions at the various levels serve a dispute resolution function. The disputing parties come together to negotiate or voluntarily submit the dispute to the heads of the family, the village chief or the paramount chief.[107]

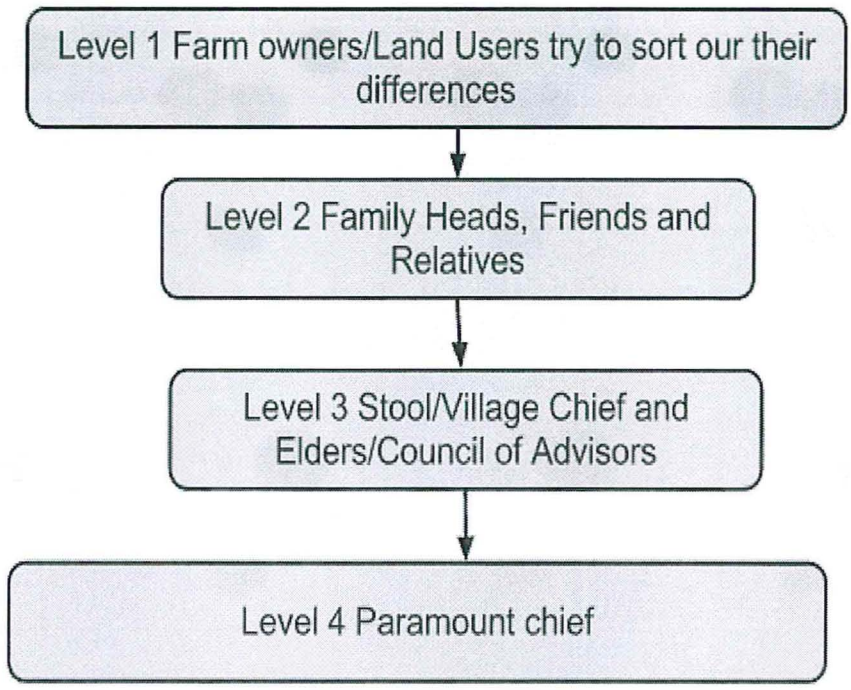

Figure 2.1: Channels of Traditional Dispute Resolution[108]

The head of the family, the village chiefs and paramount chiefs employ mechanisms such as rituals, negotiation, reconciliation and mediation in resolving the matter.[109] The rituals used vary from community to community but basically have the same significations due to the belief that land is a spiritual entity and, therefore, the *Earthgod* is the ultimate decider of land disputes.[110] Negotiations are used by the disputants themselves and at other times under the recommendation of those in charge of dispute resolution.[111] Reconciliation

[107] Paaga D and Dandeebo G, 'Assessing the appeal of traditional dispute resolution methods in land dispute management: Cases from the upper west region' 4 *Developing Country Studies*, 11 (2014), 4.
[108] Alhassan O and Manuh T, Land registration in eastern and western regions, Ghana, International Institute for Environment and Development, Research Report 5, 2005, 29.
[109] Paaga and Dandeebo, 'Assessing the appeal of traditional dispute resolution methods in land dispute management', 3.
[110] Paaga and Dandeebo, 'Assessing the appeal of traditional dispute resolution methods in land dispute management', 3.
[111] Paaga and Dandeebo, 'Assessing the appeal of traditional dispute resolution methods in land dispute management', 5.

and mediation are employed where the parties are not able to resolve the dispute themselves or when rituals are not used.[112]

3.3 South Sudan

Land is held in common in traditional African communities in South Sudan. Individuals have the right to use – usufruct, passed down generations and chiefs regulate land use for the common good.[113] Land disputes are heard and determined by customary courts.[114] Disputes are resolved at the different levels: those at the meta-family level are handled by elders; those at the boma by sub-chiefs; those at the payam by executive chiefs; and those at the county by paramount chiefs.[115] Disputes not resolved at one level are taken to the next.[116] The resolution of disputes by customary courts is a practice that thrives in rural areas where the state mechanisms are not present.[117]

The operation of customary courts is recognised under the Local Government Act.[118] Each county has a Customary Law Council as the highest customary law authority charged with the protection, promotion and preservation of the traditions, customs, cultures, values and norms of the communities within that county.[119] It also has the responsibility of ensuring proper administration of customary law and training the customary court staff in the county. It derives its authority from the customs and traditions of the people.

There are four levels of customary courts: "C" Courts; "B" Courts or Regional Courts; "A" Courts or Executive Chief's Courts; and Town Bench Courts.[120] These courts have the competence to entertain customary disputes, including customary land disputes,[121] in accordance with traditions, customs and norms of the communities.[122] The levels also serve an appellate function.[123]

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[112] Paaga and Dandeebo, 'Assessing the appeal of traditional dispute resolution methods in land dispute management', 3.
[113] Mennen T, Customary law and land rights in South Sudan, Norwegian Refugee Council Report, 2012, 11.
[114] Mennen, Customary law and land rights in South Sudan, 11.
[115] Mennen, Customary law and land rights in South Sudan, 10.
[116] Mennen, Customary law and land rights in South Sudan, 10.
[117] Mennen, Customary law and land rights in South Sudan, 13.
[118] Section 12, *Local Government Act* (South Sudan).
[119] Chapter X, *Local Government Act* (South Sudan).
[120] Section 97, *Local Government Act* (South Sudan).
[121] Section 100, *Local Government Act* (South Sudan).
[122] Section 98, *Local Government Act* (South Sudan).
[123] Sections 99, 100, 101 and 102, *Local Government Act* (South Sudan).

3.4 Lessons from the Comparative Study

The case studies reveal that indigenous TJS institutions are able to deliver justice and are accessible, affordable and comprehensible especially to the communities in rural areas. They also show that land is more than an economic asset to traditional African communities so other aspects, for example, social and religious implications inform the land holding and consequently dispute resolution.

It is also evident that the state can recognise TJS without interfering with them. This enables the indigenous TJS institutions to work and remain true to their objectives, for example, the pursuit of restorative justice. The processes and outcomes of indigenous TJS institutions need to be afforded legal recognition.

The comparative study also shows that TJS thrive where community land, customary law and associated practices are legally protected. Constitutional recognition ensures that they are not undermined in the policy, law and practice.

3.5 Conclusion

The case studies depict the manner in which TJS practices continue to operate to date with regard to the resolution of community land disputes. The case of Ghana shows how indigenous TJS institutions continue to operate without interference from the formal justice system while that of South Sudan shows recognition of TJS by the state without interference.

CHAPTER FOUR
SUITABILITY OF TJS IN RESOLVING COMMUNITY LAND DISPUTES

4.1 Introduction

This chapter looks at the prominent features of TJS, the nature of community land ownership and explains why TJS are most suitable in resolving community land disputes. Communal property rights, for example, community land rights, are likened to a 'web of interests' as they incorporate different parties with various rights. Various rights attach to community land, for instance, the right to graze, right to fetch water, right to harvest forest resources like honey or right to regulate or manage the resources.[124] This is why land tenure in traditional African communities is conceptualized as a 'web of interests'.[125] The resolution of disputes relating to the ownership and use of such resources, therefore, requires mechanisms that take into account and preserve these relationships. This role is best fulfilled by TJS due to the following attributes:

4.2 Communitarian Nature of TJS

TJS are community inclusive due to the fact that they involve the disputants as well as the community at large in resolving the dispute at hand. They are not solely concerned with the offender and the victim as does the formal dispute resolution process.[126] This is because in African traditional communities, the members are tied in varying degrees to the disputants and, therefore, each member of the community feels wronged or responsible depending on the extent of the ties with the disputants.[127] A dispute between individuals is *"...not merely... a matter of curiosity regarding the affairs of one's neighbour, but in a very real sense a conflict that belongs to the community itself."*[128] This is founded on the traditional African principle that rights and duties primarily attach to a community or group rather than to an individual. Igbokwe observes as follows in this regard,

> *Very often, the members of the group, as individuals, are only users of collective rights belonging to the family, lineage, clan, tribe or ethnic group as a whole. A*

[124] Meinzen-Dick R and Mwangi E, 'Cutting the web of interests: Pitfalls of formalizing property rights' 26 *Land Use Policy*, 1 (2007), 36 – 43.
[125] Kariuki F, 'Securing land rights in community forests: Assessment of article 63(2)(d) of the Constitution' LL.M Thesis, University of Nairobi, 2013, 34.
[126] Elechi O, 'Human rights and the African indigenous justice system' 18th International Conference of the International Society for the Reform of Criminal Law (Montreal, August 2004)
[127] Penal Reform International, *Access to justice in sub-Saharan Africa: The role of traditional and informal justice systems*, 2000, 22.
[128] Holleman J, 'An anthropological approach to Bantu law: With special reference to Shona law" 10 *Rhodes-Livingstone Journal*, 53.

law-breaking individual thus transforms his group into a law-breaking group, for in his dealings with others, he never stands alone. In the same vein, a disputing individual transforms his group into a disputing group and it follows that if he is wronged, he may depend upon his group for vengeance, for in some vicarious manner, they too have been wronged.[129]

It is in this regard that a dispute afflicts the entire community and, therefore, the disputants as well as the community at large must be involved, in the process and outcomes, in order for harmony to be restored.[130] In addition to the fact that the processes and outcomes of TJS are community oriented,[131] public consensus is a necessary ingredient since social pressure is required to enforce the decisions.[132]

The processes employed in TJS afford the members of the community the opportunity to tender evidence and voice their opinions:[133]

*...**although judgment was delivered by the chief on the advice of the elders, everybody had a right to speak in an orderly manner, to put questions to witnesses, and to make suggestions to the court.** This privilege was extended to passers-by who, although they might have been complete strangers, could lay down their loads and listen to the proceedings. The chief and his wise elders would sit for hours listening to what by Western standards might be considered a mass of irrelevant details. **This was done to settle the disputes once and for all so that the society could thereafter continue to function harmoniously.***[134] (Emphasis added).

This feature is further depicted in the observation of Nelson Mandela in outlining the democratic aspects in the traditional decision making in his ethnic group in South Africa. He stated that:

*The meetings would continue until some kind of consensus was reached. They ended in unanimity or not at all. Unanimity, however, might be an agreement to disagree, to wait for a more propitious time to propose a solution. **Democracy meant all men were to be heard, and a decision was taken together as a people.***

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[129] Igbokwe V, 'Socio-cultural dimensions of dispute resolution: Informal justice processes among the Ibo-speaking peoples of eastern Nigeria and their implications for community/neighbouring justice system in north America' 10 *African Journal of International and Comparative Law* (1998) 449 – 450.
[130] Penal Reform International, *Access to justice in sub-Saharan Africa,* 26.
[131] Zehr H. *The little book of restorative justice*, Good Books, Pennsylvania, 2002.
[132] Penal Reform International, *Access to justice in sub-Saharan Africa,* 26.
[133] Allott A, 'African law' in Derrett D, *An introduction to legal systems*, Sweet & Maxwell, London, 1968, 146.
[134] Chimango L, 'Tradition and the traditional courts of Malawi' 10 *Comparative and International Law Journal of Southern Africa* (1977), 40.

> *Majority rule was a foreign notion. A minority was not to be crushed by a majority.* ***Only at the end of the meeting, as the sun was setting, would the regent speak. His purpose was to sum up what had been said and form some consensus among the diverse opinions****... A [true] leader... is like a shepherd. He stays behind the flock, letting the most nimble go on ahead, whereupon the others follow, not realizing that all along they are being directed from behind.*[135] (Emphasis added).

This makes TJS suitable for resolving community land disputes since community land is held and managed communally.[136] TJS ensures that all the individuals and groups involved are involved and catered for in the administration and resolution of disputes. The main aim of TJS is to preserve the relationships between the members of the community.

The formal system takes away self-governance from the hands of communities and vests them in state machinery which is oriented towards different ends from those of communities, for example, the state seeks retributive justice while communities seek restorative justice and preservation of relationships. The formal system marginalizes and intimidates communities. Communities have, therefore, opted to maintain TJS in order to *"...retain control over dispute resolution within their own cultural, familial and sometimes religious norms."*[137]

Apart from being an economic and political resource, land, to traditional African communities, is also a cultural and spiritual asset. It is a medium that defines and binds social relations in both an intra-generational and inter-generational aspect.[138] TJS are, therefore, appropriate as they are able to fully take into account these various aspects of land in traditional African communities. The fact that TJS are anchored on communal values allows communities to perform their religious obligations and retain and enhance their cultural identity.[139]

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[135] De Villiers, F, 1998 'Democratic aspects of traditional conflict management' in D'Engelbronner-Kolff M, Hinz M and Sindano J (eds) *Traditional Authority and Democracy in Southern Africa, Proceedings from the workshop, Traditional Authorities in the Nineties – Democratic Aspects of Traditional Government in Southern Africa, 15-16 November 1995*, New Namibia Books, Windhoek, 1998, 105 – 106 (Citing Nelson Mandela).

[136] Okoth-Ogendo, 'The tragic African commons', 2.

[137] Macfarlane J, 'Working towards restorative justice in Ethiopia: Integrating traditional conflict resolution systems with formal legal system' *Cardozo Journal of Conflict Resolution* (2006 – 2007), 495.

[138] Republic of Kenya, *Report of the Commission of inquiry into the land law system of Kenya*, 19.

[139] Macfarlane, 'Working towards restorative justice in Ethiopia', 495.

4.3 Resolution of Disputes as Opposed to Settlement

Resolution identifies and addresses the underlying issues in a dispute between parties.[140] It requires going beyond the positions held by the parties and looking into the underlying values and feelings. Settlement, on the other hand, is centred on the assertion by the parties of *upholding established social norms of right and wrong* without delving into the core issues underlying the dispute between the parties.[141] In dispute settlement, the focus is on the allocation of legal rights and duties and aims at bringing the dispute to an end as quickly and amicably as possible.[142] It therefore has the implication that a related or similar dispute may arise since the core issues have not been fully addressed.[143]

In a resolution process, the disputants are not compromising or bargaining away their interests. On the contrary, "*they engage in a process of information-sharing, relationship-building, joint analysis and cooperation.*"[144] This is due to the understanding that "*the roots of conflict lie in the subjective relationships between the disputants.*"[145] A settlement process, however, approaches disputes from an objective or realistic perspective and does not take into account the underlying values and feelings of the parties.

Settlement of disputes is superficial: the core issues are not addressed and *remain to flare up again, either when strength of feeling produces new issues or renewed dissatisfactions over old ones, or when the third party's guarantee runs out.*[146] Azar criticises such an approach since according to him, it is premised on *'a temporary settlement or control of a crisis, without tackling the deeper structural roots underlying the crisis.... There are no "quick fix" solutions to these problems.'*[147]

TJS handle disputes with the underlying theme being the resolution of the issues at the core of the dispute with the aim of *restoration of relationships, peace-building and parties' interests. They are not concerned with the allocation of rights between*

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[140] Burton J and Dukes F, *Conflict: Practices in management, settlement & resolution*, St. Martin's Press, New York, 1990, 83 – 87.
[141] Burton and Dukes, *Conflict*, 83 – 87.
[142] Spangler B, 'Settlement, resolution, management, and transformation: An explanation of terms' in Guy B and Heidi B (eds.) *Beyond intractability*, Boulder, University of Colorado, 2003 http://www.beyondintractability.org/essay/meaning-resolution on 1 March 2015.
[143] Burton J, *Conflict: Resolution & prevention*, St. Martin's Press, New York, 1990, 5.
[144] Bloomfield D, 'Towards complementarity in conflict management: Resolution and settlement in Northern Ireland' 32 *Journal of Peace Research*, 2 (1995), 151 – 164, 152.
[145] Bloomfield, 'Towards complementarity in conflict management', 152.
[146] Bloomfield, 'Towards complementarity in conflict management', 152.
[147] Azar E and Moon C, 'Managing protracted social conflicts in the third world: Facilitation and development in diplomacy' 15 *Millennium Journal of International Studies*, 3 (1986), 393 – 406, 401.

disputants[148] and in this regard therefore seek *to promote restorative justice as opposed to retributive justice.*[149]

The observation by Allot serves to reinforce this position. He opines that TJS are premised on "*the notion of reconciliation or the restoration of harmony.*"[150] To Elechi, TJS makes use of restorative and transformative principles in dispute resolution due to the involvement of the community at large in the search for a solution to the problem at hand. It is not solely about the individual offender and the individual victim.[151] The outcomes, as Zehr concludes, "*are community oriented with little damage and nobody is excluded.*"[152]

4.4 Informality

Formal justice mechanisms are understood to mean the mechanisms established and endorsed by the state while informal mechanisms are run outside the ambit of the state.[153] Formalisation is the act of legally recognising informal activities, those involved and the respective institutions.[154] This has focused mainly on land. As Okoth-Ogendo notes, "*Land rights systems have been the target of reform in Africa for nearly a century.* "[155]

The conception underlying this process has been that private land rights are superior to communal land rights: *"property rights, meaning private rights or rights analogous to them, are in the last analysis the only power by which men can execute positive plans for the use of land and natural resources.*"[156] This is in line with the sentiments of the English Economist Adam Smith[157] and is one of the reasons as to why indigenous property systems are viewed as being retrogressive. It has informed the move from informal to the formal in East Africa up to date.[158]

The process of formalisation needs to be undertaken, if necessary, with a lot of caution. Failure to fully appreciate the process leads to grave consequences for land

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[148] International Commission of Jurists Kenya, *Interface between formal and informal justice systems in Kenya*, 32.
[149] Kariuki, 'Applicability of traditional dispute resolution mechanisms in criminal cases in Kenya' 204.
[150] Allott, 'African law', 131.
[151] Elechi, 'Human rights and the African indigenous justice system'.
[152] Zehr, *The little book of restorative justice*.
[153] Forsyth M, 'A typology of relationships between state and non-state justice systems,' *Journal of Legal Pluralism & Unofficial Law*, (2007), 67.
[154] Okoth-Ogendo, 'Formalising informal property rights: The problem of informal land rights reform in Africa' Background paper prepared for the Commission for the Legal Empowerment of the Poor, Nairobi, 2006, 5.
[155] Okoth-Ogendo, 'Formalising informal property rights', 6.
[156] Denman D, *Land use and the constitution of property: An inaugural lecture*, Cambridge University Press, Cambridge, 1969.
[157] Smith A, *The wealth of nations*, Matheu, London, 1961.
[158] Government of the United Kingdom, *Report of the East African royal commission*, 1955.

rights.[159] The context is also a factor to be keenly observed. Okoth-Ogendo makes the observation that, "*Legislating rights is always risky business. But legislating land rights for the poor is particularly risky!*"[160]

Access to justice is taken in this study to be the use of informal justice systems to ensure access to justice.[161] Informal justice systems guarantee access to justice especially in rural areas and informal settlements because the people in such areas are not able to afford the formal systems and live in remote areas. In Ethiopia, for example, informal justice systems are more influential and affect the lives of the individuals and groups living in areas far from regional centres.[162]

TJS in Kenya have been clearly placed under the informal mechanisms. They "*operated outside the formal justice system without adequate recognition and protection in law.*"[163] Today, they have been recognised by the Constitution.[164] This is due to the realisation that they can dispense justice better in resolving conflicts[165] since they are affordable and not alien to the traditional communities[166] and have inclusive processes.[167]

One question that arises is whether TJS can now be referred to as formal mechanisms due to the Constitutional recognition. The answer to this can be found in clearly establishing the position of TJS in relation to traditional state mechanisms. It has to be determined whether they are still subjugated to statutory mechanisms or whether they are actually promoted by the state.[168] Therefore, "*mere recognition without active state participation does not change informal justice systems to formal justice systems.*"[169]

Many issues arise when one considers the relationship between the formal and informal justice systems. Can these systems work together?[170] Can the informal be incorporated into the formal? There have been various attempts to address these issues. Those advocating for the informal justice systems due to their ability to achieve restorative justice have argued that merging the informal and formal will dilute or undermine informal

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[159] Kingwill R, Cousins B, Cousins T, Hornby D, Royston L and Smit W, 'Mysteries and myths: De Soto, property and poverty in South Africa' *Gatekeeper Series,* 124 (2006).
[160] Okoth-Ogendo, 'Formalising informal property rights', 28.
[161] Kariuki, 'Applicability of traditional dispute resolution mechanisms in criminal cases in Kenya', 210.
[162] Macfarlane, 'Working towards restorative justice in Ethiopia', 488.
[163] Kariuki, 'Community, customary and traditional justice systems in Kenya', 1.
[164] Article 159(2), *Constitution of Kenya* (2010).
[165] Forsyth M, 'A typology of relationships between state and non-state justice systems', 69.
[166] Pimentel D, 'Can indigenous justice survive? Legal pluralism and the rule of law,' 32 *Harvard International Review,* 2 (2010), 32 – 36.
[167] Hunter E, 'Access to justice: to dream the impossible dream?' 44 *The Comparative and International Law Journal of Southern Africa,* 3 (2011), 408 – 427.
[168] Macfarlane, 'Working towards restorative justice in Ethiopia', 491.
[169] Kariuki, 'Community, customary and traditional justice systems in Kenya', 4.
[170] Macfarlane, 'Working towards restorative justice in Ethiopia', 489.

systems.[171] According to them, merging the two means restorative justice is undermined since its very essence *"...is its fidelity to intuitive and organic forms of informal justice within any given community, and that its adoption by a State machinery inevitably detracts from that authenticity."*[172]

4.5 The Pursuit of Restorative as Opposed to Retributive Justice

Restorative justice has been defined as *"...a process to involve, to the extent possible, those who have a stake in a specific offense and to collectively identify and address harms, needs, and obligations, in order to heal and put things as right as possible."*[173] Retributive justice, on the other hand, has been used in describing the conventional criminal justice system with special regard to offenders being punished.[174] The two forms of justice share the desire to vindicate a wrongful act through reciprocal action but differ in the manner of realizing their objectives.[175] Retributive justice imposes pain in order to vindicate while restorative justice is of the opinion that,

> *what truly vindicates is acknowledgement of victims' harms and needs, combined with an active effort to encourage offenders to take responsibility, make right the wrongs, and address the causes of their behavior.*[176]

To restorative justice, the primary stakeholders in a dispute are individual victims, their families, victimized communities, offenders and their families. The state also has an interest but is seen as more removed since it has not suffered a direct impact.[177]

TJS seek restorative ends[178] due to their basis in reconciliation and restoration of harmony:[179]

> ***At the heart of [traditional] African adjudication lies the notion of reconciliation or the restoration of harmony. The job of a court or an arbitrator is less to find the facts, state the rules of law, and apply them to the facts than to set right a wrong in such a way as to restore harmony within the disturbed community.*** *Harmony will not be restored unless the parties are satisfied that justice has been*

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[171] Zehr H, *Changes lenses: A new focus for crime and justice*, Herald Press, Scottdale, PA, 1990, 97 – 105.
[172] Zehr, *Changes lenses*, 97 – 105.
[173] Zehr, *The little book of restorative justice*, 37.
[174] Umbreit M, Coates R and Kalanj B, *Victim meets offender: The impact of restorative justice and mediation,* Criminal Justice Press, Monsey, NY, 1994, 2 – 4.
[175] Zehr, *The little book of restorative justice*, 58.
[176] Zehr, *The little book of restorative justice*, 59.
[177] Umbreit M, Vos B, Coates R and Lightfoot E, 'Restorative justice: An empirically grounded movement facing many opportunities and pitfalls' 8 *Cardozo Journal of Conflict Resolution,* 511 (2007), 516.
[178] Kariuki, 'Applicability of traditional dispute resolution mechanisms in criminal cases in Kenya' 204.
[179] Allott, 'African law', 131.

done. The complainant will accordingly want to see that the legal rules, including those which specify the appropriate recompense for a given wrong, are applied by the court. But the party at fault must be brought to see how his behaviour has fallen short of the standard set for his particular role as involved in the dispute, and he must come to accept that the decision of the court is a fair one. On his side he wants an assurance that once he has admitted his error and made recompense for it he will be reintegrated into the community.[180] (Emphasis added).

They seek to restore relationships, build peace and protect interests of the parties without allocating formal rights between the parties.[181] Their involvement of the whole community in resolving the dispute at hand also contributes to restoration and transformation.[182] The outcomes are also community oriented and little damage is involved as nobody is excluded.[183] Archbishop Desmond Tutu describes the concept of 'Ubuntu' – which roughly translates to 'restoring a balance that has been lost', as being at the centre of traditional concepts of African justice. He states that,

Retributive justice is largely Western. The African understanding is far more restorative - not so much to punish as to restore a balance that has been knocked askew. The justice we hope for is restorative of the dignity of the people."[184]

TJS place a higher premium on reconciliation due to the realization that in most disputes,

...no party is totally at fault or completely blameless. As such, a high value is placed on reconciliation and everything is done to avoid the severance of social relationships. ***Where men must live together in a communalistic environment, they must be prepared for give and take relationships and the zero-sum, winner-take-all model of justice is inappropriate in their circumstances."***[185] (Emphasis added).

Furthermore, TJS avoids adversarial approaches in order to preserve the web of relationships in the multiplex societies. Adversarial approaches raise the tension and estrangement between the disputants and their supporters and, therefore, threaten the moral cohesion of the community or group.[186]

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[180] Allott, 'African law', 145.
[181] International Commission of Jurists Kenya, *Interface between formal and informal justice systems in Kenya*, 32.
[182] Elechi, 'Human rights and the African indigenous justice system'.
[183] Zehr, *The little book of restorative justice.*
[184] Bell R, *Understanding African philosophy: A cross-cultural approach to classical and contemporary issues*, Routledge, New York, 2002, 90 (Citing Desmond Tutu).
[185] Igbokwe, 'Socio-cultural dimensions of dispute resolution', 449 – 450, 457.
[186] Igbokwe, 'Socio-cultural dimensions of dispute resolution', 449 – 450, 451 – 452.

The sanctions imposed in TJS also reflect the underlying principle of restoration of social harmony and reconciliation of the disputants and the community. Compensation and restitution are emphasized in order to restore the status quo rather than imposing punishment.[187] Traditional African societies do not need to employ the punitive measures used by the formal systems since for them, *"enforcement lies within the complex of relationships..."*[188] The social pressure founded on the web of relationships play a powerful role in securing compliance.[189] Failure to comply with a finding arrived through a highly public participatory process is commensurate with disobeying the entire community and attract social ostracism.[190] The members of the community withdraw social contact and economic cooperation[191] leading to separation of the individual from the community, a condition likened to a 'living death'.[192] In some instances, restitution of more than the damage occasioned is ordered *"especially when the offender has been caught in flagrante delicto."*[193]

4.6 Conclusion

These aspects depict how TJS, through the pursuit of restorative justice, provides a better approach to community land dispute resolution. The whole community is included and the main aim is to preserve the relationships and restore harmony.

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[187] Merry S, 'The social organisation of mediation in nonindustrialised societies: Implications for informal community justice in America' in Abel R (ed), *The Politics of Informal Justice: Comparative experiences*, Academic Press, New York, 1982, 17 – 45, 20.

[188] Roberts S, *Order and dispute: An introduction to legal anthropology*, St. Martin's Press, New York, 1979, 51.

[189] Igbokwe, 'Socio-cultural dimensions of dispute resolution', 449 – 450, 469. Merry, 'The social organisation of mediation in nonindustrialised societies', 36.

[190] Igbokwe, 'Socio-cultural dimensions of dispute resolution', 449 – 450, 459.

[191] Roberts, *Order and dispute*, 27, 39, 65.

[192] Oputa C, 'Crime and the Nigerian society' in Elias T, Nwabara S and Akpamgbo C, *African indigenous laws*, Nigerian Government Printer, Enugu, 1975, 8.

[193] Elias T, 'Traditional forms of public participation in social defence' 27 *International Review of Criminal Policy*, 1968, 18 – 24, 20.

CHAPTER FIVE
FINDINGS AND RECOMMENDATIONS

5.1 Introduction

This chapter outlines the findings, recommendations and conclusions of the study. The study was undertaken with the intention of establishing whether TJS are the most suitable dispute resolution mechanisms for community land disputes.

5.2 Findings

a) The State of Community Land

The study has also arrived at the finding, in Chapter One, that community land is recognised by the Constitution but is not well protected. The law required to be enacted in order to regulate the holding and management of community land is yet to be put in place. This poses a challenge since the individualisation of land ownership destroys the web of interests that TJS practices are greatly reliant on.

b) Treatment of Customary Law in the Legal System

The laws, policies and practices on dispute resolution have viewed customary law as inferior as discussed in Chapter Two. The treatment of customary laws as an inferior system of law originates from the colonial administration. The laws in independent Kenya continued the subjugation of customary law in legislative instruments. Section 3(2) of the Judicature Act continues to propagate this negative treatment as it requires that customary law should not be repugnant to justice and morality and that the courts are only to be guided and not bound by customary law. Apart from requiring customary law to conform to it, the Constitution also retains the repugnancy clause and does not define the term. These provisions only serve to continue the subjugation of customary law.

c) The Suitability of TJS to Community Land Disputes

The study has established in Chapter Four that TJS are the most appropriate mechanism for resolving community land disputes. The community inclusive approach inherent in TJS is able to cater for the different parties exercising the various rights over community land. TJS are also able to preserve the diversity in the lives of traditional communities since each community has its own mechanisms. The informal nature of TJS enables it to reach every community even those in remote areas in an accessible, comprehensible and affordable manner. The pursuit of restorative justice is able to preserve and strengthen the web of relationships by the various right holders in community

land. The resolution of disputes as opposed to settlement facilitates reconciliation by tackling the underlying issues in order to restore harmony among the various users of community land and related resources.

5.3 Recommendations

a) Need for Better Protection of Community Land

Laws and policies need to ensure a better protection of community land. The absence of community land legislation increases the tenure insecurity. The communities are likely to lose their land to private individuals through questionable processes as there is no law governing the holding and conversion of land from community to private tenure.

b) Need to Remove the Barriers Hindering the Application of Customary Law

There is a need to ensure that the policy and legal barriers hindering the application of customary law are removed. The validity and application of customary law should not be determined by other forms of law. The place of customary law in the juridical system ought to be determined by the Constitution just as is the case for other sources of law.

c) Need to Recognise and Encourage the Indigenous TJS Institutions

The indigenous TJS institutions, for example, the village elders, headmen and chiefs, need to be recognised and encouraged. These institutions are the custodians of the customs and values of the various traditional communities. Sidelining them results in decline of cultural activity and consequently the demise of TJS.

d) Need to Have TJS operate without interference by formal mechanisms

The formal justice systems should not interfere with TJS mechanisms. Bringing the two justice systems together results in the undermining of the objectives of informal justice systems, for example, the pursuit of restorative justice.

e) Need for TJS Policy

It is also necessary to formulate a TJS Policy to guide the relationship between the formal and the informal justice systems mostly in the points of intersections. The policy should also address the human rights and due process concerns raised against TJS. The terminology challenges posed by the laws on TJS also need to be addressed by the policy.

5.4 Conclusion

The study has achieved its objectives and responded to the Statement of Problem. The objectives were:

i. To investigate the suitability of TJS in resolving community land disputes;
ii. To examine the factors impeding the application of TJS in resolving community land disputes; and
iii. To make recommendations on the measures necessary to ensure that TJS are applied in resolving community land disputes.

Objective i

The study has brought out the various features inherent in TJS that make them most suitable for resolving community land disputes. Chapter four has detailed the various features and explained how each of them would be significant in resolving community land disputes.

Objective ii

Through the examination of the present and past manifestations of TJS in policy and law, the study has managed to establish the main factors impeding the application of TJS. It has shown that the approach taken by laws and policies overestimates the ability of formal systems in land dispute resolution and undermines the place of TJS.

Objective iii

The study has suggested various measures that can be undertaken to restore the place of TJS in community land dispute resolution.

Hypothesis

The hypothesis was that TJS are the most appropriate dispute resolution mechanisms for resolving community land disputes.

The study has tested and proved the hypothesis by highlighting the inherent features in TJS that make them suitable for resolving community land disputes. Chapter Four has examined the various features of TJS and explained the manner in which they correspond with the manner in which community land is held and managed.

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