EVALUATING THE EFFECTIVENESS OF THE LEGAL AND INSTITUTIONAL FRAMEWORK IN ADDRESSING HISTORICAL LAND INJUSTICES IN KENYA: A COMPARATIVE STUDY WITH SOUTH AFRICA'S LAND REFORM LAWS.

Submitted in Partial Fulfillment of the Requirements of the Bachelor of Laws Degree

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TABLE OF CONTENTS

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DECLARATION

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

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

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ABSTRACT

Land has always been an emotive issue in Kenya. Since gaining independence, there has been a consistent call from Kenyan citizens, politicians, leaders, and other key players for the establishment of new land laws. Unfortunately, the reforms in land law have been incremental and have failed to yield beneficial outcomes for the general population, instead, further injustices related to land have been inflicted upon Kenyans post-independence.

In 2010, the adoption of a new Constitution in Kenya marked significant progress, leading to comprehensive reforms and the restructuring of the land law system. The Constitution of Kenya offered a beacon of hope on the path to achieving transitional justice. It established the National Land Commission (NLC) which was tasked with investigating and making recommendations concerning current and historical land injustices. However, since its inception, the NLC has made very limited progress in this specific mandate.

Consequently, this research project aims to examine the legal and institutional framework that governs restitution of Historical Land Injustices to determine where the hindrances lie. In order to remedy the issues identified, it explores effective strategies for the resolution of historical land injustices in Kenya, drawing lessons from South Africa's post-apartheid restitution efforts. With a focus on comparative analysis, the study seeks to understand how Kenya can leverage international best practices, particularly those of South Africa, to address its own challenges of land dispossession stemming from colonial and post-independence policies.

The study employs a qualitative approach and encompasses a detailed examination of both countries' legal and institutional frameworks for land restitution, with an emphasis on the establishment and operations of South Africa's Land Claims Court and the Commission for Restitution of Land Rights, and their potential applicability within the Kenyan context.

This study suggests the need for Kenya's National Land Commission to adopt clear procedural guidelines, establish specialized mechanisms dedicated to land restitution, and ensure judicial support for the restitution process. Furthermore, it recognizes the need to adopt a holistic approach that addresses not only legal restitution but also the social, cultural and economic rights of affected communities. These measures are critical for achieving transitional justice, promoting sustainable development, and fostering national reconciliation in Kenya.

LIST OF ABBREVIATIONS

ADR	Alternative Dispute Resolution
CLMB	County Land Management Boards
COK	Constitution of Kenya
ESTA	Extension of Security of Tenure Act
HLI	Historical Land Injustices
LCC	Land Claims Court
LRA	Land Registration Act.
LTA	Labour Tenants Act
NLC	National Land Commission
NLP	National Land Policy
RLRC	Restitution of Land Rights Commission
TJRC	Truth, Justice and Reconciliation Commission

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In the Matter of the National Land Commission, Advisory Opinion No. 2 of 2014.

James Ngochi Ngugi v National Land Commission & Another (2017) eKLR.

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Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others (2016) Constitutional Court of South Africa.

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Mathebula and Another v Harry (2015) Land Claims Court of South Africa.

Mike Campbell (Pvt) Ltd and Others v. Republic of Zimbabwe (2008) Southern African Development Community.

Msiza v. Director-General for the Department of Rural Development and Land Reform and Others (2016) Constitutional Court of South Africa.

Mureithi v Attorney General & 4 Others (2005) eKLR.

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Nhlabathi and Others v Fick (2003), Land Claims Court of South Africa.

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Speaker of the National Assembly and Another v Land Access Movement of South Africa and Others (2019) Constitutional Court of South Africa.

Torino Enterprises Limited v Attorney General (2023) eKLR.

LIST OF LEGAL INSTRUMENTS

Constitution of Kenya (2010).

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Crown Lands Ordinance, 1915 (Repealed Crown Lands Ordinance, 1902).

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Interim Constitution of South Africa (Act No. 200 of 1993).

Investigation of Historical Land Injustices Regulations, 2017.

Labor Tenants Act (Act No. 3 of 1996).

Land Act (Act No.6 of 2012).

Land Control Act (Act No.19 of 2015).

Land Laws (Amendment) Act (Act No.28 of 2016).

Land Laws (Amendment) Bill, 2023.

Land Registration Act (Act No. 3 of 2012).

Limitation of Actions Act (Chapter 22 of 2012).

National Land Commission Act (No. 5 of 2012).

Restitution of Land Rights Act (Act No. 22 of 1994).

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United Nations General Assembly Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Adopted by General Assembly resolution 40/34 of 29 November 1985. New York: UN General Assembly. (1985).

LIST OF DEFINITIONS

Alternative dispute resolution mechanisms: any methods used in the resolution of disputes outside the courtroom. Common methods of alternative dispute resolution include arbitration, mediation, negotiation and conciliation.

Historical Land Injustices: a grievance which was occasioned by a violation of right in land on the basis of any law, policy, declaration, administrative practice, treaty or agreement; resulted in displacement from their habitual place of residence; occurred between 15th June 1895 when Kenya became a protectorate under the British East African Protectorate and 27th August, 2010 when the Constitution of Kenya was promulgated; has not been sufficiently resolved and subsists up to the aforementioned period.

Transitional Justice: The full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation

CHAPTER 1

1. INTRODUCTION TO THE STUDY

1.1 Background

The right to own property is entrenched in article 40 of the Constitution of Kenya.[1] The property ownership that this paper shall seek to focus on is land ownership. Article 60 of the Constitution denotes the principles of land policy which include equitable access to land. [2] However, these fundamental provisions of the constitution have been subject to several hindrances. Notably, one of the many encumbrances that have plagued these provisions is historical land injustices. Historical land injustices are a conundrum that has long plagued Kenya since time immemorial, both in the colonial period and the post-colonial period.[3] These injustices date all the way back to the colonial period whereby land was systematically alienated from different communities in the country. [4] In fact, when Kenya became a British Colony in 1920, the alienation and marginalisation of Kenyans from their ancestral lands intensified. Under colonialism, all the land laws and land reforms made by the Crown refused to recognise the land rights of the indigenous Kenyans in all parts of the country. [5] Without paying heed to how the land was acquired, the independence constitution recognized all land rights that existed prior to 1 June 1963. All untitled land became Trust Land, which the independence state thereafter used as an endless resource to reward people who were politically and ethnically right. This began a trend of large-scale corruption in the subsequent ruling governments.[6] In the coast especially, since the time of the Arab-Swahili dominance until the present, the coastal population has steadily watched as their land was seized and they have been reduced to mere squatters. Furthermore, they lack the ability to speak out, the financial and political clout to fight back, and, for the majority of them, the social standing to stop

[1] Article 40, Constitution of Kenya (2010).
[2] Article 60, Constitution of Kenya (2010).
[3] Truth, Justice and Reconciliation Commission, *Report of the Truth, Justice, and Reconciliation Commission*,2013. Commission of Inquiry into Illegal/Irregular Allocation of Public land, *Report of the Commission of Inquiry into Illegal/Irregular Allocation of Public land,* 2003. -These reports provide a detailed glimpse into the several events that took place in Kenya that led to the unjust usurping of land.
[4] Syagga P, 'Public land, historical land injustices and the new constitution' Society for International Development, Constitution Working Paper number 9, 2011, (20).
[5] 'Historical Injustices: A Complementary Indicator for distributing the Equalization Fund' Commission on Revenue Allocation, Working Paper Number 2,2012,16.
[6] 'Historical Injustices: A Complementary Indicator for distributing the Equalization Fund'17.

their land from being unjustly acquired.[7] These injustices that have taken place since the dawn of colonialism have thus left people in the affected areas, landless, destitute and with no means of reprieve. Attempts have been made to rectify this issue, but they have all come to naught. This can be seen through the constitution of three major taskforces; that is the Njonjo Commission which was tasked with coming up with a National Land Policy framework, and new policy for the registration of land[8] ;The Ndung'u commission which investigated the illegal and irregular allocation of public land in Kenya[9], and the Truth and Justice Reconciliation Commission (TJRC) which was formed to investigate historical injustices ; their cause, effect and thereafter make appropriate reforms.[10] These commissions made several recommendations in a bid to tackle this longstanding issue but majority of these recommendations were not implemented. The TJRC report exclusively touches on the subject matter that this study seeks to evaluate. It was published in May 2013 and tabled in the National Assembly in July 2013. Since then no substantive progress has been made by way of creating an implementation mechanism for the recommendations in the report thus depicting that there is a real stumbling block when it comes to matters of resolving historical land injustices. This leaves victims of past historical land injustices at a great loss on the way forward of seeking redress.

The Constitution of Kenya sought to review and reform the country's land laws to address this conundrum. This was done by establishing the National Land Commission and outlines its duties which includes to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress.[11] In a bid to achieve this, the National Land Commission Act was enacted in 2012 and provided that within two years of its enactment, it shall recommend to Parliament appropriate legislation to provide for investigation and adjudication of claims arising out of historical land injustices for the purposes of Article 67(2)(e) of the Constitution.[12] Thus far, the National land commission(hereinafter NLC) has fallen

[7] Mghanga M, Usipoziba ufa utajenga ukuta, Land, elections, and conflicts in Kenya's Coast Province, Heinrich Boll Stiftung, Nairobi,2010,17.
[8] Report of the commission of inquiry into the land law system of Kenya on the principles of a national land policy framework, constitutional provision of land and new institutional framework for land administration, Government Printer, Nairobi, November 2002.
[9] Review of African Political Economy, *The Ndung'u report: land and graft in Kenya,* March 2005, (6).
[10] Report of the Truth, Justice, and Reconciliation Commission. Kenya, Truth Justice and Reconciliation Commission (TJRC), (hereafter TJRC Report), 2013.
[11] Article 67, Constitution of Kenya (2010).
[12] Section 15, National Land Commission Act (Act No 5 of 2012).

short of its mandate prescribed in the NLC act. In fact, claims on historical land injustices still crop up in the Environment and Land Courts due to the NLC failing to exercise their mandate.[13] A case worth mentioning is *Kenya National Chamber of Commerce & Industry -KNCC1 (Muranga Chapter) & 2 others v Delmonte Kenya Limited & 3 others* whereby the presiding judge held that the cause of action according to the Plaintiffs arose in 1895 when the colonial Government illegally alienated land that belonged to their ancestors and descendants. By filing this suit in the Environment and Land Courts, the parties chose a path that would be imperiled by section 7 of the Limitations of Actions Act.[14] He further noted that through section 15 of the NLC Act, the NLC was given a window and exempted from the provisions of the Limitations of Actions Act. This implies that this claim should have been taken up with the NLC. However, the plaintiffs had already referred their complaint to the NLC and received no redress. This goes to show that NLC has been of little to negligible help in performing their functions. Additionally, according to the Annual Report of the NLC for the year 2020 to 2021, the Commission only handled 6 historical land injustice cases, none of which were finalized.[15] The NLC lacks an elaborate description of the specialized institutional framework that would undertake this momentous task. The legal mechanisms that it has been endowed with only outline a basic process for processing claims that appears to only consider NLC looking into claims on its own initiative (by way of notice); which leaves out important factors like the process for submitting complaints to start an investigation, the standard of proof needed, and a recourse process in the event a complainant is unhappy with the initial decision. Furthermore, there are no standards on the various remedies and how they would be determined, and there is also no guidance about the financial funding aspect or specific deadlines for the resolution of complaints.[16] The National land Act amendment bill was enacted in order to give the National Land Commission the power and proper procedures to fruitfully address historical land injustices. The NLC act now lists the specific remedies it shall recommend after

[13] *Henry Wambega & 733 others v Attorney General & 9 others* (2020) eKLR.
Kenya National Chamber of Commerce & Industry -KNCC1 (Muranga Chapter) & 2 others v Delmonte Kenya Limited & 3 others; County Government of Kiambu (Interested Party) (2020) eKLR.
[14] Section 7, Limitation of Actions Act (Chapter 22 of 2012). - Given that the Limitations of Actions Act was enacted and came into force on the 19/4/1968, even if it is assumed that the computation of time started running then, then 12 years expired in 1980 within which time the Plaintiffs ought to have moved the Court for recovery of the 1500 acres of land.
[15] National land Commission, *Annual report of the National Land Commission for 2020-2021*, 2021,55.
[16] '*Redress for Historical Land Injustices in Kenya: A Brief on Proposed Legislation for Historical Land Injustices*,' Kenya Human Rights Commission,12.

investigating any cases of historical land injustices.[17] However, the Act does not explicitly state which authorities shall implement the recommendations. Moreover, it fails to state any procedures that will be undertaken should the anonymous authorities fail to undertake their function. Lastly, there is no means for recourse or appeal should the aggrieved parties fail to be satisfied with the National Land Commission's decisions. [18]

1.2 Statement of Problem

Historical Land Injustices have been a chronic problem that has persisted in Kenya since time immemorial. Different communities such as the coastal communities, the Maasai, Samburu, Turkana and Pokot have been dispossessed of their land through different means from colonial laws to large scale corruption by the ruling class. This has thus deprived them of their rightful entitlement to own property and diminished their economic life which has led to widespread poverty. The issue of historical land injustices has also sown seeds of discord in the Kenyan society that contributed to the tragic 2007-2008 post-election violence.[19] Cases concerning historical land injustices have still not been sufficiently addressed even with the existence of the National Land Commission and the current legal framework governing this interminable matter.

While the Constitution of Kenya and the National Land Act provide for the establishment of the National Land Commission to look into present and past land injustices, there is inadequate legislation on the process for submitting complaints to start an investigation, the standard of proof needed, and a recourse process in the event a complainant is unhappy with the initial decision.

This study shall thus seek to assess the effectiveness of the National Land commission in addressing historical land injustices and providing a way forward to mitigate the dearth in substantive and procedural law that renders the National Land Commission ill-equipped to carry out its function of addressing historical land injustices.

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[17] The National Land Commission Amendment Bill, 2022, 7-8.
[18] Section 15, National Land Commission Act (Act No 5 of 2012).
[19] Wakhungu J, 'Land Tenure and Violent Conflict in Kenya: In the Context of Local, National and Regional Legal and Policy Frameworks, African Centre for Technology Studies, 2008 -http://hdl.handle.net/11295/86977 on 15 September 2023.

1.3 Research questions

1. To what extent has the existing legal and institutional framework succeeded in resolving Historical Land Injustices?
2. What lessons can be drawn from South Africa in addressing Historical Land Injustices?
3. Which recommendations and proposals should Kenya adopt to effectively address Historical Land Injustices?

1.4 Research Objectives

1. To evaluate the effectiveness of the existing legal and institutional framework in resolving Historical Land Injustices.
2. To conduct a comparative study with South Africa that established a Lands Claims Court to address historical land injustices.
3. To propose recommendations on how the issue of Historical land injustices can be resolved in Kenya as drawn from South Africa.

1.5 Hypothesis

This research proceeds on the premise that the National Land Commission in Kenya has legal frailties and challenges that render it inadequate to efficiently carry out its mandate of resolving Historical Land Injustices.

1.6 Justification

Historical land injustices affect a wide variety of Kenyan communities till date. These communities include the coastal communities, Maasai and Pokot. It is worth highlighting that the unjust land alienation has led to acute population pressure, land degradation, erosion of subsistence livelihoods, increased vulnerability to drought and famine and abject poverty for these communities.[20] This study will thus be useful in so far as it will explore an effective means of

[20] Historical Injustices: A Complementary Indicator for distributing the Equalization Fund',42.

rectifying these historical land injustices which will lead to restoration of land to its rightful owners and contribute towards eradicating the resultant problems listed above.

This project will yield information that is useful to legislators to create the necessary legal framework that will help achieve the constitutional mandate of rectifying historical land injustices. Furthermore, it will benefit policy makers as they make decisions regarding the mandate of the National Land Commission. Additionally, this study will raise awareness among researchers and scholars alike that will enhance initiatives to revive the discussion around seeking solutions to the historical land injustices problem in Kenya. Moreover, this study will be beneficial to human rights organizations such as Kenya Human Rights Commission in their campaign for restorative justice.

1.7 Conceptual Framework

Victims as persons deserving effective transitional justice systems.

The United Nations (UN) defines Transitional Justice (TJ) as "the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation".[21]
The foundation of this study will be based upon the concept of 'victims as persons deserving effective transitional justice systems.'[22] Simply put, this concept states that victims should be the center and main focus of transitional justice with a key emphasis on meeting their needs. Recognition of the needs and rights of victims should thus be the primary justification for the existence of institutions and processes throughout the spectrum of transitional justice practice, from local and international prosecutions to truth recovery, memorialization, and reparations.[23]

[21] Kangerep H, 'Introduction to Transitional Justice' Kenya National Commission on Human Rights, 18 June 2018- < https://www.knchr.org/Articles/ArtMID/2432/ArticleID/1038/Introduction-to-Transitional-Justice> on 31 August 2023.
[22] McEvoy K, 'Victimology in transitional justice: Victimhood, innocence and hierarchy' 9(5) *European Journal of Criminology*, 528.
[23] McEvoy K, 'Victimology in transitional justice: Victimhood, innocence and hierarchy' 9(5) *European Journal of Criminology*, 528.

This concept is key in shedding light on the need for more efficient transitional justice mechanisms. In fact, the Prosecutor of the International Criminal Court has, for example, claimed that 'the sole raison d'être of the Court's activities is the victims and the justice they deserve'.[24]

To begin with, a victim may be understood as someone or something that has been hurt, damaged, or killed or has suffered, either because of the actions of someone or something else, or because of illness or chance.[25] In light of this study, a victim will be viewed as a person or community who was unjustly deprived of their land from the colonial period till present times. Ideally, justice for victims is sought through conventional means where their needs were increasingly framed as being capable of being met only in inverse proportion to the extent to which offenders' needs were recognized. In conservative discourses, harsher punishment of criminal offenders was justified as a response to victims' needs.[26]

However, this conventional approach of meeting victims' needs is not always possible, especially when injustices occurred in the past and were occasioned by people who possessed great power.[27] From this evolved the need to embrace a different method of catering to the needs of victims. The concept of transitional justice was thus born. Transitional justice has been defined narrowly as 'the conception of justice associated with periods of political change, characterised by legal responses to confront the wrongdoings of repressive predecessor regimes', and more broadly as 'that set of practices, mechanisms and concerns that arise following a period of conflict, civil strife or repression, and that are aimed directly at confronting and dealing with past violations of human rights and humanitarian law'.[28] Transitional justice has been observed through the lenses of the victim, the establishment of truth commissions and reparations.

[24] Robins S, 'Failing Victims? The Limits of Transitional Justice in Addressing the Needs of Victims of Violations' University of York,2017 < Failing Victims? The Limits of Transitional Justice in Addressing the Needs of Victims of Violations - White Rose Research Online > on 14 February 2023.
[25] Cambridge advanced learner's dictionary, 4th ed.
[26] McEvoy K, 'Victimology in transitional justice: Victimhood, innocence and hierarchy' 9(5) *European Journal of Criminology*, 528.
[27] Roht-Arriaza N, 'The new landscape of transitional justice. Transitional justice in the twenty-first century: beyond truth versus justice, *Cambridge University Press*, Cambridge, 2006.
[28] Roht-Arriaza N, 'The new landscape of transitional justice. Transitional justice in the twenty-first century: beyond truth versus justice, *Cambridge University Press*, Cambridge, 2006.

The victim

Victims are marginalized not just because they are victims, but frequently even before they become victims due to causes like poverty, gender, or ethnicity. It is essential that victims themselves have agency and voice in the process to address these impacts, and this has become a mainstay of the international rhetoric surrounding transitional justice. Their needs frequently result from the interaction of long-term marginalization and the violations of conflict.[29]

While restorative approaches have been accompanied by claims that victims are willing to forgive perpetrators who confess, or that they merely seek acknowledgement and symbolic reparations, a "rule of law" narrative has attempted to assert that victims want punitive justice, and that assumption is used to support the primacy of prosecutions.[30] The problem for a global discourse on transitional justice, which is often realized in a small number of institutional mechanisms, is to effectively address victims' concerns in a variety of different circumstances and across a variety of cultural contexts.[31] The emphasis on trials, truth commissions, and reparation processes that has become a universal practice has led to the institutionalization of transitional justice, whose primary function is considered as the establishment of state or supra-state agencies. These institutions serve to distance the transitional justice process and "to see victims or violence-afflicted communities as constituencies which must be managed rather than citizens to whom they must be accountable," given that the majority of contemporary transitional justice processes take place in low-income states in the global South.[32]

Truth Institutions

Truth commission claims to deliver both individual and national healing through truth-telling, specifically by institutionalising the truth claims of victims.[33] While supporting a wide range of

[29] Robins S, 'Failing Victims? The Limits of Transitional Justice in Addressing the Needs of Victims of Violations' University of York,2017, 45.
[30] Robins S, 'Failing Victims? The Limits of Transitional Justice in Addressing the Needs of Victims of Violations' University of York,2017, 44.
[31] Robins S, 'Failing Victims? The Limits of Transitional Justice in Addressing the Needs of Victims of Violations' University of York,2017, 44.
[32] Lawther C, 'Let Me Tell You: Transitional Justice, Victimhood and Dealing with a Contested Past '30(6) *Social and Legal Studies International Journal*,2021,891-890.
[33] Lawther C, 'Let Me Tell You: Transitional Justice, Victimhood and Dealing with a Contested Past '30(6) *Social and Legal Studies International Journal*,2021,891-890.

contemporary transitional procedures, the cliché of truth commission processes as reconciliation mechanisms seems to have little empirical support. The South African Truth and Reconciliation Commission (TRC) has been the object of huge study, but very little data is available about how its work is perceived by victims.[34] The most thorough analysis of victims' reactions to the TRC revealed that victims felt their participation in the process was insufficient.[35] This has also been echoed in Kenya by the TJRC.

Reparations

Reparations may be the most obvious way for the state to alleviate the harms sustained by conflict victims in many transitional circumstances.[36]

The only mechanism that should by its very nature be victim-centered is reparations, and efforts to provide reparations will fall short if victim needs are not taken into account. Too frequently, the wishes of the victims are not considered while designing and implementing compensation plans.[37]

The UN Basic Principles of Justice for Victims do not contain the word 'need', but indicate that 'reparation should be proportional to the degree of the violations and the suffering experienced.[38]

In summary, victims benefit more from reparations rather than truth commissions or punishing the perpetrators of the injustices that were occasioned on them. The needs of victims are taken into account more adequately by providing some form of compensation to them. Accordingly, victims should thus have a means of seeking reparations from an independent body that solely seeks to restore or compensate what is due to them.[39]

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[34] Robins S, 'Failing Victims? The Limits of Transitional Justice in Addressing the Needs of Victims of Violations' University of York,2017, 47.
[35] Robins S, 'Failing Victims? The Limits of Transitional Justice in Addressing the Needs of Victims of Violations' University of York,2017, 47.
[36] P. de Grieff, 'Repairing the past: Compensation for victims of human rights violations. *Oxford University Press*, Oxford, 2008.
[37] P. de Grieff, 'Repairing the past: Compensation for victims of human rights violations. *Oxford University Press*, Oxford, 2008.
[38] United Nations General Assembly Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Adopted by General Assembly resolution 40/34 of 29 November 1985. New York: UN General Assembly. (1985).
[39] P. de Grieff, 'Repairing the past: Compensation for victims of human rights violations. *Oxford University Press*, Oxford, 2008.

When the above concept is juxtaposed with the land situation in Kenya, it is clear that the transitional justice systems in place have not been effective in fulfilling their tasks. In fact, the afflicted victims have received no substantive or meaningful redress to their Historical Land Injustices claims. Consequently, there is a need to evaluate the manner in which HLI's are addressed, in order to make the process more victim centered and thus provide substantive and meaningful solutions to the victims.

1.8 Literature Review

The ongoing academic discourse surrounding legislation that governs the NLC in Kenya has taken a number of detours that when analyzed are rather distinct to the research problem.

To begin with, Ambreena Manji examines the land reform process in Kenya via the adoption of the new land laws in 2012 and claims that, despite the new legislation's importance for the constitution and politics, it was completed quickly and without the input of lawmakers or the general public. Manji claims that the new land laws in Kenya are not transformative nor do they address the fundamental problem of political control over property allocation and management.[40] Additionally, she posits that the short life of the commission has been riddled with infighting and uncertainty with the NLC taking a subordinate role to the Land Ministry. Moreover, she discusses an advisory opinion by the Supreme Court of Kenya that failed to resolve the problems between the NLC and land ministry. The court did not guarantee the independence of NLC hence the NLC is a far cry from that envisaged by the constitution and the National Land Policy.[41] Similarly, Musyoki and Kima Jemosop have investigated the insufficiency of the country's current land laws to solve historical land injustices such as land grabbing by examining the National Land Commission and the Ministry of Lands and highlighting their shortcomings in addressing the issue of land grabbing in Kenya.[42] Additionally, researchers such as Kabue Sharon have taken the approach of the use of Alternative Dispute Resolution pursuant to Article 252 (l) of the Constitution of Kenya to resolve historical land injustices; that is the power of the National Land

[40] Manji A, The Politics of Land Reform in Kenya 2012, *African Studies Review*, 57, 2014.
[41] Manji A, 'A Lost Opportunity: Can the National Land Commission Reclaim Its Original Mandate and Regain the Public's Trust?' The Elephant,2019,3.
[42] Kisa N, 'Inadequacy of the current land laws to address the problem of land grabbing in Kenya' Unpublished LLB Thesis, Strathmore University, Nairobi,2018, 4,6,8.

Commission to utilize mediation, conciliation, and negotiation in addition to traditional dispute resolution mechanisms.[43]

1.8.1 Complexity of resolving land injustices in Kenya

Nicky Nzioki, Catherine Kariuki, and Jennifer Murigu have observed the land issues in Kenya in their paper. They note that up until a task force was established in 2002, Kenya has not established an effective legal framework to address land injustices.

Only two of the five institutions—the NLC and Land Division Court—that were suggested in the task force's draft national strategy have been acknowledged by the Constitution. They admitted that the implementation phase will provide the biggest obstacle to land reform. They contend that the implementation will necessitate the amendment of current laws, the creation of new laws, the harmonization of current laws, and the elimination of obsolete ones. The authors do not, however, add any further suggestions.[44]

Ambreena Manji examines the Kenyan land reform process through the implementation of new land laws in 2012 and asserts that the procedure was hurriedly carried out without the participation of lawmakers or public, despite the new laws' importance in terms of the constitution and politics. Manji claims that the new land laws in Kenya show a clear continuity with the past, are not transformative, and do not address the primary problem of political control over property allocation, restitution, and management.[45]

Furthermore, In her article on the failure of land law reform in Kenya, Ambreena Manji claims that the Parliament disregarded academic criticisms of the new land laws before enactment, particularly on the issue of borrowing provisions from other African countries without considering their applicability or relevance in Kenya, failing to recognize the contradictions between the

[43] 'Kabue S, 'To assess the role of the National Land Commission to resolve the problem of Historical Land Injustices in Kenya.' Unpublished LLB Thesis, Strathmore University, Nairobi,2018, 5.
[44] N. Nzioki and Others 'Implementing Law Reform Policies in East African Countries: The case study of Kenya' (2009).
[45] Manji A, The Politics of Land Reform in Kenya 2012, African Studies Review, 57, 2014.

National Land Policy and the constitution, and failing to address in detail the flaws in the new land laws.[46]

According to Duncan Okowa's study on land reforms in Kenya, corruption, incompetence, and selective land allocation by government officials seeking the favor of those in positions of authority are some of the factors contributing to land-related issues. He further adds that the "existence of grey areas in the law in terms of clearly defining the tasks of the two functions" and "power struggles and ongoing disputes between the National Land Commission and the Ministry of Lands" are obstacles to the implementation of land reforms.[47]

The Truth Justice and Reconciliation Commission report was published in May 2013. The Truth Justice and Reconciliation Commission (TJRC) was created by an Act of Parliament. Its objective was to promote peace, justice, national unity, healing and reconciliation among the people of Kenya. According to the report, all post-independence government regimes failed to honestly and adequately address these injustices.[48]

This shows that indeed there is a critical gap that needs to be filled in Kenya's legislative framework in order to achieve the constitutional objective of redressing historical land injustices.

1.8.2 The fruitful establishment of a Lands Claims Court in South Africa

The land question has not only been unique to Kenya; rather it has affected a number of countries world over. One of the concerns of nations who have achieved independence from colonial powers or that have seen a significant shift toward embracing inclusive policies for their entire population face regularly is dealing with land issues. Seeing as South Africa has similar economic, social, and historical backdrop as Kenya, it is a worthwhile jurisdiction to look into. South Africa took on the institutional framework approach which consisted of institutional development and legitimacy building for agencies that are engaged in transitional activities.[49] Consequently two bodies were

[46] Manji A, Whose Land is it anyway? The Failure of Land Law Reform in Kenya, *Africa Research Institute*, June 2015.
[47] Okowa D, Land Reforms ill Kenya; Achievements and the Missing link*, Institute for Law and Environmental Governance*, March 2015.
[48] Kenya Transnational Justice Network, Summary of the Truth, Justice and Reconciliation Commission Report, 17.
[49] Farmbry K, 'Institutional Legitimacy Building in a Context of Transition: The South African Land Claims Court' 65(6) *Public Administration Review*,2005,678.

created to handle the restitution claims, the Restitution of Land Rights Commission (RLRC) and the Land Claims Court. The RLRC received and screened all claims – which had to be lodged by December 1998. Only matters not resolved by the RLRC were referred to the Land Claims Court. The Land Claims Court was set up as a special court to hear not only claims under the RLRA (1994), but also matters arising under other acts designed to implement other facets of the land reform process (including land tenure reform, land redistribution)[50]

Contribution

The NLC has thus far taken on a subordinate role to the land ministry. It has been rendered incapacitated to fully carry out its duty as envisaged by the Constitution as it does not function as an independent body. Furthermore, as advised by the Supreme Court, its functions are more consultative, advisory and safe-guard oriented rather than practical.

Existing research has argued that the National Land commission ought to be given quasi-judicial powers in order to perform its mandate. Additionally, existing researchers have argued that the National land commission should utilize Alternative dispute resolution mechanisms as the focal means of performing its duties. This study will be unique in so far as it will argue that Kenya should follow in the footsteps of South Africa by creating a Lands claim court to work in tandem with the National Land commission to enable the land restitution process to take place effectively.

1.9 Methodology

The nature of research in this study will be qualitative. The main sources of data will be secondary sources such as books, journal articles, working papers, research reports, research blogs and case law. Additionally, the study will utilise primary sources of data such as statute including the Constitution of Kenya (2010), the National Land Commission Act among others. This study will begin by taking a deductive approach to study the sensitivities surrounding land in Kenya. It will be conducted by means of a historical approach in order to decipher how land law reforms have

[50] Syagga P, 'Public land, historical land injustices and the new constitution' Society for International Development, Constitution Working Paper number 9, 2011, (20) – http://sidint.net/docs/WP9.pdf– on 2011.

evolved over time and how they still fall short of addressing historical land injustices in a substantive and meaningful way. Furthermore, this study will use deductive means to look into the mandate of the National Land Commission, its powers and how it has fallen short of its functions. Additionally, an inductive approach will be taken to conduct a comparative analysis between South Africa and Kenya in the ways that they have handled redressing historical land injustices. South Africa is the most favourable country to use in this comparative study, due to the similarities between both countries in having a history of colonial rule that led to the dispossession of land and the marginalization of the indigenous population. Additionally, resistance to systemic disparities is a common theme in both Kenya's struggle against British colonial rule and South Africa's fight against apartheid. Moreover, land redistribution presents difficulties for both countries, including problems with ownership, tenure, and historical grievances. Lastly, South Africa has successfully resolved a large chunk of their historical injustices through the Truth and Justice Reconciliation commission and Commission for the Restitution of Land Rights working in tandem with the lands claims court. Kenya can thus draw lessons that can inform potential improvements or adjustments to the land restitution mechanisms employed in Kenya.

Finally, the study will assess the suitability of Kenya establishing a Lands Claims court to tackle the problem of historical land injustices.

The entirety of the research will primarily be desktop research using online resources, the Strathmore University materials as well as online resources and databases.

1.10 Chapter Breakdown

Chapter 1: Introduction to the study: This chapter is an introduction and will detail the research objectives, conceptual framework and the justification of the study and thus sets the foundation for the subsequent chapters.

Chapter 2: **An analysis of the legal and institutional framework governing Historical Land Injustices:** This second chapter will assess the legal framework that governs the resolution of Historical Land Injustices. Additionally, it will discuss the institutive capacity of the National Land Commission in addressing the same.

Chapter 3: **A comparative analysis of the method used in South Africa to address historical land injustices:** This chapter will study international best practices that can be drawn from the Land reform and restitution practices in South Africa.

Chapter 4: A case for the implementation of International Best Practices in Kenya: This chapter will address the implementation of lessons drawn from the legal and institutional framework of South Africa in the Kenyan Context. It will analyse the salient features of the Lands Claims court that can supplement the existing framework of the National Land Commission.

Chapter 5: **Conclusions, findings and recommendation:** The fifth chapter will form the recommendation section and offer solutions to the different challenges unearthed by this study. It will propose remedial measures that will effectively rectify historical land injustices.

CHAPTER 2

LEGAL AND INSTITUTIONAL FRAMEWORK GOVERNING HISTORICAL LAND INJUSTICES

2.1. Introduction

This chapter examines the legal framework, institutional, and policy framework that governs restitution of historical land injustices in Kenya. Additionally, it aims to evaluate the strengths and weaknesses of the current legal framework and determine whether it is adequate to address historical land injustices.

2.2 Background of the law

The Njonjo Commission marked the beginning of efforts towards developing the current legal framework governing historical land injustices. It was established in 1999 and tasked with developing guidelines and principles that would lead to the creation of a National Land Policy Framework and formulation of a new institutional framework necessary in land administration.[51] Thereafter, the Ndung'u commission was established and tasked with investigating land allocation irregularities and the underlying causes of land related issues in Kenya.[52] Afterwards, the Truth, Justice and Reconciliation commission of Kenya was established in 2008 to probe into and suggest appropriate solutions for human rights violations that occurred between December 12, 1963, and February 28, 2008, when President Kibaki and Prime Minister Raila Odinga signed the agreement for power sharing and peace in response to the violence that followed the election.[53] Part of its mandate was to inquire into illegal and irregular acquisition of land which thus constitute historical land injustices.[54] The Truth and Justice Reconciliation commission recommended the establishment of the National Land Commission which would work in tandem with the Ministry of Lands to take steps to cancel titles that were obtained illegally. It also recommended updating computerised land inventories to make them accessible to all Kenyans. Additionally, the Report

[51] The Njonjo Commission of Inquiry into Land Law Systems of Kenya, (1999).
[52] Report of the Commission of Inquiry into the Illegal and Irregular Allocation of Public Land, Republic of Kenya, 2004 (the 'Ndung'u Commission Report').
[53] Report of the Truth, Justice and Reconciliation Commission. Kenya, Truth Justice and Reconciliation Commission (TJRC), (hereafter TJRC Report), 2013.
[54] Section 6, *Truth, Justice and Reconciliation Commission Act*, (Act No.6 of 2008)

advised implementing reparations for historical injustices.[55] Finally, the Commission on Investigation of Post-Election Violence – the Waki Commission pointed out that the constitutional liberty to own land anywhere in Kenya is merely *de jure* but does not exist on the ground. Tracing its origins to colonial times, creation of districts had largely been ethnic based, creating exclusive subnational enclaves akin to 'native reserves' in which there are 'insiders' (ancestral landowners) and 'outsiders' (migrants), which thus posed as an obstacle towards land ownership and contributed towards post-election violence whereby many people were illegally dispossessed of their land.[56]

2.3 National Land Policy

Lastly, in 2009, parliament adopted Sessional Paper No. 3 of 2009. This was also known as the National Land Policy which outlined the main land related issues facing the country and also provided proposals for administrative reforms and legislative action to bring the desired land reforms.[57] Moreover, the Policy stated that lack of a policy led to problems such as the proliferation of conflicting and incompatible land laws.[58] The Sessional Paper was intended to give a framework to address key measures prerequisite in solving land issues. It outlined critical aspects of land administration, land access, land use planning, environmental degradation, conflicts, informal urban settlements' unplanned growth, obsolete legal and institutional frameworks, and information management.[59] Additionally, it delved into addressing historical injustices through constitutional matters such as compulsory acquisition, development control, and tenure. The Policy emphasised the importance of safeguarding landowners, irrespective of their socioeconomic status, and acknowledged the marginalised segments of the Kenyan population, including squatters and residents in informal settlements.[60] This paper went on to inform the creation of the National Land Commission. It is also of importance to note that the efforts that culminated in the formation of the National Land Commission demonstrated the inadequacy of the previous constitution to provide Kenyans with a framework that would address their land related

[55] TJRC Report, 2013, 47, 48.
[56] Syagga P, 'Public land, historical and injustices and the new constitution' (13).
[57] Muwongo A, Kamunyori S, Choi N and Kahindo L, *In search of Land: Public Land Management, Compulsory Land Acquisition and Resettlement in Kenya*, October 2016.
[58] Sessional Paper No.3 of 2009 on National Land Policy, 1.
[59] Sessional Paper No.3 of 2009 on National Land Policy.
[60] Sessional Paper No.3 of 2009 on National Land Policy, 1

issues. The National Land commission pointed out the various factors that the constitution of the time neglected to address.[61] "These included: Mass disinheritance of communities and individuals of their land; Inadequate access to land for various groups such as children, women, people with disabilities and minorities; Lack of government accountability, especially in cases of acute land mismanagement and illegal acquisition; Protection of the constitution of people who acquired land illegally, but have acquired legal documents afterwards; and Lack or ineffective regulations on private property rights, as a result of which unplanned settlements and environmental degradation have become commonplace."

In conclusion, the National Land Policy provided that in order to resolve historical land injustices, the government needed to review laws and policies that were adopted by the post-independence governments that further exacerbated historical land injustices.[62]

These issues were thus addressed in the Constitution of Kenya (2010) as shall be portrayed below:

2.3 Legislation addressing Historical Land Injustices.

a.) **The Constitution of Kenya (2010)**

The COK adopted many of the recommendations laid out in the NLP.[63] To begin with, the Constitution has provisions that reinforce the inviolability of titles to property. It grants the right to every person either in association with others or individually, to acquire and own property of any description and in any part of Kenya.[64] It further prohibits parliament from enacting any law that permits the state or any person to arbitrarily deprive a person of any property of any description or of any interest in, or right over, any property of any description or limit in any way the enjoyment of any right to own property on the basis of any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.[65] Consequently, the Constitution bars purposeful deprivation of the right to own land, thus guaranteeing sanctity of title. Furthermore, The State is prohibited from depriving a person of property of any description of any interest in, or right over, property of any

[61] National land Commission Strategic Plan, 2013-2018.
[62] Sessional Paper No. 3 of 2009 on National Land Policy, 42.
[63] Muwongo A, Kamunyori S, Choi N and Kahindo L, *In search of Land*, 2016, 15.
[64] Article 40, *Constitution of Kenya* (2010).
[65] Article 40(2), *Constitution of Kenya* (2010).

description unless the deprivation results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land in accordance with Chapter Five, or is for a public purpose or in the public interest and is carried out in accordance with the Constitution and any Act of Parliament that; requires prompt payment in full or just compensation to the person and allows any person who has an interest in, right over that property a right of access to a court of law.[66] This provision prohibits the government from depriving persons of their land unless by compulsory acquisition, or other avenue provided for in chapter five. However, the Constitution states that the rights under article 40 do not extend to property that is deemed to have been unlawfully acquired which thus implicitly suggests that protection of ownership of property is not an absolute right.[67] This thus implies that there is leeway for any property that was grabbed or taken without the owner's consent or is otherwise illegally acquired to be taken away from the holder without any compensation.

It is crucial to note, that in respect to historical land injustices, the constitution provides a framework for implementation of some of the recommendations made in the National Land Policy. Key among issues on land in the 2010 Constitution is the establishment of the NLC to manage land on behalf of central and county governments. One of the functions of the National Land Commission is to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress.[68] Noting this function, the court opined that the NLC should be viewed as a fourth arm of government, which was created to cater for specific land related matters but was ultimately independent of the government. However, the independence referred to by the courts herein should not be applied in the traditional sense, rather, it mandates that the NLC operate within a collaborative, constitutional legal framework and that it creates a safeguard-oriented, consultative, and advisory system in order to carry out its role of resolving land disputes.[69]

Furthermore, issues have often arisen on the extent of the NLC's Jurisdiction. This is especially in regard to Parliament's mandate to enact legislation to enable the review of all grants or dispositions

[66] Article 40(2), *Constitution of Kenya* (2010).
[67] Article 40(6) *Constitution of Kenya* (2010).
[68] Article 67, *Constitution of Kenya* (2010).
[69] Advisory Opinion, In the Supreme Court of Kenya, 2nd December 2015.

of public land in order to establish their propriety or legality.[70] The bone of contention is whether NLC has the powers to also review acquisition of private land titles. This mandate, is undoubtedly connected to the resolution of historical land injustices, as the Ndung'u report noted that illegal and irregular allocation of public land that has occurred from time immemorial has been perpetrated by state officials, who would then transfer the land to private ownership[71] In light of this, in the case of *Japheth Kipkemobi Magut v National Land Commission & 2 others*, the petitioner averred that the suit was private land and thus beyond the jurisdiction of the NLC. The court first and foremost ruled that the NLC is a creature of the Constitution of Kenya 2010. Additionally, it was stated that it is empowered on its own motion or upon a complaint by the National or County government, a community or an individual, to review all grants or disposition of public land to establish their property. In the court's view, land that was formerly public land but was converted to private land is subject to review by the NLC.[72] However, in another case, *Republic v National Land Commission Ex-Parte Cecilia Chepkoech Leting & 3 others,* The court was of the view that, though land which was unlawfully acquired does not confer a good title and is not protected under Article 40 of the Constitution, where the land in question is private land, it is only the Environment and Land Court which has the jurisdiction to investigate and determine the legality of such titles. Therefore, the NLC may not arbitrarily decide to investigate a title.[73] Yet another judgement on the same matter was made in the case of *James Ngochi Ngugi v National Land Commission & another* whereby the same principle was reinforced with a slight variation whereby the NLC's mandate to review all grants and dispositions extends only to public land while disputes over private land fall within the jurisdiction of the Environment and Land Court. However, the Court stated that such powers do extend to public land that has been converted to private land.[74] This was also affirmed in the case of *Joseph Mungai Gichuru & another v Mathaara Mwangi & 4 others*, whereby the land which formed the subject matter of the proceedings was originally public land which was converted to private land. It was held that the NLC had jurisdiction under Article 68(c)(v) of the Constitution to investigate the process under which public

[70] Article 68 (c) (v) *Constitution of Kenya* (2010).
[71] Kieyah J, Mba e-Njoroge, *Ndung 'u Report on Land Grabbing in Kenya: Legal and Economic Analysis*, Kenya Institute Public Policy Research and Analysis (KIPPRA) Discussion Paper No 119, 2010.
[72] *Japheth Kipkemobi Magut v National Land Commission & 2 others* (2017) eKLR.
[73] *Republic v National Land Commission Ex-Parte Cecilia Chepkoech Leting & 3 others* (2016) eKLR.
[74] *James Ngochi Ngugi v National Land Commission & another* (2017) eKLR.

land was converted to private land.[75] As can be seen from the aforementioned cases, there is a lack of harmony on the courts view pertaining to the jurisdiction of the NLC. This has thus contributed to the myriad of challenges that the NLC has faced since its institution.

b.) **National Land Commission Act, No. 5 of 2012**.

The NLC has a vast range of functions which include: to recommend a national land policy to the national government; to manage public land on behalf of the national and county governments; to advise the national government on a comprehensive programme for the registration of title in land throughout Kenya; to conduct research related to land and the use of natural resources, and make recommendations to appropriate authorities; to initiate investigations, on its own initiative or on a complaint into present or historical land injustices and recommend appropriate redress; to encourage the application of traditional dispute resolution mechanisms in land conflicts; to assess tax on land and premiums on immovable property in any area designated by law; and to monitor and have oversight responsibilities over land use planning throughout the country.[76] The NLC Act stipulates that the Chairperson and the members of the NLC shall be persons who are knowledgeable and experienced in land matters so as to enhance the competence of NLC in carrying out its designated functions.[77] Central to the crux of this study, the NLC Act empowers NLC by virtue of the Constitution to, within five years of the commencement of the Act, on its own motion or upon a complaint by the national or a county government, a community or an individual, review all grants or dispositions of public land to establish their propriety or legality. On establishment that the title was acquired unlawfully, the NLC is required to direct the registrar to revoke or cancel the title.[78] This provision, however, seems to overstep the role of the Environment and Land Court which has exclusive jurisdiction to deal with land disputes.[79]

The NLC Act has been amended to include a number of profound provisions. To begin with, it aptly describes historical land injustices as a grievance which was occasioned by a violation of right in land on the basis of any law, policy, declaration, administrative practice, treaty or agreement; resulted in displacement from their habitual place of residence; occurred between 15th

[75] *Joseph Mungai Gichuru & another v Mathaara Mwangi & 4 others* (2017) eKLR.
[76] Section 5, *National Land Commission Act* (Act No. 5 of 2012).
[77] Section 8, *National Land Commission Act* (Act No. 5 of 2012).
[78] Section 14, *National Land Commission Act* (Act No. 5 of 2012).
[79] Article 162, *Constitution of Kenya* (2010).

June 1895 when Kenya became a protectorate under the British East African Protectorate and 27th August, 2010 when the Constitution of Kenya was promulgated; has not been sufficiently resolved and subsists up to the aforementioned period.[80] This implies that only historical injustices that occurred on or before the promulgation of the 2010 Constitution of Kenya can be handled by the NLC, thereby excluding any land injustices that are occurring now from investigation by the NLC, as these are not considered 'historical' in nature as defined by the act. It can thus be inferred that individuals experiencing land injustices in present times would need to seek alternative means of restitution , perhaps from the Environment and Land Courts that have jurisdiction over land related matters.[81] Secondly, a historical claim may only be admitted, registered and processed by the Commission if it is verifiable that the act complained of resulted in displacement of the claimant or other form of historical land injustice; the claim has not or is not capable of being addressed through the ordinary court system on the basis that-the claim contradicts a law that was in force at the time when the injustice began[82]; or the claim is debarred under the Limitation of Action Act.[83] Additionally, the Act provides that the claimant was either a proprietor or occupant of the land upon which the claim is based; no action or omission on the part of the claimant amounts to surrender or renouncement of the right to the land in question; and it is brought within five years from the date of commencement of this Act. Consequently, this five-year time-frame unfortunately bars those who have not filed their claims within this period from seeking justice.

Thirdly, the act spells out the grounds upon which one may allege a historical land injustice was occasioned which are; colonial occupation, independence struggle, pre-independence treaty or agreement between a community and the government, development-induced displacement for which no adequate compensation or other form of remedy was provided, including conversion of non-public land into public land, inequitable land adjudication process or resettlement scheme, politically motivated or conflict based eviction; corruption or other form of illegality; natural disaster; or other cause approved by the Commission. [84] Lastly, the NLC shall recommend any of the following remedies: restitution; compensation, if it is impossible to restore the land;

[80] Section 15, *National Land Commission Act* (Act No. 5 of 2012).
[81] Article 162, *Constitution of Kenya* (2010).
[82] Section 15, *National Land Commission Act* (Act No. 5 of 2012).
[83] Section 7*, Limitation of Actions Act* (Chapter 22 of 2012).
[84] Section 15, *National Land Commission Act* (Act No. 5 of 2012).

resettlement on an alternative land; rehabilitation through provision of social infrastructure; affirmative action programmes for marginalized groups and communities; creation of wayleaves and easements; order for revocation and reallocation of the land; order for revocation of an official declaration in respect of any public land and reallocation; sale and sharing of the proceeds; refund to bona fide third-party purchasers after valuation; or declaratory and preservation orders including injunctions.[85] These remedies are well-intentioned however, they require implementation forces which the NLC is unfortunately lacking.

Fourthly , fairly recent Supreme Court decisions have attempted to shed light on the resolution of Historical Land injustices ; particularly in the cases of *Dina Management Limited v County Government of Mombasa & 5 Others*[2023][86] and *Torino Enterprises Limited v Attorney General [2023]*.[87] Both cases have highlighted the importance of addressing land title irregularities and the insufficiency of title documents in cases where the origins of those titles are disputed. The rulings emphasize the need to go beyond the title instrument itself and establish the legality of land acquisition from its inception.

In light of these legal precedents, the National Land Commission (Amendment) Bill of 2023 aligns with the evolving jurisprudence. The main purpose of the proposed Bill is to make changes to the National Land Commission Act. It aims to restore the National Land Commission's authority to review all public land grants or allocations to check if they were properly and legally issued. This is essential, because (section 14) of the NLC Act that allowed for such reviews has expired. Consequently, the Commission is currently unable to look into complaints about public land or correct any illegal allocations.[88]

Additionally, the Bill aims to enable the National Land Commission to accept and process claims of historical land injustices beyond the current five-year limit set from when the Act started. This would allow for the addressing of grievances about land that were not filed and resolved within that initial timeframe.[89] If the bill is enacted into law, it shall give those who were originally time

[85] Section 15, *National Land Commission Act* (Act No. 5 of 2012).
[86] *Dina Management Limited v County Government of Mombasa & 5 Others* (2023) eKLR.
[87] *Torino Enterprises Limited v Attorney General* (2023) eKLR.
[88] *The Land Laws (Amendment) Bill*, 2023.
[89] *The Land Laws (Amendment) Bill*, 2023.

barred by the initial provisions of the act, to file their claims regarding historical land injustices with the NLC.

c.) **Land Act, No. 6 of 2012**

This Act of parliament was enacted in 2012 and commenced on 2nd May 2012. It was enacted to give effect to Article 68 of the Constitution; to revise, consolidate and rationalise land laws; to provide for the sustainable administration and management of land and land-based resources, and for connected purposes.[90] Basically, the Act offers the legal framework required to reclaim land that was obtained unlawfully which creates an avenue for restitution of Historical Land Injustices Regarding the sanctity of title, the Act states that any public land grants, land ownership certificates issued, or dispositions obtained through corruption on the part of any government official, county government official, or NLC employee are unlawful from the start and are null and void with no legal effect.[91] It requires persons occupying such lands to forfeit it back to the government without being entitled to any compensation.[92] The Act grants the authority to void any transaction tainted by corruption or illegality in this case, making no distinction between first and subsequent registrations. The indefeasibility of first registration, as stipulated by the prior land laws, is therefore violated.[93] By holding the transactions void, it allows for cancellation of the titles. It further denies any form of compensation, without protecting an innocent purchaser for value and without notice bringing the Act under the purview of article 40(6) the Constitution.[94] It also improves on earlier legislations by empowering the NLC to issue a notice to a person or entity it suspects to be illegally occupying public land to vacate. If the conditions of the notice are not complied with, NLC is consequently empowered to move to court to validate the notice and thereafter obtain appropriate orders for vacation.[95] The Act further makes the fraudulent and corrupt land transactions a criminal offence liable on conviction to a fine not exceeding ten million shillings or imprisonment for a term not exceeding ten years or both.[96] This stiff penalty thus acts

[90] Preamble, *Land Act*, (Act No.6 of 2012).
[91] Section 158, *Land Act* (Act No.6 of 2012).
[92] Section 158(4), *Land Act* (Act No.6 of 2012).
[93] Section 158(4), *Land Act* (Act No.6 of 2012).
[94] Section 158(4), *Land Act* (Act No.6 of 2012).
[95] Section 155, *Land Act* (Act No.6 of 2012).
[96] Section 157, *Land Registration Act* (Act No. 3 of 2012).

as a deterrent to individuals who wilfully engage in facilitating and enacting fraudulent and corrupt land transactions.

Additionally, the Act addresses compulsory acquisition which has been recognised as a means of reclaiming illegally acquired land. It provides that whenever the National or County government is satisfied that it may be necessary to acquire some particular land for public use, the respective Cabinet Secretary or the County Executive Committee Member shall submit a request for acquisition of public land to the Commission to acquire the land on its behalf.[97] The Commission is empowered, however, to reject a request of an acquiring authority to undertake an acquisition if it establishes that the request does not meet the requirements prescribed under Article 40(3) of the Constitution. The acquisition is subject to prompt and adequate payment of compensation.[98] In summary, this is a crucial legal instrument in the resolution of Historical Land Injustices and ensuring that future land administration is transparent, equitable, and just. This is because it empowers the NLC to address past wrongs by allowing for the review and cancellation of unlawfully obtained land titles. Additionally, it enables the Commission to act against illegal land occupation and facilitates the return of such lands to rightful ownership or use for public interest.

d.) **The Land Registration Act, No. 3 of 2012**

It sought to consolidate, revise and rationalise the registration of titles to land and to give effect to the objects and principles of devolved governments in land registration and connected purposes. The Act applies to registration of interests in all public land as declared by Article 62 of the Constitution; registration of interests in all private land as declared by Article 64 of the Constitution and registration and recording of community interests in land.[99]

In order to eliminate the rampant corrupt practices and eliminate or reduce corruption and incompetence that have characterised the management of land registry, the Act provides for recruitment of the Land Registrars that is competitive by an independent body which is the Public Service Commission.[100]The functions of the registrars are stipulated in the Act which includes the

[97] Section 107, *Land Registration Act* (Act No. 3 of 2012).
[98] Section 108, *Land Registration Act* (Act No. 3 of 2012).
[99] Section 3, *Land Registration Act* (Act No. 3 of 2012).
[100] Section 12, *Land Registration Act* (Act No. 3 of 2012).

power to cancel a title due to the provision that states that 'The Chief Land Registrar shall perform such other functions or duties as may be provided under any written law'[101] The Act safeguards sanctity of title, but confines that to only lawfully acquired titles. It holds that the certificate of title shall be considered conclusive evidence of proprietorship except based on misrepresentation or fraud to which the person is proved to be a party; or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.[102]This provision serves two crucial functions which are; providing the government with a roadmap to reclaim public land that has been unlawfully acquired as well as restoring the public's faith in the government's ability to effectively carry out public landholding. However, the roadmap set out in this act is encumbered with a couple of obstacles when it comes to restitution of historical injustices. To begin with, The Act holds that if a person receives or acquires land in respect of which the court could make an order for restoration or for the payment of reasonable compensation, the court shall not make that order against that person if that person proves that; the land was received or acquired in good faith and without knowledge of the fact that it has been the subject of a disposition to which the part applies, or received or acquired through a person who received or acquired it in the circumstances set out therein.[103] This fundamentally means that an innocent third party purchaser without notice of any indiscretion has a valid title and the government cannot for that reason confiscate their land. This could result in people using this provision as a loophole in order to thwart the efforts and intentions of the NLC or government in reclaiming illegitimately alienated public land, by transferring the titles to third parties who act as their proxies.

In order to prevent this, the Act empowers the Land Registrar to place a restriction on the transfer of the land if they suspect any improper dealing or fraud or for any other sufficient cause.[104] Further, the knowledge of fraud with regard to the third party is widened to embrace actual, imputed and constructive knowledge, lessening the burden of discharging the proof on this.[105] Finally, the Act also empowers the Environment and Land Court established by the Environment and Land Court Act to hear and determine disputes, actions and proceedings concerning land.[106]

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[101] Section 14, Land *Registration Act* (Act No. 3 of 2012).
[102] Section 26, *Land Registration Act* (Act No. 3 of 2012).
[103] Section 53(1), *Land Registration Act* (Act No. 3 of 2012).
[104] Section 76 of the Act, *Land Registration Act* (Act No. 3 of 2012).
[105] Section 53(2) of the Act, *Land Registration Act* (Act No. 3 of 2012).
[106] Section 101 of the Act, *Land Registration Act* (Act No. 3 of 2012).

From the provisions above, it can be deduced that this Act allows for the complete cancellation through the courts of any land registration that may have been obtained illegally, without following the proper procedures, through fraud, deception, or through a corrupt scheme. It does not distinguish between first and subsequent registrations. Although it protects innocent purchasers for value, it lessens the burden of proof that the person who acquired it knew of fraud while engaging in the acquisition of the land.

Bearing this in mind, the reasonable conclusion drawn is that the Land Registration Act, 2012 fortifies the doctrine of sanctity of title. This doctrine provides that a title document issued by a land registrar (the State) shall be taken by all Courts as prima facie evidence that the person named as the proprietor of the land is the absolute and indefeasible owner subject to the encumbrances, easements, restrictions and conditions contained in the Title.[107] This effectively means that an innocent buyer who purchased property and was legally issued with a title deed by a land registrar is the rightful owner , despite there being irregularities or illegalities in the initial allocation process.

However, a landmark judgement delivered by the Supreme Court of Kenya slightly deviates from this doctrine by holding that while the law provides for the indefeasibility of a title, the principle is not absolute. In the case of *Dina Management Limited v County Government of Mombasa & 5 others,* Nyali Beach property in Mombasa was originally owned by the late Daniel T. Arap Moi. Over the years, it was sold several times until it was acquired by Dina Management Limited. The Mombasa County Government then forcefully took over the property, claiming that the land was irregularly allocated as it formed public land. Dina Management, however, claimed they legally bought the land and had the title deed to prove it. The dispute led to litigation at the Environment and Land Court, followed by an appeal to the Court of Appeal, and eventually, a petition was filed with the Supreme Court.[108]

The Supreme Court held that since the first allocation to H.E. the late Daniel Arap Moi was irregular no valid legal interest could pass, as such all the subsequent transfers including the

[107] Section 26, *Land Registration Act* (Act No. 3 of 2012).
[108] *Dina Management Limited v County Government of Mombasa & 5 others* (2021) eKLR.

allocation to Dina Management were irregular and illegal. Therefore, the title held by Dina Management cannot be held as indefeasible.[109]

From this case, it is abundantly clear that The Supreme Court has departed from the Torrens System of Registration and held that a title document can be invalidated if it is proven that the initial allocation process was illegal or unprocedural. In a nutshell, possession of a registered title document by a property owner is not conclusive proof of ownership.

In 2010 the Maasai community instituted a suit; *Ledidi Ole Tauta & Others v Attorney General & 2 others,* laying claim over 500 Hectares of land within the Ngong Hills. [110] This dispute arose out of the renowned "Maasai Agreements" between 1904 and 1911 which forced the Maasai to vacate from their fertile lands in Suswa, Ol-Jr-Orok and Ol-Kalau areas and move to the Southern Ngong and Laikipia region.[111] Among the important issues that were raised are: whether the petitioners in this case were the proper claimant and whether a claim concerning historical land injustices should be instituted as a land matter as opposed to a constitutional matter. The court through the Environment and Land Court (ELC) ruled that it had jurisdiction to listen to the matter. However, the court believed the case went against the spirit of the Constitution that gives the state an obligation to protect the environment.[112] Justice Mumbi who was one of the presiding judges stated 'the decision reached in this suit is bound to have far reaching consequences since there are many other communities in Kenya with similar historical claims which may now be vested in the public. The Petition if allowed would only benefit the Petitioners at the expense of the wider public who benefit from the forest'.[113] She further pointed out that the Constitution has the foresight to acknowledge the possibility of historical injustices being occasioned by previous government regimes; thus establishing the NLC and giving it the mandate to investigate historical injustices and make recommendations for redress . The High Court should therefore not usurp its function.[114] This goes to show that the Maasai were unfortunately unsuccessful in seeking restitution over

[109] *Dina Management Limited v County Government of Mombasa & 5 others* (2021) eKLR.
[110] *Ledidi Ole Tauta & Others v Attorney General & 2 others* (2015) eKLR.
[111] L. Hughes, Land Alienation and Contestation in Kenya Maasai land, 2013.
[112] Article 69, *Constitution of Kenya* (2010).
[113] *Ledidi Ole Tauta & Others v Attorney General & 2 others* (2015) eKLR.
[114] *Ledidi Ole Tauta & Others v Attorney General & 2 others* (2015) eKLR.

their claims. Additionally, the court passed over the mantle of resolving this dispute towards the NLC.

Similarly, in 1997 the Ogiek Community instituted a suit through the case of *Joseph Letuya & 21 others v Attorney General & 5 others*, where they lay claim to East Mau forest claiming it to be their ancestral land. This began a long 17-year court battle before the judgement was finally proclaimed. [115] Their argument was that eviction would constitute a violation of their rights and that it prevented them from living in accordance with their culture; that is their right to development (right to live out the kind of life one values or has reason to value)." The court in this case ruled in favour of the Ogiek community stating that: eviction was a violation of their rights. However, it could not issue orders. This is because pursuant to the Constitution ,the NLC is the only body constitutionally mandated to manage and alienate and allocate public land.[116] The NLC had been given a period of 1 year in which to establish a register and identify the members who would thereafter be settled.

From these cases, it becomes apparent that the Constitution anticipates the National Land Commission (NLC) to address matters related to historical land injustices, yet, cases concerning these issues are still being pursued in the judicial system. Judgments such as those given from the two aforementioned cases showcases that judges are reluctant to making necessary interventional measures and thus making conclusive decisions on the matter at hand.

In fact, quite recently, on Tuesday 6th February 2024, the Members Economic, Social and Cultural Rights ESCR-Net members, Endorois, and Ogiek communities took to the streets and held a peaceful procession to deliver two call-to-action letters to the Attorney General of Kenya's office in Nairobi demanding the government immediately implement the African Commission on Human and Peoples' Rights and Court rulings to ensure justice and reparations for the Endorois and Ogiek Peoples, including return of their ancestral lands and respect of their rights to free, prior and informed consent over any actions taken there.[117] In relation to Historical Land Injustices, the African Commission established that the Kenyan Government had violated the Endorois peoples'

[115] *Joseph Letuya & 21 others v Attorney General & 5 others* (2014) eKLR.
[116] Article 67, *Constitution of Kenya* (2010).
[117] -<https://khrc.or.ke/news/escr-net-stands-with-endorois-and-ogiek-communities-urging-justice-from-the-kenyan-government/>- on 10 February 2024.

rights and directed the Kenya Government to: recognize rights of ownership to the Endorois and restitute Endorois ancestral land; ensure that the Endorois Community has unrestricted access to Lake Bogoria Game Reserve and surrounding sites for religious and cultural rites and for grazing their cattle; pay adequate compensation to the Community for all the loss suffered.[118] The Court finally delivered judgment on reparations for the Ogiek Community in 2022 and ordered the Government of Kenya to: Pay the Ogiek KES. 157.85 million as collective compensation for material and moral damages suffered; return the Ogiek's ancestral lands in the Mau Forest to collective title within two years through a delimiting, demarcation and titling exercise in consultation with the Ogiek;commence a dialogue and consultation process with the Ogiek and any concerned parties in relation to any concessions and/or leases granted over Ogiek lands to reach an agreement on whether or not these operations will continue by way of lease or benefit sharing agreement and, where no agreement is reached, to return the lands to the Ogiek and compensate concerned third parties.[119] The Ogiek also requested a public apology and the construction of a monument to commemorate the violation of their rights, but the Court denied their requests, stating that a judgment constitutes a sufficient form of reparation and measure of satisfaction.[120]While this brought out a beacon of hope to different individuals seeking land reparations, it is unfortunate that these court orders were not implemented. In fact, the Kenyan government has done the complete opposite of these judgements by carrying out forced evictions in the Mau forest since November 2, 2023, thus affecting more than 700 people from the Ogiek community, half of whom are women and children.[121]

As can be observed from the cases above, the journey to resolving historical land injustices is far from over with the Kenyan government blatantly flaunting court orders. Additionally, the NLC has been notably silent over these cases which fall directly under its mandate. This serves as a painful reminder of the incompetence of the NLC.

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[118] -<https://khrc.or.ke/news/escr-net-stands-with-endorois-and-ogiek-communities-urging-justice-from-the-kenyan-government/>- on 10 February 2024.
[119] Dominguez L, ' Reparations at Last: Land justice for Kenya's Ogiek' Minority Rights Group International, 2022, 3 - https://minorityrights.org/resources/reparations-at-last-land-justice-for-kenyas-ogiek/ on 5 February 2024.
[120] Dominguez L, 'Reparations at Last: Land justice for Kenya's Ogiek' 5.
[121] -<https://khrc.or.ke/news/escr-net-stands-with-endorois-and-ogiek-communities-urging-justice-from-the-kenyan-government/>- on 10 February 2024.

2.3.2 Implications of the laws addressing Historical Land Injustices.

Tracing back to the colonial period, a number of unjust laws such as the Crown Lands Ordinances were enacted. The Crown 's Land Ordinance of 1915 also provided power to the monarch to sell freehold titles to the white settlers not exceeding 1000 acres and leasehold titles of up to 999 years to whomever the monarch wished.[122] Resultantly, the ordinance facilitated the systemic dispossession of the Africans of their land.

Fortunately, the Kenyan government cut down these leases from 999 years to 99 years, retroactive from the promulgation of the Constitution of Kenya in 2010.[123] This essentially means that freehold land cannot be owned by a non-Kenyan citizen; and a leasehold interest of over 99 years cannot be held by a non-Kenyan citizen. Therefore, any freehold land owned by a non-Kenyan citizen is deemed to have been converted into a 99-year leasehold interest and any leasehold interest with an unexpired term of over 99 years is deemed to be converted into a 99-year leasehold interest commencing from 27/8/2010. Consequently, freehold titles formerly held by foreigners and now converted to leasehold titles will not expire until 2109.

At a glance, this seems like a huge stride forwards in terms of land reforms, however, most of the ranches in Northern Kenya are owned by Kenyan citizens, including those of European origin, and they are therefore unaffected by the new laws effective from 2010.[124] Consequently, no freehold title or lease will expire on most of the ranches in Laikipia or northern Kenya in the foreseeable future due to this technicality. Disgruntled Kenyans who are first affected by the systemic dispossession of their land by dint of the Crowns Land Ordinance thus have no means of reprieve as the current land laws do not seem to favour them, and instead protects those who acquired the land under the previous regime.

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[122] Crown Lands Ordinance, 1915 (Repealed Crown Lands Ordinance, 1902).
[123] Sixth schedule, *Constitution of Kenya (2010)*
[124] -< https://afrolegends.com/2020/01/06/did-you-know-about-the-999-year-lease-granted-to-europeans-in-kenya/>- on 5 February 2024.

2.4 Institutional Framework on Land

2.4.1 National Land Commission

Prior to the establishment of the NLC , Kenya's land governance system was highly centralised, corrupt, inefficient ,lacked accountability, and furthermore did not engender public participation in land administration and management.[125] In order to cater to this institutional challenge ,one of the proposals of the NLP was adopted which resulted in the establishment of the NLC.[126] The functions of the NLC that are central to the crux of this study include: The Commission is given mandate to carry out investigations on its own motion on historical land injustices and make recommendations for appropriate redress;[127] The commission has the power to review all grants and establish their legality and propriety within five years of the commencement of the NLC Act;[128] Revocation of title is to be done by the registrar upon direction of the commission where there is impropriety or illegality of title;[129]The Act provides for the recommendations to the parliament for appropriate legislation for the investigation of historical land injustices.[130] In lieu of this , the Commission has since established an Investigations and Forensic services to exercise this investigative power amid rising cases of public land grabbing.[131]

2.4.2 Ministry of Lands, Public Works, Housing and Urban Development

The ministry of Lands, Public works, Housing and Urban Development has three departments: Department of Lands; Department of Physical planning; and Department of Survey.[132]The department of lands is further divided into land registration, administration and valuation.[133] Fundamental functions of this ministry that relate to the core of this study include: Land registration which has various functions including registration of documents for all land

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[125] Kariuki F, Ouma S, Ng'etich R, *Property Law*. 2016, 339.
[126] Republic of Kenya, Sessional Paper no. 3 of 2009 on national land policy. 55.
[127] Article 67 (2) (e), *Constitution of Kenya*. 2010.
[128] Section 14 (I), *National Land Commission Act*,2012.
[129] Section 14 (5), *National Land Commission Act*, 2012.
[130] Section 15, *National Land Commission Act*, 2012.
[131] 'Mutai E: Swazuri sets up probe unit as land fraud cases increase' Business Daily Africa 4 June 2017 - <https://www.businessdailyafrica.com/economy/Swazuri-sets-up-probe-unit-as-land-fraud-cases-increase/3946234-3955608-tx9xbtz/index.html >-on 15 December 2023.
[132]-< https://lands.go.ke/about-us/>- on 15 December 2023.
[133] -< https://lands.go.ke/about-us/>- on 15 December 2023.

transactions, issuance of title deeds, and processing conversion of titles from one land statute to another.[134]Additionally, the Ministry is required to work hand -in-hand with the NLC, in specific matters; for example the Ministry is required to develop and facilitate land policies on the basis of advice and recommendations from the NLC.[135]

In the case of *Mwaja & 5 others v National Land Commission & another (Environment & Land Case 100 of 2021)* Judge Addraya Dena, sitting in Kwale, ruled that there is no provision allowing the NLC to revoke titles even if it is proven that they were obtained illegally or irregularly. Judge Dena stated that the power to revoke title is vested in the Registrar and not the NLC, which only has the power to recommend.[136] This goes to show that only the Land Registrar under the ministry of Lands, has the capacity to revoke land titles. Despite orders given from either the court or the NLC, only the Land Registrar may implement them.

Initially, the role of the Ministry of Lands in liaison with the NLC was devolved to County Land Management Boards.[137] However, this provision was repealed by the Land Laws Amendment Act.[138] The counties presently play the role of regulating and monitoring land transactions primarily concerning agricultural land through the establishment of Land Control Boards.[139]

2.5 Impediments Facing the NLC and Ministry of Lands in Addressing Historical Injustices

To begin with, the National Land Commission lacks the autonomy necessary for it to be an independent institution. This is because it financially relies on parliament to enable it to carry out its functions.[140] Considering the historical issues of irregularities and illegalities within the previous land regime involving political elites, a notable conflict of interest emerges. It is plausible that the very same political elites implicated in past improprieties could still hold positions in parliament, potentially maintaining influence over the budget allocated to the National Land Commission fund. This scenario poses a monumental challenge to the Commission's independence, as the risk of continued interference from individuals associated

[134] Government of Kenya, *Executive Order* No 1/2016, 44.
[135] *In the Matter of the National Land Commission*, Advisory Opinion No. 2 of 2014, para.231.
[136] *Mwaja & 5 others v National Land Commission & another* (2023) eKLR.
[137] Section 18, *National Land Commission Act* (Act No. 5 of 2012).
[138] Section 39*, Land Laws (Amendment) Act* (Act No.28 of 2016).
[139] Section 6, *Land Control Act* (Act No.19 of 2015).
[140] Section 26 *National Land Commission Act* (Act No. 5 of 2012).

with prior land-related controversies remains a valid concern.[141] Historical land injustices will thus remain to be a persistent burden encumbering the people of Kenya. In addition, there lacks sustained political goodwill seeing as the elite and political class are the beneficiaries of this land problem and would rather unnecessarily delay the implementation of land reforms in order to protect their own selfish interests.

Secondly, historically, the relationship between the National Land Commission and the Ministry of Lands has been acrimonious rather than collaborative in relation to land administration. There has often been an overlap of functions which led to the NLC seeking an advisory opinion from the Court. The court stated that neither the NLC nor the Ministry could perform its functions in isolation but had to work in cooperation and in consultation, where the NLC acts as the body formulating policy while the Ministry implements the policy.[142] This renders the NLC as a toothless dog whose only functions are recommendatory in nature. Additionally, the ministry of lands has an upper hand in comparison to the NLC due to the fact that only the ministry has the authority to issue land titles on behalf of the government.[143] It is also crucial to note that the ministry of lands has in the past abused this authority ,thereby exacerbating land injustices through corrupt practices. Regrettably, the court overlooked this aspect, consequently hindering the NLC by not affording it due authority and credence to enable it to execute its mandated responsibilities effectively.[144]

Additionally, the NLC'S powers to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress has had very minimal effect on the resolution of historical land injustices. First off, the commission has received a total of 3,663 claims from 2017 to 2021.[145] Out of all those claims, the Commission has only managed to conduct investigative hearings for 58 claims in which four (4) have been concluded and are awaiting determination while 54 are ongoing.[146]

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[141] Atieno B, 'Assessing the effectiveness of the National Land Commission in addressing irregular and illegal allocation of land in Kenya' Unpublished LLM Thesis, University of Nairobi, 2016.
[142] *In the Matter of the National Land Commission,* Advisory Opinion No. 2 of 2014.
[143] *In the Matter of the National Land Commission*, Advisory Opinion No. 2 of 2014, 59.
[144] Kariuki F. Ouma S. Ngetich R. *Property Law,* 2016,375.
[145] National Land Commission, *Annual Report*, 2021/2022, 50.
[146] National Land Commission, *Annual Report*, 2021/2022, 53.

Lastly, the courts have portrayed their stance on the recommendatory powers of commissions as has been observed through the case of *Mureithi v Attorney General.* In this case, the court held that "the respondents were under no statutory duty whatsoever to implement the recommendations of the Ndung 'u Report and that the President after receiving the recommendation has complete discretion on what to do with the report." Furthermore, The court stated that, "it did not have the powers to implement the recommendations issued by the Ndung 'u report as it was not the function of the court to formulate and implement policy as these powers lay with the Executive and Parliament.[147] Seeing as the NLC still lacks an enforcement mechanism, recommendations issued by the NLC are more than likely doomed to suffer a similar fate, in that recommendations could be given but they end up taking no effect.

2.6 Conclusion

As observed above, the Commission's performance is notably subpar, given the extensive backlog of outstanding cases. This substantial number of unresolved cases raises concerns about the efficiency and efficacy of the Commission in addressing and concluding its caseload. The NLC report indicates an even more disconcerting issue, as the Commission has encountered challenges in obtaining cooperation from state agencies. [148] This is further heightened by the fact that the NLC Act does not explicitly state which authorities should enact their recommendations, nor does it provide for a means of appeal should a victim be unsatisfied nor any procedure that should be undertaken should the authorities fail to act within three years.[149] This goes to show that the legislation empowering the commission is not sufficient to effectively carry out its mandate and coerce relevant state agencies to cooperate with the commission in the discharge of its duties. Furthermore, due to their lacklustre performance, one of their strategies to address historical injustices involves seeking an extension of the Historical Land Injustices (HLI) timeframe, which is set at 10 years.[150] To pursue this objective, the Commission plans to actively engage with legal

[147] *Mureithi v Attorney General & 4 others* (2005) eKLR.
[148] National Land Commission, Annual *Report*, 2021/2022, 50.
[149] Section 15(10), *National Land Commission Act* (Act No. 5 of 2012).
[150] Section 15(11), *National Land Commission Act* (Act No. 5 of 2012).

cases such as the Omtatah case of 2021 and the Malindi Law Society which specifically question the constitutionality of the statutory time limits for HLI victims to file compensation claims.[151]

Despite the NLC's well-intentioned efforts and strategic initiatives, their effectiveness is hindered by the insufficient legal authority granted to them by existing legislations to fulfil their duty of addressing historical land injustices. In light of this limitation, it becomes imperative to explore alternative jurisdictions and study best practices, as detailed in the upcoming chapter.

[151] National Land Commission, *Annual Report*, 2021/2022, 53.

CHAPTER 3

COMPARATIVE ANALYSIS OF SOUTH AFRICA'S LEGAL AND INSTITUTIONAL FRAMEWORK IN ADDRESSING HISTORICAL LAND INJUSTICES

3.1 Introduction.

The issue of Historical Land Injustices has plagued different countries all over the world. Just to mention a few, Kenya, South Africa, Zimbabwe, India and even China have been significantly affected by this incessant problem.[152] This chapter shall delve into the case of South Africa, aiming to examine the legal and institutional framework that has enabled the resolution of Historical Land Injustices with a specific focus on the Lands Claims Court. The ultimate objective is to analyse the lessons Kenya can learn from South Africa in the mode and manner in which they resolved Historical Land Injustices.

3.2 Brief History of the journey towards restitution of Historical Land Injustices in South Africa

It would be remiss to explore the restitution of historical land injustices in South Africa without recognizing the insights South Africa garnered from its counterparts, such as Namibia and Zimbabwe. These lessons significantly informed and shaped South Africa's unique approach to land restitution.

a.) The case of Zimbabwe and Namibia

Zimbabwe, a country also colonised by Britain, is one of the few African states that have successfully repossessed land from large scale land owners.[153] The big question is, how feasible are their restitution methods? In 1979, Zimbabwe negotiated its independence at Lancaster House in the United Kingdom, where a significant debate centred on the restitution of land taken from natives during colonialism took place. This led to the resulting constitution protecting private property, including land, from state seizure, except under specified conditions such as national defence and public benefit, with the promise of prompt and adequate compensation and the right

[152] Mulevu E, 'A Critical Analysis of the Extent to which the National Land Commission Addresses the Land Question in Kenya' Unpublished LLMThesis, University of Nairobi, Nairobi,2014, 42.
[153] Musyoki B 'Addressing Past Historical Land Injustices in Kenya' Unpublished LLMThesis, University of Nairobi, Nairobi,2012, 43.

to legal recourse in disputes. Initially, this safeguarded the land holdings acquired by the white population during colonial times, allowing for compulsory state acquisition for public benefit, particularly land resettlement.[154] However, by 2000, the approach delineated in the Lancaster House Agreement had proven ineffective, marking the collapse of the model due to the central government's inability to utilise the legal mechanisms available. Despite this, when Robert Mugabe's government proposed a new draft property clause, it did not significantly depart from the Lancaster House framework, indicating a continued market fundamentalist trajectory in land reform. The opposition Movement for Democratic Change (MDC) also proposed a market-friendly property clause emphasizing private property rights protection.[155] Mugabe's party, ZANU-PF, adopted the MDC's market-oriented approach to land reform but used it for chauvinistic and populist purposes after losing the 2000 constitutional referendum. During this time, judges who upheld the rule of law in land disputes faced pressure to step down, which resulted in a move toward military control and the distribution of land to those with political power.[156] This indubitably led to the infamous case of *Campbell v Zimbabwe* where it was held that the Zimbabwean model of expropriation without compensation was contrary to International law. The court ruled that 'it is the right of the applicants under international law to be paid, and the correlative duty of the respondent to pay, fair compensation.[157]

Zimbabwe's land reform consequently collapsed under the weight of market fundamentalism, disrespect of the rule of law, corruption and bureaucratic inefficiency.[158] Approximately a decade after the Lancaster House negotiations, Namibia adopted a similar approach to constitutionalizing land reform. The Namibian Constitution upholds the protection of existing property rights, thereby preserving the land relations established during colonialism and reinforced by apartheid.[159] Unlike Zimbabwe, where the constitution mandated prompt and adequate compensation for compulsory land seizure, the Namibian Constitution empowers the government with the authority for compulsory acquisition, termed 'expropriation'. The profound difference in Namibia, is that the

[154] Ngcukaitobi T, *Land Matters; South Africa's Failed Land Reforms and the Road Ahead*, Penguin Random House, Cape Town,2021,11.
[155] Ngcukaitobi, *South Africa's Failed Land Reforms and the Road Ahead*,11.
[156] Ngcukaitobi, *South Africa's Failed Land Reforms and the Road Ahead*,11.
[157] *Mike Campbell (Pvt) Ltd and Others v. Republic of Zimbabwe* (2008) Southern African Development Community.
[158] Ngcukaitobi, *South Africa's Failed Land Reforms and the Road Ahead*,12.
[159] Article 16, *Constitution of Namibia* (1990).

state is required to offer "just" compensation for expropriated land, although it is not required to pay the market price or provide sufficient compensation.[160]

Within four years following Namibia's attainment of independence, South Africa joined the ranks of independent African nations. Similar to the conditions in Namibia and Zimbabwe, property rights became an essential challenge throughout the democratic transition. A strategy, initially derived from Zimbabwe and subsequently refined in Namibia, was adopted.[161] Property that had been acquired during the periods of colonialism and apartheid would not be immediately redistributed. Instead, the state would have the power to take land for the sake of land reform or relocation, provided that fair and reasonable compensation is given.[162] This thus formed the basis for which South Africa modelled their framework for restitution of Historical Land Injustices which shall be aptly discussed within this chapter.

3.3 Legal Framework of South Africa.

3.3.1 Introduction

The land restitution process in South Africa was initially envisioned as a mechanism to rectify the post-apartheid property rights system by addressing specific instances of unjust possession. These instances were identified as holdings that could be traced back to dispossessions incurred under previously enforced racially discriminatory legislation.[163] In addition, the land restitution program employed a rights-based strategy, which attempts to right historical wrongs by restoring rights and rebuilding livelihoods for those impacted by land seizures after 1913.[164] It is therefore clear that the aim of the programme goes beyond procedural restitution to include substantive redress. The restitution of land rights programme has been implemented through five different options: restoration of the actual land from which people were displaced; provision of alternative land in cases where the original land is not available; financial compensation for the lost land; "alternative relief," which includes a combination of two or more of the above types. The fifth option involves

[160] Ngcukaitobi, *South Africa's Failed Land Reforms and the Road Ahead*,12.
[161] Ngcukaitobi, *South Africa's Failed Land Reforms and the Road Ahead*,12.
[162] Ngcukaitobi, *South Africa's Failed Land Reforms and the Road Ahead*,13.
[163]Theunis R, 'Land Restitution and Reconciliation in South Africa' in Theunis R (eds) *Cambridge University Press*, 2009,155.
[164] Chitonge H, 'Resettled but not redressed: Land restitution and post-settlement dynamics in South Africa' 22(4) *Journal of Agrarian Change*,2022,725.

giving “priority access to state resources” for land claimants, and this often entails priority access to free housing or infrastructure development provided by the state, although this option is rarely offered nowadays.[165]

3.3.2 The South African Constitution.

To begin with, the 1993 Interim South African Constitution considered land to be integral to the right to equality, with landlessness serving as an indicator of inequality.[166] It particularly articulated that "every person or community dispossessed of rights and land before this Constitution's enactment, under laws that would have been deemed inconsistent with subsection (2) if it had been in effect at the time of dispossession, is entitled to restitution of such rights."[167] Furthermore, it provided a comprehensive provision for the restitution of land rights to individuals and communities.[168] This displays the concerted efforts of South Africa's Constitution to restitute Historical Injustices from the very onset.

Secondly, one of the noteworthy pillars of land restitution is the setting of a cut-off point for land claims submissions. South Africa settled on 1913 as the cut-off point. This year was significant due to the enactment of the Natives Land Act. It stands out as a logical cut-off point in the context of land ownership laws.[169] From a practical perspective, inspired by philosopher Robert Nozick's philosophy, this year was chosen as a boundary to prevent the land return process from becoming endless. One of the officially cited reasons for this choice was the absence of adequate written records before 1913. Another reason was to prevent an overwhelming number of claims that could impoverish the system, and to avoid potential conflicts among various ethnic groups over historical land losses.[170] Additionally, authorities provided reassurances that those unable to submit claims by the cut-off date would still have their land needs addressed through land redistribution efforts, marking a distinction from the restoration of historical lands.[171]

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[165] Chitonge H, ‘Resettled but not redressed: Land restitution and post-settlement dynamics in South Africa’ *725.*
[166] *Interim Constitution of South Africa* (Act No. 200 of 1993).
[167] Section 8(3a), *Interim Constitution of South Africa* (Act No. 200 of 1993).
[168] Section 121, *Interim Constitution of South Africa* (Act No. 200 of 1993).
[169] Theunis R, ‘Land Restitution and Reconciliation in South Africa,’156.
[170] Theunis R, ‘Land Restitution and Reconciliation in South Africa,’156.
[171] Theunis R, ‘Land Restitution and Reconciliation in South Africa,’156.

Thirdly, in its endeavour to redress the dispossession of land experienced by millions of its citizens during colonial and apartheid eras, South Africa enacted the Restitution of Land Rights Act and established the Land Claims Court in the years 1994 and 1996, respectively.[172]

3.3.3 Restitution of Land Rights Act of 1994

Firstly, it is important to note that this is the key legal provision, central to the core of this study.

The Restitution Act provides that the following people can lodge an application for restitution: A person dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices; The estate of a person who was dispossessed; The direct descendant of a person who was dispossessed if no ascendant of that person (who is also a direct descendant of the dispossessed person) has lodged a restitution claim; A community or part of a community that was dispossessed[173] Initially, the window to lodge claims for restitution closed on 31 December 1998. However, in 2014, Parliament enacted the Restitution of Land Rights Amendment Act 15 of 2014 which reopened the window to lodge restitution claims for five years from 1 June 2014 to 30 June 2019. Tens of thousands of applications were lodged when the window opened.[174] On 28 July 2016, the Constitutional Court invalidated the Amendment Act regarding land claims for failing to ensure public participation, abruptly halting the process. Although the ruling suspended the Act's invalidity for two years, it barred the submission of new claims. To date, Parliament has not enacted new legislation to reopen the claims process, leaving the situation unresolved.[175] In Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others II, the Constitutional Court determined that the Commission cannot process claims submitted between 2014 and 2016 until all claims lodged before 1998 are either resolved or the Land Claims Court permits the processing of new claims. The Court also stated that new claims should not ordinarily impact awards to old claimants unless extraordinary circumstances justify it. Furthermore, it mandated regular progress reports from the Commission to the Land Claims Court

[172] Diala A, 'Chained Communities: A Critique of South Africa's Approach to Land Restitution' 20(3) *African Studies Quarterly*,2021, 1.
[173] Section 2, *Restitution of Land Rights Act* (Act No. 22 of 1994).
[174] *Restitution of Land Rights Amendment Act* (Act No.15 of 2014).
[175] *Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others* (2016) Constitutional Court of South Africa.

on settling old claims.[176] In 2022, the Land Claims Court authorised the Commission to preliminarily sort through the preserved historical land claims (claims filed between 2014-2016) in Transkei and Ciskei. The Commission was tasked to report on the scope and number of these claims within four months, in order to aid the Court in determining whether to allow the Commission to reopen the preserved claims process.[177]

Secondly, this Act grants the minister of land affairs the power to expropriate land for land reform purposes. Additionally, it permits an expropriation only where the beneficiary is entitled to restitution of a right in land. Consequently, the beneficiary of an expropriation decision must be a land claimant whose claim has been successfully decided in their favour by the Land Claims Court, or, alternatively, whose land claim is uncontested. If no restitution of a right in land is due, alternative relief – such as a different piece of land – can also be provided through expropriated land.[178] In situations where there is no land claim, the authority to expropriate land under the Restitution Act is limited to cases where the land acquisition is 'directly related to' or 'impacted' by a successful land claim. Essentially, the precondition for the Department of Land Affairs to utilise its expropriation powers for land reform is the presence of a successful or uncontested land claim.[179] This provision authorises the minister to expropriate the claimed land or an alternative parcel of land, provided there is a justifiable link.[180] The purpose of this legal drafting was to ensure that while valid restitution claims might limit existing property rights, any expropriation resulting from the land restitution process must be compensated fairly and equitably.[181] This generally requires paying market value, unless the current owner acquired the property below this value. The Restitution Act positions the state as an intermediary, funding the resolution of claims—whether through compensating for land restored to claimants or providing redress to retain land—using public funds, thus aiming to legitimise the property rights framework.[182]

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[176] *Speaker of the National Assembly and Another v Land Access Movement of South Africa and Others* (2019) Constitutional Court of South Africa
[177] *Nelson Sipho Dangazele & others v Ministry of Agriculture, Land Reform and Rural Development & others* (2022) Lands Claims Court of South Africa.
[178] Ngcukaitobi, *South Africa's Failed Land Reforms and the Road Ahead*,106.
[179] Ngcukaitobi, *South Africa's Failed Land Reforms and the Road Ahead*,106.
[180] Ngcukaitobi, *South Africa's Failed Land Reforms and the Road Ahead*,106.
[181] Ngcukaitobi, *South Africa's Failed Land Reforms and the Road Ahead*,106.
[182] Theunis R, 'Land Restitution and Reconciliation in South Africa,'159.

A notable side effect of the land restitution legal framework is that it eliminates the need for direct reconciliation between the landowner and the claimant. Claims are submitted to the appropriate regional land claims commissioner for initial review and official announcement.[183] Following this, the land cannot be sold or otherwise altered without the Commission's approval. After detailed examination, the commissioner must submit a report to the Chief Land Claims Commissioner. If land restoration is advised, the Commission negotiates with the landowner for purchase, excluding the claimant from these discussions. Alternatively, if cash compensation is deemed appropriate, this is negotiated between the Commission and the claimant, without involving the landowner.[184] This process proved effective to some extent, however, the bulk of the claims that remained to be settled were claims to rural land. In the urban context, various devices were developed to accelerate the restitution process, which was initially very slow. The literature is unanimous in attributing this slow start to the central role given to the Land Claims Court in the original statutory scheme. As initially conceived, all restitution claims, even those resolved by agreement, had to be ratified by the Land Claims Court.[185] Recognising this, the legislature amended section 42D of the Restitution Act in 1999 so as to make it possible for the Minister of Land Affairs to settle land claims without recourse to the Court which led to a marked acceleration in the rate of settlement of claims after 2000.[186] The 1999 amendment should be viewed as reinforcing the state's function as the financier of restitution, with the primary change being the diminished oversight role of the Land Claims Court regarding the suitability of cash compensations, especially in cases where there is mutual agreement between the parties involved.[187]

Fairly recently, a legislative draft, tabled late in 2020, allowed expropriation only for "public purpose" and in the "public interest", as stipulated in section 25 of the Constitution. However, alongside "just and equitable compensation", it introduced the possibility for "nil compensation" to be considered in specified instances, such as abandoned land, state land, or land held for speculative purposes.[188]Conversely, the proposed Eighteenth Amendment Bill to the Constitution

[183] Section 16(1), *Restitution of Land Rights Act* (Act No. 22 of 1994).
[184]Theunis R, 'Land Restitution and Reconciliation in South Africa,'159.
[185] Theunis R, 'Land Restitution and Reconciliation in South Africa,'164.
[186] Theunis R, 'Land Restitution and Reconciliation in South Africa,'165.
[187] Theunis R, 'Land Restitution and Reconciliation in South Africa,'165.
[188]Marianne M, 'Controversial Expropriation Bill is finally approved after navigating a 14-year rocky road' Daily Maverick, 29 September 2022- <https://www.dailymaverick.co.za/article/2022-09-29-controversial-expropriation-bill-is-finally-approved-after-navigating-a-14-year-rocky-road/ -> on 2nd February 2024.

that intended to modify section 25 to permit the state to expropriate land without compensation, did not achieve the necessary votes in the National Assembly. Consequently, there were no amendments to the Constitution.[189] South Africa has thus managed to steer away from Zimbabwe's method of expropriation without compensation.

3.3.4 The Labour Tenants Act

The Labour Tenants Act seeks to reverse the effects of discriminatory laws enacted to dispossess Black people of land. Justice Madlanga J stated that these discriminatory laws, aimed to increase the availability of land for white farmers. Secondly, these laws sought to impoverish black people by dispossessing them and restricting their farming practices, which previously allowed for some level of self-sufficiency. This forced black people to rely on employment, thus supplying white farms and mines with a source of inexpensive labour. This was in response to white farmers' complaints about African people's reluctance to work as servants and labourers. Lastly, these laws were implemented to reinforce racial segregation, a policy that became even more pronounced during the apartheid era.[190]

The preamble of the Labour Tenants Act recognizes that labour tenancy "is the result of racially discriminatory laws and practices which have led to the systematic breach of human rights and denial of access to land". According to the preamble, "it is desirable to ensure the adequate protection of labour tenants, who are persons who were disadvantaged by unfair discrimination, in order to promote their full and equal enjoyment of human rights and freedoms"[191]

The Labour Tenant Act was thus enacted both to protect labour tenants' existing rights, and to afford them the opportunity to gain real rights in the land they occupied.[192]

Lastly, the Labour Tenant Act allowed labour tenants to apply to the Director-General to recognise their rights in the land they occupy.[193] In case of a dispute over whether or not the person is a labour tenant, the matter must be referred to an arbitrator or to the Land Claims Court.[194] If the

[189]-<https://www.parliament.gov.za/news/national-assembly-fails-pass-constitution-eighteenth-amendment-bill#:~:text=The%20envisaged%20Constitution%20Eighteenth%20Amendment,no%20changes%20to%20the%20Constitution.>- on 2nd February 2024.
[190] *Daniels v Scribante and Another* (2017), Constitutional Court of South Africa.
[191] Preamble, *Labor Tenants Act* (Act No. 3 of 1996).
[192] Chapter III, *Labour Tenants Act* (Act No. 3 of 1996).
[193] Section 16,17(1), *Labour Tenants Act* (Act No. 3 of 1996).
[194] Section 17,18, *Labour Tenants Act* (Act No. 3 of 1996).

Court determines that the applicant is a labour tenant, it must then determine what award to make to the applicant. This may be the award of ownership of the land, or servitudes to either the labour tenant or the owner, or compensation to the labour tenant instead of an award of rights in land.[195]

3.3.5 Extension of Security of Tenure Act (ESTA)

The Extension of Security of Tenure Act (hereinafter referred to ESTA) was legislated to operationalize the constitutional mandate of providing individuals with insecure land tenure rights, 'access to tenure which is legally secure or comparable redress.'[196]

ESTA especially targets one of the most vulnerable people in South Africa known as 'occupiers.' An individual is deemed to be an occupier if they meet the following three requirements: If he/she is a person residing on land which belongs to another person; who had on 4 February 1997, or thereafter, had consent or another right in law to do so; and whose income is not above a prescribed threshold of R13 625 per month.[197]

Consequently, a person has the 'right to reside on and use the land' only if he or she qualifies as an 'occupier' as defined in ESTA.[198]ESTA thus serves to protect 'occupiers' from unlawful evictions and allows them to apply to the Minister for subsidies for the facilitation of on-site or off-site development.[199]

ESTA ensures that if vulnerable occupiers are evicted from land, it must be in a fair manner and landowners must apply to the Magistrates court for an eviction order which considers the full circumstances of the occupiers.[200] If this matter is brought up in the Magistrates Court, the Rules of the High Court are applicable.[201]

If an order for the eviction is issued by the Magistrate, the Magistrate must send his or her judgment to the Land Claims Court for automatic review. The decision cannot be implemented until it is

[195] Section 22, *Labour Tenants Act* (Act No. 3 of 1996).
[196] Section 25(6), *Interim Constitution of South Africa* (Act No. 200 of 1993).
[197] Section 1, *Extension of Security of Tenure Act* (Act No. 62 of 1997).
[198] Section 1, *Extension of Security of Tenure Act* (Act No. 62 of 1997).
[199] Mbhense N, 'Litigation in the Lands Claims Court' *Training manual,* 24.
[200] Mbhense N, 'Litigation in the Lands Claims Court' *Training manual,* 24.
[201] Section 17, *Extension of Security of Tenure Act* (Act No. 62 of 1997).

reviewed by the judge of the Land Claims Court. The judge of the Land Claims Court can confirm or set aside or substitute the order of the Magistrate. Furthermore, the judge can remit the matter to the Magistrate with directions.[202]

3.3.6 Burial rights under ESTA

This matter is covered under ESTA due to the bone of contention between the owners of farms and occupiers of farms in South Africa. On the one hand, land owners feel that as owners of land they have a right to enjoy undisturbed use and ownership of their land. On the other hand, occupiers feel that as occupiers of land they have a right to bury their deceased family members on land where they reside.[203] To complicate matters further, both the landowners and occupiers are protected by the Constitution.[204] ESTA was thus promulgated in order to specify and regulate the rights and duties of occupiers and land owners in relation to burials.[205] In order for an 'occupier' to enjoy protection under the provisions of ESTA, he or she must establish on the balance of probabilities that: he or she is an 'occupier' on the farm where he or she intends to bury the deceased; the deceased was a member of his or her family; the burial sought would be in accordance with his or her religious and/or cultural beliefs; the deceased was residing on land, which the occupier resided on at the time of death of the deceased; and an established practice in respect of the land exists to bury deceased family members on the land.[206]The landowner is also protected in the sense that an occupier must practice his or her culture and religion in a reasonable manner.[207]

In the case of Lizzy *Mathebula and Another v Mr. Harry*, which was determined in the Land Claims Court, Ngcukaitobi AJ stated that: "The meaning of the term "reside" as used in section 6(2) (dA) should not depend on mathematical formulas, such as how many days in a week does a person spend in a particular farm. Nor should it depend on the subjective views of the owner of the land or the occupier. In determining whether a person is resident, there should at least be a

[202] Section 19(3), *Extension of Security of Tenure Act* (Act No. 62 of 1997).
[203] Mbhense N, 'Litigation in the Lands Claims Court' *Training manual,* 29.
[204] Section 25, *Interim Constitution of South Africa* (Act No. 200 of 1993).
[205] Section 6(2), *Extension of Security of Tenure Act* (Act No. 62 of 1997).
[206] Section 6(2), *Extension of Security of Tenure Act* (Act No. 62 of 1997).
[207] *Nhlabathi and Others v Fick* (2003), Land Claims Court of South Africa.

degree of physical presence. But this need not necessarily be continuous. Importantly, the Court should accept that actual physical presence may be interrupted by economic factors, such as employment. Where this is the case, there must at least be an intention – exhibited by conduct – to return on a permanent basis to one's residence. It is wrong to assume, in all instances, that simply because one lives elsewhere out of economic necessity, that fact should ipso facto exclude their residence of a particular farm."[208] It can be deduced from the above that ESTA recognizes that many South Africans do not have secure tenure of their homes and the land that they use. Consequently, the above legal provisions and determined cases demonstrate South Africa's cumulative efforts to reconcile individual's land rights with practices from their culture.

3.4 Institutional Framework for the resolution of Historical Land Injustices in South Africa

This section will delineate the procedure for rectifying historical land injustices, which primarily involves an institutionalized process.

3.4.1 Commission on Restitution of Land Rights.

South Africa created a commission that was charged with seeking reprieve for the black nationals who owned nothing in terms of land in the vast country since most of the arable land had been taken by the white men/women. This commission was known as The Commission on Restitution of Land Rights.[209] This Commission was empowered by the Restitution Act of 1995 which made provisions for the setting up of a commission that would work towards the acquisition of land and redistribution of the same for the black farmers.[210]

3.4.2 Phases of a Claim for Restitution

The Commission mainly handles claims according to the Restitution Act, involving five stages. Typically, a party seeks the Land Claims Court (LCC) only after completing these stages. However, disputes can emerge at any point, necessitating a claimant to appeal to the LCC for resolution. The phases are as follows:

The Lodgment Phase: This is the first phase of a claim for restitution. Any person who, or the representative of any community which is entitled to claim restitution of a right in land, may lodge

[208] *Mathebula and Another v Harry* (2015) Land Claims Court of South Africa.
[209] Theunis R, 'Land Restitution and Reconciliation in South Africa,'160.
[210] Section 2, *Restitution of Land Rights Act* (Act No. 22 of 1994).

such a claim. The Commission at this stage of the process is required to receive and acknowledge receipt of all claims lodged with or transferred to it in terms of the Restitution Act. Additionally, it must take reasonable steps to ensure that claimants are assisted in the preparation and submission of claims. [211]

The Publication Phase: This second phase begins after lodgment and ends with the publication in the Government Gazette. The Commission, upon accepting the land claim, publishes it in the Government Gazette. The publication only takes place once the Commission is satisfied that (a) the claim has been lodged in the prescribed manner, (b) the claimants have reasonable grounds for arguing that the claim meets the qualifying requirements of section 2 of the Restitution Act, and (c) the claim is not frivolous and vexatious.[212]

The Investigation Phase: The Commission must meticulously investigate the land claims. The Commission must also advise the owner of the land in question of the claim lodged against the land and that he may not dispose, develop, exchange, donate, lease, subdivide, or rezone the land without notifying the Commission.[213]

The Referral or Settlement Phase: The Commission either settles or refers the land claim to the Lands Claims Court.[214] The referral only takes place when it is not possible to settle the claim by mediation or negotiation or when the Commission is of the opinion that the claim is ready for hearing by the LCC.[215]

Alternatively, the Restitution Act permits the Commission to recommend to the Minister how a claim should be settled. If the Minister concludes that the claimant deserves land rights restoration under the Restitution Act, they can negotiate a settlement with all involved parties.[216]

[211] Section 2,10, *Restitution of Land Rights Act* (Act No. 22 of 1994).
[212] Section 11, *Restitution of Land Rights Act* (Act No. 22 of 1994).
[213] Section 11,12,13, *Restitution of Land Rights Act* (Act No. 22 of 1994).
[214] Section 14,42, *Restitution of Land Rights Act* (Act No. 22 of 1994).
[215] Section 14, *Restitution of Land Rights Act* (Act No. 22 of 1994).
[216] Section 42(d), *Restitution of Land Rights Act* (Act No. 22 of 1994).

The Litigation Phase: Once the claim has been referred to the Court, the Court may then adjudicate the claim and decide: whether the claimants are entitled to restitution; and if they are, the relief to which the claimants are entitled.[217]

3.4.3 The Lands Claims Court (LCC)

The LCC was established by the Restitution Act and has jurisdiction throughout the Republic of South Africa with a wide range of important powers.[218] Cases are brought before the LCC in several ways; such as directly through action or application; through referral by the Director-General of a Land Reform claim; or through referral by the Chief Land Claims Commissioner in restitution claims. Additionally, the LCC handles appeals or reviews of decisions made by Magistrates' Courts or arbitrators under the Land Reform (Labour Tenants) Act (LTA) or the Extension of Security of Tenure Act (ESTA).[219]

Originally, the Land Claims Court played a significant role in overseeing the land restitution process oblivious to the volume of claims that would be filed. It held the authority to review all claims, even those settled through agreements, to ensure they met the criteria established by the Restitution Act.[220] The Court was to adopt fact-finding methods similar to those of a conventional court in evaluating these claims. However, due to the overwhelming number and complexity of claims submitted, the Court's involvement slowed down the restitution process. Consequently, about five years later, the initial approach was shifted to a model centered around the Commission.[221]

3.4.4 Adducing evidence in the Lands Claims Court.

The rules of evidence in the LCC are not identical to the High Court. They are generally slightly more relaxed, particularly on the issue of hearsay evidence. This is majorly because the nature of land restitution cases often involves historical claims that stretch back over many years, if not decades. As a result, direct evidence, written records or first-hand witnesses may not always be available thus necessitating a more flexible approach to evidence which is often in the form of oral

[217] Section 35, *Restitution of Land Rights Act* (Act No. 22 of 1994).
[218] Section 22, *Restitution of Land Rights Act* (Act No. 22 of 1994).
[219] Mbhense N, 'Litigation in the Lands Claims Court' *Training manual,* 33
[220] Theunis R, 'Land Restitution and Reconciliation in South Africa,'160.
[221] Theunis R, 'Land Restitution and Reconciliation in South Africa,'160.

evidence. Additionally, oral history is not only concerned with historical facts, but also the values and convictions of the community it recollects which are necessary for substantive and holistic restitution of Historical Land Injustices.[222] Similarly, oral histories reveal a hidden past often snuffed out by the written historical record.[223]

This is manifestly evident in the Restitution Act which empowers the LCC to admit any evidence which it considers relevant and cogent, regardless of whether such evidence would be admissible in another court.[224]

Likewise, the Restitution Act permits any party before the Court to adduce two types of evidence: firstly, hearsay evidence; and secondly, expert evidence regarding historical facts.[225] Flowing from the above , the Restitution Act calls upon the Court to assess the hearsay and expert historical evidence that is adduced in order to give it the weight it deems appropriate, rather than to exclude it altogether.[226] The deliberate permission for hearsay and expert historical evidence that is adduced in trials in the LCC points to the *sui generis* nature of the Court. In such instances, there is frequently a dependence on oral accounts of history, cultural practices, and land use that were carried over through generations by way of stories, rather than written documents. It is also indicative of the more inquisitorial approach of the LCC.[227]

3.4.5 Compensation in the Lands Claims Court

In the constitutional era, the Constitutional Court and the Land Claims Court have raised the possibility that the deprivation of property does not attract the duty to pay compensation. [228]While deprivation of property does not always attract the duty of compensation, expropriation usually does. Some contend that expropriation without compensation may be permissible under specific

[222] Bezuidenhout J, 'Eroding the Past: A Study of the Approaches of Courts towards Oral and Expert Testimony in the Salem Commonage Land Claim' *Kronos* 48(1), 2022,40.
[223] Bezuidenhout J, 'Eroding the Past: A Study of the Approaches of Courts towards Oral and Expert Testimony in the Salem Commonage Land Claim',44.
[224]Section 30(1), *Restitution of Land Rights Act* (Act No. 22 of 1994).
[225] Section 30(2), *Restitution of Land Rights Act* (Act No. 22 of 1994).
[226] Section 30(3), *Restitution of Land Rights Act* (Act No. 22 of 1994).
[227] Mbhense N, 'Litigation in the Lands Claims Court' *Training manual,* 35.
[228] Ngcukaitobi, *South Africa's Failed Land Reforms and the Road Ahead*,85.

circumstances. However, expropriations should generally be balanced by just and equitable compensation.[229]

This brings us to the question of determining what constitutes just and equitable compensation. South Africa has no compensation formula. Two methods are applied in practice. First, in the redistribution context, the state applies the willing-seller, willing-buyer approach.[230] In restitution and labour tenant claims, the state tends to apply the Geldenhuys formula. This is a formula devised by a former judge of the Land Claims Court, Antonie Geldenhuys. Its basic framing is that one should start by determining the market value of the property and then apply the other factors in Section 25(3) of the Constitution to adjust the value as necessary. The number that is ultimately produced becomes the amount of compensation.[231]

Moreover, the Land Claims Court (LCC) possesses the authority to examine decisions made under the Restitution Act, employing criteria identical to those used by the High Court. Should these decisions constitute administrative actions, their review must adhere to the Promotion of Administrative Justice Act 3 of 2000.[232] If they fall outside the scope of administrative actions, their examination is governed by the principle of legality.[233]

This system of restitution has thus far enabled significant progress in addressing historical land injustices. As of the 31 December 1998 deadline, 63,455 restitution claims were lodged, with a distribution of 72% urban and 28% rural. Investigations led to an increase in the total to 79,693 claims by March 2004. Initially, the settlement pace was slow, but accelerated significantly thereafter, with a total of 71,654 claims resolved by March 2006. Urban claims were settled more swiftly than rural ones, predominantly through cash compensations.[234] Financially, by August 2004, R1.5 billion had been allocated for land acquisition and R2.5 billion for cash compensation, with spending on rural claims rising sharply, evidenced by R1.8 billion spent in the 2005/2006 fiscal year alone. By June 2007, the restitution process had benefited approximately 1.3 million individuals across over 250,000 households. The expedited resolution of urban claims, frequently

[229] Ngcukaitobi, *South Africa's Failed Land Reforms and the Road Ahead*, 85.
[230] Ngcukaitobi, *South Africa's Failed Land Reforms and the Road Ahead*, 91.
[231] Ngcukaitobi, *South Africa's Failed Land Reforms and the Road Ahead*, 91.
[232] *Promotion of Administrative Justice Act* (Act No. 3 of 2000).
[233] Mbhense N, 'Litigation in the Lands Claims Court' *Training manual,* 33.
[234] Theunis R, 'Land Restitution and Reconciliation in South Africa,'164.

via cash settlements, has markedly contributed to the overall efficacy and progress of the restitution efforts.[235]

South Africa's Minister of Agriculture and Land Affairs Thoko Didiza stated that a total of 64,422 land claims had been finalised as of 2021.[236] This goes to show that South Africa has made significant progress in its resolution of Historical Land Injustices.

3.5 Criticisms facing South Africa's model of addressing Historical Land Injustices.

To begin with, the scheme for the restitution of land rights was developed with a legalistic focus, aimed primarily at reversing specific unjust land transfers. This approach however, neglects the broader necessity of addressing the profound social and psychological impacts stemming from apartheid land laws.[237]

Secondly, the courts have often leaned towards colonial interpretation of rules, rather than adopting inclusive interpretations of the law to realise the transformative intent of the Constitution. This is demonstrated in the case of *Department of Land Affairs & others v Goedgelegen Tropical Fruits* whereby eleven former tenants sought land restitution from a commercial fruit farm, but the Land Claims Court in Limpopo denied their claim due to insufficient evidence of involuntary dispossession by white settlers in the mid-19th century. The court viewed the claimants not as a community but as labour tenants with individual contracts, which was further upheld by the Supreme Court of Appeal. However, the Constitutional Court later overturned this, advocating for a lower threshold to define a community, acknowledging that colonialism had significantly altered African social structures.[238] Similarly, in the case of *Elambini Community and Others v Minister of Rural Development and Land Reform and Others*, the claimants' inability to demonstrate 'shared rules' for community land access led to their failure, despite evidence of their communal living, which thus highlights the legal challenges faced in proving historical community ties to land under the current restitution framework.[239]

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[235] Theunis R, 'Land Restitution and Reconciliation in South Africa,'164.
[236]Mayibongwe M, 'Hundreds of Land Reform Cases before Courts Countrywide,' Independent Online, 27th March 2021-<https://www.iol.co.za/news/politics/hundreds-of-land-reform-cases-before-courts-countrywide-7f8b7fb8-9517-471a-93d1-ce23e4e38153 >-
[237] Theunis R, 'Land Restitution and Reconciliation in South Africa,'160.
[238] *Department of Land Affairs & others v Goedgelegen Tropical Fruits* (2007) Constitutional Court of South Africa.
[239] *Elambini Community and Others v Minister of Rural Development and Land Reform and Others* (2018) Constitutional Court of South Africa.

Thirdly, it is rather challenging to balance between restitution, sustainable agricultural development, and broader land reform goals in the resolution of Historical Land Injustices. This is postulated by Professor Ben Cousins, a land matters expert, who argues for ending the current restitution process while labelling it as potentially misguided.[240] He advocates for resolving most claims through cash compensation rather than resettlement, citing the process as overly complex, conflictual, costly, and inefficient, often resulting in limited sustainable outcomes. Cousins notes that few claimants actually wish to engage in farming thus suggesting that standard compensation settlements, common in urban land claims, might be a more effective resolution method.[241] Additionally, he acknowledges that it may be more advantageous for claimants genuinely interested in farming, to have their land restored and to form partnerships with the private sector.[242]

Moreover, South Africa's land restitution regime prioritises landowner autonomy over broader societal and reparative needs. This is because the land redistribution program is significantly shaped by a dominant group of agricultural landowners, contrasting with the claimant-focused restitution program. In the current redistribution system, it is the landowners who determine which lands are up for sale, through methods like direct negotiation, public advertising, or auctions.[243] Under the willing-seller, willing-buyer principle, landowners set the sale conditions and prices, leaving buyers with the option to accept the terms or withdraw from the deal. Moreover, landowners have the discretion to select their buyers and are under no obligation to sell to the state, even in light of national land reform objectives. They also retain control over the land's use and the type of agriculture practised on it.[244]

Furthermore, beneficiaries of land reform often face a stigma questioning their competence, leading to reliance on landowners for training and skill development. This dynamic ensures landowners control the redistribution process, acting in their interests rather than those of the state or beneficiaries, who struggle to gain independence. [245]Despite the state's role as financier, it mainly observes, lacking active involvement in rebalancing power dynamics. Originally, the

[240] Ngcukaitobi, *South Africa's Failed Land Reforms and the Road Ahead*,63.
[241] Ngcukaitobi, *South Africa's Failed Land Reforms and the Road Ahead*,63.
[242] Ngcukaitobi, *South Africa's Failed Land Reforms and the Road Ahead*,63.
[243] Ngcukaitobi, *South Africa's Failed Land Reforms and the Road Ahead*,63.
[244] Ngcukaitobi, *South Africa's Failed Land Reforms and the Road Ahead*,63.
[245] Ngcukaitobi, *South Africa's Failed Land Reforms and the Road Ahead*,63.

market-driven, willing-seller, willing-buyer model, promoted by the World Bank and adopted by South Africa post-1994, did not align with post-1994 legislation. Recent reconsiderations of this approach have yet to change official land policy thus maintaining the status quo.[246]

Moreover, there have been issues of delay in implementing court decisions. This is manifested in the 2004 Labour Tenants law case of Msiza, whereby the Land Claims Court rendered a ruling affirming Mr. Msiza's right to land. However, additional determinations regarding the proper compensation to be given were not made until 2016, or roughly twelve years later. Mr. Msiza was unable to use his ownership rights in the meantime, even though a judge had found that he was the rightful owner of the land.[247] If one factors in likely appeals from the 2016 decision, he would potentially have to wait an additional two to three years. Thus, between the time the claim was lodged and finally determined, more than fifteen years would have elapsed. Not only is this highly inefficient, but it is also inconsistent with the promise of the Constitution that public functions should be performed diligently and without delay.[248]

In addition, there exists an unwillingness to evolve in South Africa's methods of rectifying historical land injustices, particularly those involving rural claims. This reluctance is deeply influenced by the Nozickian model's seductive yet misleading premise that it is feasible to return to the status quo ante, the state before the injustices took place. The issue lies in the model's failure to acknowledge the transformed and multifaceted nature of modern land rights and identities, hindering a more nuanced and effective resolution of land claims.[249]

On top of that, there is increasing concern that the slow progress and uncertain outcomes of land restitution might compel the government to adopt more drastic and potentially unfair measures. Such worries are intermittently reignited by announcements from the Department of Land Affairs about its intention to pursue land reform strategies similar to those used in Zimbabwe.[250] Overall, the prevailing view is that land restitution in South Africa has not sufficiently corrected the

[246] Ngcukaitobi, *South Africa's Failed Land Reforms and the Road Ahead*,63.
[247] *Msiza v. Director-General for the Department of Rural Development and Land Reform and Others* (2016) Constitutional Court of South Africa.
[248] Ngcukaitobi, *South Africa's Failed Land Reforms and the Road Ahead*, 90.
[249] Theunis R, 'Land Restitution and Reconciliation in South Africa,'164.
[250] Theunis R, 'Land Restitution and Reconciliation in South Africa,'167.

injustices suffered by those forcibly removed from their land, failing to significantly advance the process of national reconciliation.[251]

Further, critics argue against the set deadlines for settling claims, which inadvertently prioritise expedient cash settlements over thorough resolutions that would potentially mend the social fabric torn by apartheid. This rush may undermine the legitimacy of post-apartheid property rights, failing to fully resolve the issue of land injustice.[252]

Lastly, the land restitution process in South Africa faces challenges in achieving deep and meaningful settlements. This is because a single payment or legal agreement alone cannot fully restore a claimant's dignity or sense of justice. It necessitates ongoing involvement with the affected individuals to make the process truly impactful for them, rather than merely for those managing the program. Therefore, activities post-claim finalisation should be a key component of the comprehensive remedy process, empowering communities to seek redress and ensure equitable treatment in interactions with various stakeholders.[253]

Additionally, the transfer of land often leads to a decline in agricultural productivity, as new owners struggle to maintain or improve land use. Even financial compensations for buying land have limited success. The resultant shift towards smaller, subsistence farming from larger commercial operations has also reduced agricultural output, highlighting a dilemma where land redistribution satisfies social objectives but raises concerns about economic viability.[254]

3.6 Lessons Kenya can draw from South Africa.

South Africa has significantly paved the way in terms of restitution of Historical Land Injustices. In South Africa, the rights-based approach to land restitution is embedded in its Constitution, ensuring that claimants' rights are prioritised.[255] This approach is operationalized through the Restitution of Land Rights Act, 1994, which allows individuals dispossessed of property after 1913 due to racially discriminatory laws or practices to claim restitution.[256] Similarly in Kenya, the

[251] Theunis R, 'Land Restitution and Reconciliation in South Africa,'167.
[252] Theunis R, 'Land Restitution and Reconciliation in South Africa,'169.
[253] Chitonge H, 'Resettled but not redressed: Land restitution and post-settlement dynamics in South Africa' 737.
[254] Theunis R, 'Land Restitution and Reconciliation in South Africa,'169.
[255] Section 25, *Interim Constitution of South Africa* (Act No. 200 of 1993).
[256] Section 2, *Restitution of Land Rights Act* (Act No. 22 of 1994).

National Lands Commission Act caters towards resolution of Historical Land Injustices and establishes the cutoff date for claims as 1895 when Kenya effectively became a British protectorate.[257]

However, unlike South Africa, Kenya's approach has not been as explicitly rights-based. Land issues in Kenya have often been addressed through creation of investigative commissions such as the Ndungu Commission and piecemeal legislative measures. Additionally, South Africa has different legislative provisions that cater to different groups of people who were dispossessed of their land rights such as : the Extension of Security of Tenure Act which caters for the rights of occupiers [258]and the Labour Tenants Act which caters for the rights of labour tenants. [259] On the other hand, Kenya lacks categorisation of those who lost their land rights and only has one umbrella Act which is the National Land Act to cater to a broad range of land matters.[260] There is consequently a need for specialised legislative reform. Kenya could benefit from creating highly specialised legislative provisions similar to the aforementioned South African provisions, which expressly addresses historical land injustices and cater to different groups of people with different needs. Consequently, this would provide clear pathways for effective resolution.

Furthermore, in South Africa, the Commission for the Restitution of Land Rights works in tandem with the Land Claims Court, thus expediting the resolution of land claims.[261] However, in Kenya, the National Land Commission lacks a specialised judicial mechanism for land restitution which has contributed towards the slow and inefficient resolution of Historical Land Injustices. Emulating the land restitution model from South Africa through the creation of a land rights judicial body could thus prove beneficial for Kenya.

The subsequent chapter shall make a case for the implementation of the practices learnt from South Africa in restituting Historical Land Injustices.

[257] Section 15, *National Land Commission Act* (Act No. 5 of 2012).
[258] *Extension of Security of Tenure Act* (Act No. 62 of 1997).
[259] *Labour Tenants Act* (Act No. 3 of 1996).
[260] Section 5, *National Land Commission Act* (Act No. 5 of 2012).
[261] Section 22, *Restitution of Land Rights Act* (Act No. 22 of 1994).

3.7 Conclusion

In conclusion, the detailed examination of South Africa's approach to addressing historical land injustices has provided valuable insights for Kenya. These insights not only highlight strategies that have shown promise but also caution against potential pitfalls, thereby offering a nuanced understanding of land restitution processes. This analysis lays a solid foundation for enhancing Kenya's legal and institutional framework on restitution. The following chapter will delve into the implementation of these practices within the Kenyan context, further elaborating on their applicability and potential impact.

CHAPTER 4

A CASE FOR THE IMPLEMENTATION OF THE BEST PRACTICES LEARNT FROM SOUTH AFRICA IN RESOLVING HISTORICAL LAND INJUSTICES IN KENYA

4.1 Introduction.

In light of the comparative analysis of South Africa's approach to addressing historical land injustices, this chapter aims to explore the practical application of the same international best practices within the Kenyan context. Kenya and South Africa, both bearing similar scars as a result of colonialism, have both faced the challenge of rectifying historical land injustices. (hereinafter referred to as HLI's)

South Africa's restitution efforts, underpinned by a robust legal framework and institutions like the Land Claims Court and the Commission for Restitution of Land Rights, consequently serve as a pertinent model for Kenya.

4.2 Contextual Adaptation of South Africa's Legal and Institutional Frameworks

4.2.1 The Need for a Specialised Land Restitution Framework in Kenya.

i.) Land Restitution Commissions

The National Land Commission of Kenya, established under the 2010 Constitution, is tasked with several responsibilities which include; overseeing the management of public land for both national and county governments, recommending a national land policy to the government, advising on land registration, regulating land use, and taxing land. The NLC also conducts research, investigates historical land injustices, promotes traditional dispute resolution for land conflicts, and oversees land use planning. Additionally, it may undertake other duties as prescribed by national legislation.[262] The NLC thus has a broad mandate and a wide range of functions.

[262] Article 68, *Constitution of Kenya* (2010).

In fact, its broad mandate has led to concentrating on its role of review of grants and dispositions of public land to the detriment of other roles given to it by the Constitution. [263] On the other hand, South Africa's Commission for Restitution of Land Rights is solely dedicated towards restitution of rights in land. The commission oversees the land restitution process from start to finish. Its main responsibilities include acknowledging claims, assisting claimants in preparing submissions, regularly updating them on progress, and investigating claims' validity. It also mediates and settles disputes arising from claims.[264] Kenya can thus benefit from South Africa's approach, where a dedicated commission focuses exclusively on land restitution without being encumbered by additional responsibilities. This specialised mandate allows for targeted and effective handling of land restitution issues, as compared to a commission that has several different responsibilities.

It is noted that according to Investigation of Historical Land Injustices Regulations, the NLC may establish a Committee consisting of at least three members to hear and recommend appropriate remedies as stipulated in the NLC Act for claims arising out of historical land injustices.[265] However, this provision is akin to a drop of water in the ocean. This is because a small committee cannot possibly have the required capacity to deal with the land claims that have been filed. As a matter of fact, this is clearly evidenced by the Commission only managing to analyse and determine 126 claims out of a staggering 3,665 claims on Historical Land Injustices.[266]

Additionally, South Africa has an entire Act that is solely dedicated towards restitution of Land Rights,[267] while in Kenya, there are different legislations such as the NLC Act, Land Act and even more recently the Historical Land Injustice Rules. Despite the lack of one, unified compact Act to address HLI's, all those existing legislations in Kenya still fail to cater for the matter at hand. Thus Kenya is in dire need of specialised legislative reforms that cater to the legal and procedural gaps identified in this study; specifically, one compact Act that only caters to resolution of HLI'S. This reform may strongly contribute to a more seamless process in addressing HLI'S.

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[263] Musyoki B 'Addressing Past Historical Land Injustices in Kenya' Unpublished LLMThesis, University of Nairobi, Nairobi,2012, 60.
[264] Section 6, *Restitution of Land Rights Act* (Act No. 22 of 1994).
[265] Section 11, *Investigation of Historical Land Injustices Regulations,* 2017.
[266] -<https://landcommission.go.ke/resources/ >- on 5th February 2024.
[267] Section 2, *Restitution of Land Rights Act* (Act No. 22 of 1994).

ii.) Land Claims Court.

The integration of a specialised framework, akin to South Africa's Land Claims Court within the NLC, could offer a targeted pathway to resolving land claims stemming from historical injustices. This section shall consequently focus on strengthening the institutional capacity of the National Land Commission (NLC) in Kenya while drawing from the success of the Land Claims Court (LCC) in South Africa.

The Land Claims court in South Africa has the authority to adjudicate land claims, making binding decisions that can lead to the restitution of land or compensation for claimants. Additionally, it provides recourse for unsatisfied claimants who may appeal their matter to the LCC. The court operates on principles of fairness, justice, and equity, guided by the country's Restitution of Land Rights Act.[268]

In Kenya, Historical Land Injustice Rules provide that a person aggrieved by the decision of the Commission may within twenty eight days of the publication of the decisions, appeal to the Court.[269] However, this provision is only nominal, when in reality, things are very different. This is because the said courts have been clogged by all manner of suits which do not necessarily concern ownership of land. Some of these suits are commercial and civil matters but because they at some point mention land they have been transferred to the Environment and Land Courts. Furthermore, it is no secret that courts in Kenya are experiencing a backlog of cases thereby making dispensation of justice incredibly difficult.[270] Additionally, courts in Kenya have majorly referred Historical Injustice land claims to the NLC which can only provide recommendatory guidance thus creating a vicious cycle whereby victims are taken round in circles without receiving the justice they deserve. Therefore, there is a need for the establishment of a specialised judicial or quasi-judicial mechanism to work in tandem with the NLC to enhance the commission's capacity to handle complex cases of historical land injustices. This body would require judges who are well versed in land matters and undergo extensive training on the same in order to be competent enough to steer the journey towards resolution of Historical Land Injustices in the right direction.

[268] Section 22, *Restitution of Land Rights Act* (Act No. 22 of 1994).
[269] Section 29, *Investigation of Historical Land Injustices Regulations,* 2017.
[270] Musyoki B 'Addressing Past Historical Land Injustices in Kenya' Unpublished LLMThesis, University of Nairobi, Nairobi,2012, 67.

In addition, the judicial body would be exclusively dedicated towards claims related to land injustices and it would have the authority to make binding decisions in order to ensure that restitution claims are addressed with the seriousness and urgency they deserve.

iii.) Incorporation of Flexible Standards of Evidence.

In Kenya, communities such as the Endorois and Ogiek have unduly suffered as their claims for recognition of the land they had occupied under customary law were initially defeated because they could not tender documentary evidence as proof of ownership of the land.[271] On the contrary, in South Africa, the LCC, allows for the inclusion of oral histories and other non-traditional forms of evidence. Additionally, it allows for the engagement of experts such as historians and anthropologists to provide context for historical claims.[272] In Kenya, however, the only provision that caters for evidence in HLI claims states that the Committee shall not be bound by strict rules of evidence.[273] The Committee thus has the freedom to exercise discretion on the kind of evidence that will be admissible. It is thus imperative to conduct a legislative reform that will stipulate exactly what kind of evidence is admissible so as to ensure fairness and consistency due to the delicate nature of HLI's. Moreover, the admissible evidence should be flexible enough for the inclusion of oral histories and other non-traditional forms of evidence

iii.) Flexible Methods of Land Restitution

Both South Africa and Kenya have demonstrated concerted efforts towards employing flexible methods of restitution. To begin with , according to the Restitution Act, "restitution of a right in land" takes on two approaches, the restoration of a right in land or equitable redress.[274] 'Restoration of a right in land' means the return of a right in land or a portion of land dispossessed after 19 June 1913 as a result of past racially discriminatory laws or practices; while "equitable redress" means any equitable redress, other than the restoration of a right in land, including - the granting of an

[271] Karanja S, 'Designing a Land Restitution Programme in Kenyan Emerging Transitional Justice' 28(2) *Nordic Journal of Human Rights*,2011.26.
[272] Section 30(1), *Restitution of Land Rights Act* (Act No. 22 of 1994).
[273] Section 13(3), *Investigation of Historical Land Injustices Regulations,* 2017.
[274] Section 1, *Restitution of Land Rights Act* (Act No. 22 of 1994).

appropriate right in alternative state-owned land or the payment of compensation.[275] Meanwhile in Kenya, the NLC act provides an inclusive list of remedies which include; restitution; compensation, if it is impossible to restore the land; resettlement on an alternative land; rehabilitation through provision of social infrastructure; affirmative action programmes for marginalised groups and communities; creation of wayleaves and easements; order for revocation and reallocation of the land; order for revocation of an official declaration in respect of any public land and reallocation; sale and sharing of the proceeds; refund to bona fide third party purchasers after valuation; declaratory and preservation orders including injunctions.[276] Consequently, communities that are adamant on returning to the status quo ante, the state before the injustices took place, can seek reprieve in the broad range of remedies mentioned above. This is especially key in situations whereby contested land has passed through a series of owners thus making it complex to restore the land to its rightful owners without exacerbating more land injustices. In light of this discussion, Kenya offers a broader spectrum of remedies to address land injustices, extending beyond restoration and compensation. Additionally, Kenya's approach is more flexible, with a variety of legal and practical remedies to ensure justice and restoration, while South Africa's approach is more narrowly focused on land restoration and equitable alternatives.

However, South Africa makes up for the narrow focus through the Land Claims Court.

The Land Claims Court has employed a number of compensation mechanisms to address the diverse needs and circumstances of claimants. This flexibility is crucial in a context where the market value of land may not fully compensate for historical injustices or the emotional and cultural significance of the land to communities. Kenya could consider adopting a similarly flexible approach to compensation, possibly adopting elements of the Geldenhuys formula to adjust compensation based on constitutional factors and the unique context of each claim.[277]

iv.) Admissibility of Land Claims.

To begin with, in South Africa, a person must meet certain criteria in order to be entitled to restitution of a right in land. The criteria is as follows: A person shall be entitled to restitution of

[275] Section 1, *Restitution of Land Rights Act* (Act No. 22 of 1994).
[276] Section 15(9), *National Land Commission Act* (Act No. 5 of 2012).
[277] Ngcukaitobi, *South Africa's Failed Land Reforms and the Road Ahead*, 91.

a right in land if - (a) he or she is a person dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices; or if it is a deceased estate dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices; or he or she is the direct descendant of a person referred to in paragraph (a) who has died without lodging a claim and has no ascendant who - (i) is a direct descendant of a person referred to in paragraph (a); and (ii) has lodged a claim for the restitution of a right in land; or is a community or part of a community dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices.[278] Furthermore, a claim for such restitution is only admissible if it is lodged not later than 31 December 1998.[279] Similarly in Kenya, a claim alleging historical land injustice shall be permissible if it was occasioned by— colonial occupation; independence struggle; pre-independence treaty or agreement between a community and the government; development-induced displacement for which no adequate compensation or other form of remedy was provided, including conversion of non-public land into public land; inequitable land adjudication process or resettlement scheme; politically motivated or conflict based eviction; corruption or other form of illegality; natural disaster; or other cause approved by the Commission.[280] Once more, Kenya has a more inclusive list that caters to a broad range of land injustices. However, one of the core provisions that is unique to South Africa that would be beneficial to Kenya is the provision that stipulates that that an individual is eligible for the restoration of a land right if they are part of a deceased estate that lost land rights after June 19, 1913, due to previous laws or practices based on racial discrimination. Additionally, this applies to individuals who are direct descendants of such dispossessed persons, provided these descendants have passed away without filing a claim and have no living direct ancestors who themselves are direct descendants of the dispossessed individuals.[281] Emulating such a provision would give descendants of displaced communities, the right to restitution of land which was unduly expropriated from their forefathers. Communities such as the Endorois, Ogiek and Maasai would thus have another basis from which to claim their rights from.

[278] Section 2, *Restitution of Land Rights Act* (Act No. 22 of 1994).
[279] Section 2, *Restitution of Land Rights Act* (Act No. 22 of 1994).
[280] Section 15(4), *National Land Commission Act* (Act No. 5 of 2012).
[281] Section 2, *Restitution of Land Rights Act* (Act No. 22 of 1994).

Secondly, both Kenya and South Africa have established a cut off point from which land claims can be made. In Kenya, it is 1895[282], while in South Africa, it is 1913.[283] These two cut off points are widely accepted. However, the source of conflict is the deadline for filing claims. In South Africa, the deadline for land restitution claims was originally set for December 31, 1998. In 2014, legislation extended this period until June 30, 2019, leading to numerous new applications. However, the Constitutional Court nullified this amendment, stopping further claims and no new legislation has been passed to reopen the claims process, leaving many claims unresolved. The Constitutional Court has stipulated that claims made between 2014 and 2016 cannot be processed until all earlier claims are addressed.[284] In Kenya, the deadline for filing further claims lapsed on 1st May 2017.[285] Kenya can learn from the mistakes of South Africa and instead choose to enact legislation to reopen the window for filing claims only after the pending claims are sufficiently resolved.

v.) Utilising a rights-based approach

South Africa has adopted a rights-based approach to address historical land injustices by categorizing dispossessed individuals into distinct groups, such as "occupiers" and "labour tenants," and enacting specific legislations tailored to their unique needs. For instance, the Labour Tenants Act aims to reverse the effects of discriminatory laws that dispossessed Black people of land, ensuring protection for labour tenants' existing rights and the opportunity to acquire real rights in land.[286] Similarly, the Extension of Security of Tenure Act (ESTA) focuses on protecting "occupiers" from unlawful evictions, providing them with legally secure tenure rights or comparable redress, and recognizing their cultural rights, including burial rights on lands they reside on but do not own.[287]

From South Africa's approach, Kenya can learn the importance of distinguishing between different groups of historically dispossessed people—such as those displaced to reserves during colonialism, victims of land grabbing, and those affected by corruption—and crafting legislation

[282] Section 15(2), *National Land Commission Act* (Act No. 5 of 2012).
[283] Section 2, *Restitution of Land Rights Act* (Act No. 22 of 1994).
[284] *Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others* (2016) Constitutional Court of South Africa.
[285] Section 15(3) *National Land Commission Act* (Act No. 5 of 2012).
[286]Chapter II, Chapter III, *Labour Tenants Act* (Act No. 3 of 1996).
[287] Section 1, *Extension of Security of Tenure Act* (Act No. 62 of 1997).

that addresses their specific rights and needs. Moreover, acknowledging and protecting cultural rights over land, as evidenced by South Africa's provisions for burial rights under ESTA, presents a critical lesson for Kenya. In Kenya, in the case of the Ogiek and Endorois communities, the court at first stated that it did not believe Kenyan law should uphold a people's ownership of land based on historic occupation or cultural rights. Consequently, neither the Ogiek nor the Endorois communities were compensated adequately as required by law for the loss of their land.[288] This is a pertinent example of how historically dispossessed groups are often treated under a single umbrella Act without recognition of their diverse needs and rights, including social and cultural rights. By emulating South Africa's detailed and group-specific legal framework, Kenya could ensure more equitable redress for historical land injustices and respect for cultural rights, regardless of land ownership.

vi.) Alternative Dispute Resolution

South Africa also employs the use of alternative dispute resolution mechanisms in land restitution claims.

The Land Claims Court is empowered by the Restitution Act to stay the proceedings at any stage if "it becomes evident that there is an issue which might be resolved through mediation and negotiation". The court can then order the parties "to attempt to settle the issue through a process of mediation and negotiation"[289]Additionally the Land Claims Court is also empowered to refer both land claims and eviction matters under the Labour Tenants Act to arbitration.[290]

Similarly, the Restitution Act empowers the Chief Land Claims Commissioner to direct the parties to attempt to settle their dispute through a process of mediation and negotiation.[291]

Moreover, the Labour Tenants Act allows the Director-General to "appoint one or more persons with expertise in relation to dispute resolution to facilitate meetings of interested parties, and to attempt to mediate and settle a dispute".[292]

[288] Karanja S, 'Designing a Land Restitution Programme in Kenyan Emerging Transitional Justice' 26.

[289] Section 35 A (1), *Restitution of Land Rights Act* (Act No. 22 of 1994).
[290] Section 19,33, *Labour Tenants Act* (Act No. 3 of 1996).
[291] Section 13, *Restitution of Land Rights Act* (Act No. 22 of 1994).
[292] Section 36(1), *Labour Tenants Act* (Act No. 3 of 1996).

Furthermore, the Extension of Security of Tenure Act provides that: "A party may request the Director-General to appoint one or more persons with expertise in dispute resolution to facilitate meetings of interested parties and to attempt to mediate and settle any dispute in terms of this Act."[293]

Consequently, the three key statutes involved in restitution of Land Rights include options for alternative dispute resolution mechanisms. Likewise, in Kenya, the National Land Commission has the mandate to encourage the application of traditional dispute resolution mechanisms in land conflicts.[294] However, there are no specific legal provisions that exclusively touch on what stage of the land claim process that alternative dispute resolution mechanisms should be used, the procedure for using them , or if the outcome of this process will be legally binding. Consequently, Kenya could benefit from adopting South Africa's method, which explicitly defines how to apply alternative dispute resolution in land restitution cases while offering a clear and organised process for doing so.

The use of Alternative Dispute Resolutions is crucial due to the fact that court processes are often fraught with challenges such as political interference, insufficient resource allocations, attacks on judicial officers and even attempts to undermine court decisions.[295] It is thus important to employ ADR mechanisms to supplement the role of the court and land commissions.

4.2.2 Conclusion

In conclusion, the contextual adaptation of South Africa's legal and institutional frameworks for land restitution is a beacon of hope for Kenya's efforts to address historical land injustices. By learning from South Africa's successes and challenges, Kenya can refine its legal and institutional framework in order to make significant strides in addressing historical land injustices. This will in turn ensure that the NLC not only has the mandate but also adequate capacity and mechanisms to fulfil its crucial role in land reform.

[293] Section 21, *Extension of Security of Tenure Act* (Act No. 62 of 1997).
[294] Article 67, *Constitution of Kenya* (2010).
[295] < https://icj-kenya.org/news/judicial-resilience-and-resistance-navigating-challenges-for-an-independent-judiciary/> on 2nd February 2024.

CHAPTER 5

FINDINGS, RECOMMENDATIONS AND CONCLUSIONS

5.1. Introduction

This chapter highlights the findings, recommendations and conclusions of this study. It also demonstrates whether the research objectives and the hypothesis of this study have been fulfilled.

5.2. Findings

5.2.1: The inadequacies of the National Land Commission

To begin with, the functions of the NLC are majorly consultative and advisory in nature.[296] Hence, they can only give recommendations to the Ministry of Lands and relevant authorities to address historical land injustices but they cannot act on these recommendations or implement them.[297] Furthermore, the court's stance on the recommendatory powers of the NLC indicates a reluctance to enforce commission findings, further complicating the resolution of historical injustices.[298] As a result, reprieve is sought from the Environment and Lands Court which is already overwhelmed with other matters and is precluded by the Statute of Limitations from listening to land claims that are historical in nature.[299]

5.2.2: The limitations of the legal framework addressing Historical Land Injustices.

[296] *In the Matter of the National Land Commission*, Advisory Opinion No. 2 of 2014, para 314.
[297] Atieno B, 'Assessing the effectiveness of the National Land Commission in addressing irregular and illegal allocation of land in Kenya' Unpublished LLM Thesis, University of Nairobi, 2016.
[298] *In the Matter of the National Land Commission*, Advisory Opinion No. 2 of 2014, para 314.
[299] Section 7, *Limitation of Actions Act* (Chapter 22 of 2012).

Secondly, the existing legal provisions, while comprehensive, are not fully adequate to address the depth and complexity of historical land injustices. They lack a specialised approach that fully recognises and caters towards different groups of victims with different needs, among other aspects of the process of resolving Historical Land Injustices.

5.2.3: The lack of proper enforcement mechanisms.

Thirdly, The NLC's investigative and enforcement powers are limited, often resulting in their recommendations being ignored or not implemented effectively. The lack of a clear enforcement mechanism for NLC recommendations significantly hinders the resolution process.

5.2.4: Statutory time Limitations in Addressing Historical Land Injustices.

Additionally, the statutory time limits on filing claims for historical land injustices restrict the ability of victims to seek redress.[300] Interestingly enough, the NLC Act provides that the provisions that cater towards resolution of HLI's will be repealed within ten (10) years.[301] The NLC Act, came into force on 2nd May, 2012, therefore, the statutory timeframe on addressing historical land injustices already lapsed on 1st May, 2022 with very minimal progress made on addressing the same.[302] Additionally the five (5) year window on the admission of claims, may have prevented individuals with genuine cases from lodging their claims before 1st May 2017.[303]

5.2.5: Political Goodwill

The political elite in Kenya have a very strong influence over land reforms and thus they intentionally impede the implementation of these reforms in order to protect their own interests.

5.3 Recommendations.

This study recommends the following in view of the foregoing discussions. The recommendations are majorly premised on the significantly successful model employed in South Africa.

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[300] Section 15(3) *National Land Commission Act* (Act No. 5 of 2012).
[301] Section 15(10) *National Land Commission Act* (Act No. 5 of 2012).
[302]Section 15(10) *National Land Commission Act* (Act No. 5 of 2012.)
[303] Section 15(3) *National Land Commission Act* (Act No. 5 of 2012).

5.3.1 The need for a specialized Judicial body

Chapter 3 extensively discussed the role of the Land Claims Court in South Africa's land restitution process. Currently the NLC is what some may term as a 'toothless dog'. Therefore, it is necessary to expand the powers of the NLC to operate as a quasi-judicial body, or alternatively to create a Lands Claims Court which would only deal with Historical Land Injustice Claims and exercise supervisory jurisdiction over the NLC.

The Land Claims Court in South Africa conducts its proceedings in open court, except under exceptional circumstances, thus enhancing its transparency and accountability.[304] This approach minimally allows for corruption. The court also complements the Commission for Restitution of Land Rights, focusing solely on land restitution cases.[305] This division of responsibilities helps prevent case backlogs and ensures the court operates within its capacity to manage all claims effectively. Emulating this approach shall thus insulate the creation of a Land Claims court in Kenya against the common problems that bedevil the Kenyan Judicial System.

Furthermore, to avoid delays in justice delivery, it is crucial to enforce strict case adjudication timelines. This can be achieved by setting procedural rules that cap the length of each case stage and give priority to older and urgent cases.

Moreover, the selection of judges and court staff should be thorough and transparent, involving civil society in the process to ensure integrity and reduce corruption risks. Additionally, providing judges and staff with specialized training on land rights, anti-corruption efforts, and ethical conduct is vital. Such education will equip them to address the nuances of Historical Land Injustice Claims and maintain the highest ethical standards.

5.3.2 The need for legislative amendments and legislative provisions on restitution of Historical Land Injustices

[304] Section 28(B), *Restitution of Land Rights Act* (Act No. 22 of 1994).
[305] Section 22, *Restitution of Land Rights Act* (Act No. 22 of 1994).

As has been observed from this study, the legislative framework governing the National Land Commission is simply inadequate in enabling the National Land Commission to carry out its mandate of resolving Historical Land Injustices.

Consequently, as referenced from South Africa, it is imperative to enact an Act that extensively and comprehensively deals with Historical Land Injustices. This legislative framework would underscore the creation of a Lands Claims court to supplement the role of the NLC, it would address the rights of the claimants by putting them at the forefront of the restitution process, it would provide for the method of calculating financial compensation and lastly, in the interest of the substantive justice, it would amend the statutory time limits imposed on the NLC. Furthermore, it would provide for the rules of admissible evidence in HLI claims which include both oral evidence and expert evidence from Historians. Moreover, it would provide for the use of alternative dispute resolution mechanisms while stating which stage of the land claim process it would be admissible to do so, the procedure for utilising these mechanisms and finally the binding nature of the outcome agreed upon.

Lastly, this Act would provide for remedies such as equitable redress that could lead to exploring more options in recognizing the people's cultural rights as was observed in South Africa, whereby 'occupiers' have burial rights on land that they do not own. [306]

5.3.3 Engagement of all stakeholders.

There is a need to engage traditional leaders, influential politicians, and civil society organizations who have a vested interest in resolving land disputes in order to resolve this persistent land problem. This can be done through organising roundtables that include MPs, local government officials, community leaders, and affected populations to discuss land issues transparently and to brainstorm solutions collectively.

Additionally, all new laws or amendments to existing laws regarding land rights should be conducted in a manner that involves a participatory approach where feedback from affected communities is sought and taken into consideration.

Furthermore, bodies tasked with the resolution of HLI'S should undergo regular audits in order to promote transparency, accountability as well as to deter political interference and corruption.

[306] Section 6(2), *Extension of Security of Tenure Act* (Act No. 62 of 1997).

5.4 Conclusion

This study has proved its hypothesis, fulfilled the research objectives and has given a response to the problem statement.

The objectives of this study were as follows:

1. To evaluate the effectiveness of the existing legal and institutional framework in resolving Historical Land Injustices.

2. To conduct a comparative study with South Africa that established a Lands Claims Court to address historical land injustices.

3. To propose recommendations on how the issue of Historical land injustices can be resolved in Kenya as drawn from South Africa.

5.4.1. Objective I

This study has assessed the legislative, policy and institutional framework for the resolution of Historical Land Injustices in Kenya. Additionally, it has highlighted the gaps in the aforementioned framework that render the National Land Commission incapacitated from fulfilling its mandate as well as the improvements that can be made.

5.4.2. Objective II

The examination of the Land Claims Court done by this study has established the specialised and collaborative role the Court plays in resolution of Historical Land Injustices which can be emulated by Kenya.

5.4.3 Objective III

This study has highlighted certain measures that can be adopted in Kenya to facilitate efficient and expeditious handling of Historical Land Injustice Claims. These measures are drawn from the lessons taken from the collaborative role of the Lands Claims Court and Commission for Restitution of Historical Land Injustices in South Africa.

5.4.4. Hypothesis

This study proceeds on the premise that the National Land Commission in Kenya has legal frailties and challenges that render it inadequate to efficiently carry out its mandate of resolving Historical Land Injustices.

This study has proved this hypothesis by examining the National Land Commission in Kenya and comparing it with its counterparts in South Africa that have displayed significantly better success in resolving Historical Land Injustices.

The inadequacies of the National Land Commission have thus been addressed through the extensive analysis of South Africa, in chapter 3, which is a model that Kenya can implement in the road to restitution of Historical Land Injustices.

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