

**INADEQUACY OF THE CURRENT LAND LAWS TO ADDRESS
THE PROBLEM OF LAND GRABBING IN KENYA**

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

By

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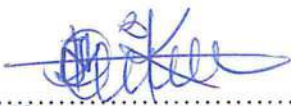
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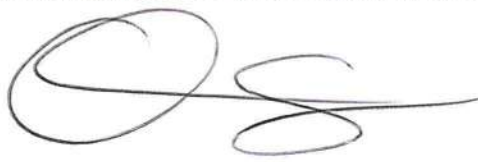
MAY 2018

DECLARATION

I, **KISA NAOMI JEMOSOP**, 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.

Signed: 
Date: 18th MAY 2018

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

Signed: 
SMITH OTIENO

16th MAY 2018

DEDICATION

This work is dedicated to my parents, Mr. and Mrs. Cheruiyot and my siblings, Grace, Emmy and Joshua.

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I wish to thank God for giving me the grace to undertake the LLB programme, and for the strength and wisdom that was required to do this dissertation.

I am grateful to my supervisor, Smith Otieno for his guidance, patience, time and effort during the entire period of working on my dissertation.

I wish to thank Strathmore Law School for giving me the resources and sufficient knowledge to undertake this task.

I also wish to thank my family members for their immense support.

LIST OF STATUTES

Constitution of Kenya 2010

Constitution of Kenya 1969 (now repealed)

Crown Lands Ordinance 1915 (repealed)

Government Land Act Cap 280 Laws of Kenya (now repealed)

Land Act No. 6 of 2012

Land Registration Act No. 3 of 2012

National Land Commission Act No. 5 of 2012

Truth, Justice and Reconciliation Commission Act, 2008

LIST OF ABBREVEATIONS

NLP: National Land Policy.

COK: Constitution of Kenya.

LRA: Land Registration Act.

NLC: National Land Commission.

RLA: Registration of Lands Act.

CLMBs: County Land Management Boards.

TJRC: Truth, Justice and Reconciliation Commission.

ABSTRACT

Land grabbing has been a problem in Kenya since the colonial period. Successive governments have not been able to deal with this problem. The current land laws were enacted in order to deal with various land issues including land grabbing, however, this problem is present, years after the enactments of the current land laws. This study explores the inadequacy of the current land laws in Kenya to address the problem of land grabbing in Kenya. It also looks at the National Land Commission and the Ministry of Lands and shows their limitations in dealing with land grabbing in Kenya. The study recommends changes in the current land laws to ensure that these laws are able to address the problem of land grabbing in Kenya.

TABLE OF CONTENTS

Declaration	i
Dedication	ii
Acknowledgements.....	iii
List of statutes.....	iv
List of abbreviations.....	v
Abstract.....	vi
Table of contents.....	vii

1. INTRODUCTION

1.1 Background to the study.....	1
1.2 Problem statement.....	3
1.3 Objectives.....	4
1.4 Research questions.	4
1.5 Hypotheses.....	5
1.6 Literature review.....	5
1.7 Theoretical framework.....	8
1.7.1 Social contract.....	8
1.7.2 Legal theory.....	9
1.7.3 Economic theory of property.....	10
1.8 Research methodology.....	11
1.9 Chapter breakdown.....	11

2. THEORETICAL FRAMWORK

2.1 Introduction.....	13
2.2 Theoretical framework.....	13
2.2.1 Social Contract.....	13
Thomas Hobbes.....	13
Jean-Jacques Rousseau.....	14
John Locke.....	15

2.2.2	Legal Theory.....	16
2.2.3	Economic Theory of Property.....	17
3.	HISTORY OF LAND GRABBING IN KENYA	
3.1	Introduction.....	20
3.2	Land ownership before colonisation.....	20
3.3	Origin of land related problems during the Colonial period.....	20
3.4	Land grabbing in Kenya during the post-colonial period.....	24
3.5	Conclusion.....	28
4.	LIMITATIONS OF THE CURRENT LAND LAWS IN ADDRESSING THE PROBLEM OF LAND GRABBING IN KENYA	
4.1	Introduction.....	29
4.2	Review of the current legislation related to land.....	30
4.2.1	Constitution of Kenya, 2010.....	30
4.2.2	Land Registration Act, 2012.....	31
4.2.3	Land Act, 2012.....	31
4.2.4	National Land Commission, 2012.....	32
4.3	Institutional Frame work.....	32
4.3.1	National Land Commission.....	32
4.3.2	Ministry of Lands, Housing and Urban Development.....	34
4.4	Limitations of the NLC and the Ministry of Lands.....	34
4.5	Limitations of the current land laws.....	35
4.6	Conclusion	37
5.	RECOMMENDATIONS AND CONCLUSION	
5.1	Introduction.....	38
5.2	Findings.....	38
5.3	Recommendations.....	39
5.4	Conclusion.....	40
6.	BIBLIOGRAPHY.....	42

CHAPTER 1

INTRODUCTION

1.1 BACKGROUND TO THE STUDY

Land is one of the most important assets in Kenya as most of the economic activities revolve around agriculture both in the subsistence and large scale.¹ This was evident in the struggle for independence in Kenya where a major reason for the struggle was to liberate land from the white settlers.² The founding president of the Republic of Kenya, the late Jomo Kenyatta in a speech acknowledged that land is a great asset in Kenya, a heritage that the Kenyan citizens received from their forefathers, that in land lies the salvation and survival of Kenya and that it is in this knowledge that Kenyans fought for the freedom of the country.³

The problem of land grabbing is seen from the colonial period and post-colonial periods. Before colonialism land was communally held by the different communities and the land laws applicable were customary laws.⁴ However, during the colonial period land was taken by the white settlers, thus displacing the Kenyan natives who were forced to reside in reserves. Various laws were enacted such as the **Crown Lands Ordinance**⁵ which provided that Crown land includes all land including all the land held by natives, therefore, the ordinance facilitated the dispossession of the Africans of their land.⁶ The Crown's Land Ordinance of 1915 also provided power to the monarch to sell freehold titles to the settlers not exceeding 1000 acres and leasehold titles of up to 999 years to whomever the monarch wished.⁷

On attaining independence, various land laws were enacted including **The Government Land Act**⁸ which gave the president unlimited power over matters relating to government land.⁹ The independent government adopted the British laws and only made superficial amendments hence

¹ Patrick O Alila, RoseMary Atieno, *Agricultural Policy in Kenya: Issues and Processes*.

² Njuguna H, Baya M, *Land Reforms in Kenya: An Institution of Surveyors of Kenya (ISK) initiative*.

³ Jomo Kenyatta, *Suffering Without Bitterness: The Founding of the Kenyan Nation*, North-western University Press, 1948.

⁴ Kimaiyo TJ, *Ogiek Land Cases and Historical Injustices, 1902-2004*, Chapter 6.

⁵ Crown Lands Ordinance, 1915 (Repealed Crown Lands Ordinance, 1902).

⁶ Kimaiyo T, *Ogiek Land Cases and Historical Injustices*.

⁷ Ndung'u P, *Tackling Land Related Corruption in Kenya*, November 2006.

⁸ The Government Lands Act (Cap 280).

⁹ Section 3, *the Government Land Act (Cap 280)*.

the powers of alienating land was transferred to the president meaning, the president could allocate land to whomever he wished.¹⁰ Too many land laws were enacted which posed a problem as they contradicted each other hence, implementation of recommendations was hindered.¹¹

In an effort to resolve the problem of too many laws in Kenya and various land injustices in Kenya, various commissions were established including: **The Njonjo Commission**¹² which found that some of the causes of land problems included corrupt and irregular way land was administered, failure to amend land laws and failure of the land offices to be efficient and to comply with set legislation and also the concentration of power in the hands of the president and commissioner of lands when land is being allocated.¹³ It gave recommendations on the need to establish the National Land Authority and District Land Authority to monitor administration of land matters and also for the radical change in administration and management of land in Kenya.¹⁴ **The Ndung'u Land Commission**¹⁵ addressed the issue on irregular allocation of public land.¹⁶ The commission found out that there were many illegal allocation of lands by the president and other senior public officials, that the government made a mistake of implementing the colonial laws as it did not take into account the new political and social equation and the lack of a national land policy.¹⁷ It gave recommendations on the amendment of the land laws and also for the formation of a National Land Policy.¹⁸ **The Truth, Justice and Reconciliation Commission**¹⁹ was established by the Truth, Justice and Reconciliation Act in section 3.²⁰ One of its mandates was to inquire on historical land injustices, illegal and irregular acquisition of

¹⁰ Ndung'u P, *Tackling Land Related Corruption in Kenya*, November 2006.

¹¹ Kieyah J, Mbae-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.

¹² The Njonjo Commission of Inquiry into Land Law Systems of Kenya, (1999).

¹³ *Project Completion Report and Department For International Development (DFID) support to the Kenya Land Reform Process; Final Report*, 11, August, 2003, Appendix 2

¹⁴ *Project Completion Report and DFID support to the Kenya Land Reform Process; Final Report*, 11, August, 2003

¹⁵ The Commission into the Illegal and Irregular Allocation of Public Land (hereafter The Ndung'u Land Commission), 2003.

¹⁶ Ndung'u P, *Tackling Land Related Corruption in Kenya*, November 2006.

¹⁷ Ndung'u P, *Tackling Land Related Corruption in Kenya*, November 2006.

¹⁸ Ndung'u P, *Tackling Land Related Corruption in Kenya*, November 2006.

¹⁹ The Final Report of the Truth, Justice and Reconciliation Commission of Kenya, 17 May 2013 (hereafter TJRC Report, 2013).

²⁰ Section 3, *Truth, Justice and Reconciliation Commission Act*, 2008.

land.²¹ The commission found out that one of the causes of displacement of persons was the colonial laws, policies and practices.²² It gave recommendations that the National Land Commission and Ministry of Lands should implement measures to revoke the illegally obtained titles, to update the computerized inventories of land that is accessible to all Kenyans and also to implement the reparations for historical injustices.²³

The **National Land Policy**²⁴ was formulated to provide guidelines on how to use land in an efficient, sustainable and equitable use of land. It addressed the issue on compulsory acquisition of land and land tenure. This was implemented in the Constitution of Kenya 2010. According to Paul Ndung'u, for a country that almost wholly relies on agriculture, it is almost criminal to operate without a land policy.²⁵ Article 60 (1) (b) of the Kenyan Constitution provides for the principle of secure land rights.²⁶ There is therefore a need to address all matters that may hinder security of land rights by legislation as the constitution provides that the principles shall be implemented through the National Land Policy and the legislations.²⁷

The Constitution of Kenya required for the legislation of laws that will address the land issues in Kenya.²⁸ This led to the enactment of the National Land Commission 2012, The Land Act 2012 and The Land Registration Act 2012.

1.2 STATEMENT OF PROBLEM

The problem of land grabbing began during the colonial period when land held by Kenyan natives were taken and given to the white settlers. This problem escalated when various laws enacted to resolve land grabbing became ineffective as they were too many and contradictory. The need to resolve the problem of land grabbing was a key foundation for the formulation of the National land policy in Kenya. The problem of land grabbing is still an issue in Kenya. The current land laws of Kenya enacted in 2012 were supposed to be a solution to land injustices

²¹ Karanja S, *Restitution Programmes in Kenyan Emerging Transitional Justice*.

²² Kituo Cha Sheria, *Summary of the Truth, Justice and Reconciliation Commission (TJRC) Report*, 2013, 46

²³ TJRC Report, 2013, 47, 48.

²⁴ Sessional Paper no. 3 of 2009 on National Land Policy, August 2009.

²⁵ Ndung'u P, *Tackling Land Related Corruption in Kenya*, November 2006, 6

²⁶ Article 60 (1) (b), *Constitution of Kenya*, 2010.

²⁷ Article 60 (2), *Constitution of Kenya*, 2010.

²⁸ Article 68, *Constitution of Kenya*, 2010.

including land grabbing by reducing the laws on land, however, this is not the case as the problem of land grabbing is still present.²⁹ The new land laws including the Constitution of Kenya 2010 have not adequately addressed land grabbing, moreover, the National Land Commission and The Ministry of Lands have been inefficient in resolving this problem. It is therefore important that the law should seek to resolve this problem.

1.3 OBJECTIVES

1. To determine the extent of land grabbing in Kenya.
2. To investigate the extent to which the new Kenya Land Laws in Kenya are inadequate to address the issue of land grabbing in Kenya.
3. To investigate the effectiveness of the National Land Commission and the Ministry of Lands in resolving land grabbing.
4. To investigate the extent to which the National Land Commission and the Ministry of Lands are limited to resolve Land Grabbing in Kenya.
5. To put forth recommendations on how the problem of Land grabbing in Kenya can be resolved.

1.4 RESEARCH QUESTIONS

1. What is the extent of Land grabbing in Kenya?
2. How has the Constitution of Kenya 2010 and the current land laws in Kenya addressed the problem of Land grabbing and how to resolve it?
3. To what extent are the National Land Commission and the Ministry of Land limited in resolving the problem of Land grabbing in Kenya?
4. What are the ways in which Kenya can take to resolve the problem of Land grabbing in Kenya?

²⁹ Manji A, *Whose Land is it anyway? The Failure of Land Reform in Kenya*, Africa Research Institute, June 2015.

1.5 HYPOTHESES

1. The problem of land grabbing is not addressed adequately by the existing Kenya land laws.
2. The National Land Commission and the Ministry of Lands are limited in solving the problem of land grabbing in Kenya.
3. The inadequacy of the current land laws in addressing the problem of land grabbing in Kenya has to be addressed for the problem to be resolved.

1.6 LITERATURE REVIEW

The land problem, including land grabbing has brought various comments by academics. The literature to be reviewed relates to historical and legal development of land laws in Kenya, including the laws that were enacted post 2010 Constitution of Kenya and have failed to address the problem of land grabbing in Kenya.

Ambreena Manji³⁰ looks at the process of land reform in Kenya through the enactment of the new land laws 2012 and states that despite the constitutional and political importance of the new legislation, the process was done hastily and without the involvement of legislators and citizens. According to Manji, the new Kenyan land laws show marked continuity with the past and is not transformational and have not addressed the main issue of political control over allocation and management of land.

Ambreena Manji in her article on the failure of land law reform in Kenya³¹ states that the Parliament neglected the critiques of scholars with regards to the faults in the new land laws before enactment particularly on the issue of borrowing provisions from other African countries without due attention to their relevance or suitability in Kenya, not identifying the inconsistencies between the National Land Policy and the constitution, not addressing in detail

³⁰ Manji A., *The Politics of Land Reform in Kenya 2012*, African Studies Review, 57, 2014

³¹ Manji A., *Whose Land is it anyway? The Failure of Land Law Reform in Kenya*, Africa Research Institute, June 2015

the functions of the devolved land administration bodies and not involving the people in the law making process as required by the constitution.³²

Jacqueline Klopp and Odenda Lumumba in their article “Kenya and the global land grab” have looked at Kenya’s experience of land grabbing.³³ The article states that various reforms have taken place to address unjust allocation of public land, including the enactment of the 2012 land laws. However, the process of developing the land laws was poorly organized and had inadequate discussion and participation by independent experts and the public.³⁴

Paul N. Ndung’u in his article on “Tackling Land Related Corruption in Kenya”³⁵ looks at the various laws governing land during the colonial period and after independence. He states that Kenya inherited the British Ordinances and did superficial amendments hence, powers of allocating land in Kenya were transferred from the British Monarch to the president³⁶. He also mentions the Ndung’u land commission which identified that the land laws had weaknesses that led to massive land grabbing of public land.

Land grabbing has been closely linked to corruption, in that, corruption is the fraudulent and dishonest conduct mainly by those in power. Jacqueline Klopp³⁷ has addressed the problem of land grabbing in Kenya and states that the intensification of irregular allocation of public land to well-connected individuals is an under scrutinized case of deepening corruption. She states that institutions such as Kenya Human Rights Commission and Kituo cha Sheria raise issues of how Kenya’s land legislation and local authority need to be changed so as to be more accountable to the public.

Duncan Okowa’s article on *Land Reforms in Kenya*,³⁸ states that the selective land allocation by officials in order to have political support by those in power, inefficiency and corruption are some of the causes of land-related problems.³⁹ He further states that factors such as power

³² Article 10(2) (a), *Constitution of Kenya*, 2010.

³³ Klopp J, Lumumba O, *Kenya and the global land grab: a view from below*, 2014.

³⁴ Klopp J, Lumumba O, *Kenya and the global land grab*, 2014.

³⁵ Ndung’u P, *Tackling Land Related Corruption in Kenya*, November 2006.

³⁶ Ndung’u P, *Tackling Land Related Corruption in Kenya*, 2006.

³⁷ Klopp J, *Pilfering the Public: The Problem of Land Grabbing in Contemporary Kenya*, *Africa Today*, vol 47, no 1, 2000.

³⁸ Okowa D, *Land Reforms in Kenya; Achievements and the Missing link*, Institute for Law and Environmental Governance.

³⁹ Okowa D, *Land Reforms in Kenya*.

struggles and persistent wrangles between the National Land Commission and the Ministry of Lands and presence of grey areas in the law in terms of clearly defining the roles of the two functions are hindrances to implementation of land reforms⁴⁰.

Tony Burns and Kate Dalrymple in their article on *Conceptual framework for governance in Land Administration*, state that secure property rights are undermined by weak governance practices, overlapping laws and weak institutions.⁴¹ The lack of good governance provides an environment for corruption and misuse of public resources.

In *Public land, historical land injustices and the New Constitution* by Paul Syagga, the land grabbing phenomena in what he terms as 'the land grabbing mania' was very rampant that land was no longer viewed as belonging to the Kenyan people but as a vacant space to be dished out to politically friendly individuals, thus, created inequalities in land ownership⁴². The article also gives recommendations such as restoration of people's entitlement to land and land institutions being independent and available for public scrutiny.⁴³

The final 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.⁴⁴ Its objective was to promote peace, justice, national unity, healing and reconciliation among the people of Kenya.⁴⁵ This was to be done through investigating and establishing a record of human rights violations by the state since independence, explain the causes of these violations and to provide recommendations such as prosecution of perpetrators and reparations for victims. One of the key violations included in the report includes historical land injustices in Kenya during the colonial era and post-independence era. According to the report, all post-independence government regimes failed to honestly and adequately address these injustices.⁴⁶

⁴⁰ Okowa D, *Land Reforms in Kenya*.

⁴¹ Burns T, Dalrymple K, *Conceptual Framework for Governance in Land Administration*, International Federation of Surveyors, August 2008.

⁴² Syagga P, *Public Land, Historical Land Injustices and the New Constitution*, Constitution Working Paper No 9, Society for International Development (SID).

⁴³ Syagga, *Public Land, Historical Land Injustices and the New Constitution*.

⁴⁴ The Truth Justice and Reconciliation (TJR) Act, 2013.

⁴⁵ Kenya Transnational Justice Network, *Summary of the Truth, Justice and Reconciliation Commission Report*, 1.

⁴⁶ Kenya Transnational Justice Network, *Summary of the Truth, Justice and Reconciliation Commission Report*, 17.

The Report of The Ndung'u Commission analyses the findings of the Ndung'u Commission.⁴⁷ The Ndung'u Commission was established in June 2003 to investigate the illegal or irregular allocation of public land in Kenya.⁴⁸ The commission recommended legal and administrative measures to the restoration of such land to its proper title and purpose. The report provides that the lead in public plunder has consistently been given from the top.⁴⁹ Some of the recommendations provided in the report include the need for an inventory of public land and computerization of land records and also the introduction of a comprehensive land policy.

The Njonjo Land Commission Report was finalized in November 2002 and published in May 2003. The Njonjo Commission.⁵⁰ It focused on coming up with principles of National Land Policy framework and coming up with a new institutional framework for land administration. The report proposes radical changes for the land administration and management in Kenya.⁵¹ It states that failure of authorities to enforce and comply with the law was the principal cause of the land problem experienced by the country.

1.7 THEORETICAL FRAMEWORK

1.7.1 Social Contract

The study seeks to rely on the Social Contract Theory by Thomas Hobbes. This theory states that the members of a society are accorded certain rights in return for giving up certain freedoms which they would otherwise possess in the state of nature, that is, where lawlessness reigns.⁵² The necessity of an absolute authority in the form of a sovereign followed the brutality of the state of nature which was intolerable thus, rational men would be willing to submit themselves to absolute authority.⁵³ In the state of nature, there is no security and the strong will survive while the weak perish.⁵⁴

⁴⁷ The Ndung'u Land Commission), 2003.

⁴⁸ African Centre for Open Governance (AFRICOG), *implementing the Ndung'u Report; Mission impossible?* 9.

⁴⁹ Southhall R, *The Ndung'u report: Land and graft in Kenya*, University of the Witwatersrand, 2005, 149.

⁵⁰ *Commission of Inquiry into the Land Law Systems of Kenya*, 1999.

⁵¹ *Final report: Project completion report and DFID Support to Kenya Land Reform Process*, 2003, 7

⁵² <http://www83.homepage.villanova.edu/richard.jacobs/MPA%208300/theories/social%20contract.html>, on January 20, 2017

⁵³ Friend C, *Social Contract Theory*, Internet Encyclopaedia of Philosophy, Hamilton College.

⁵⁴ McCartney S, Parent R, *Ethics in Law Enforcement*.

According to Thomas Hobbes, without a government that is capable of functioning as a referee over all human beings, the members of the society are condemned to exist in a state of chaos and civil war as they would seek only what is in their individual interests, therefore, it is a need to create a government or a sovereign.⁵⁵ Hence, through the social contract, the society has a collective understanding that it is in the interest of everyone to enforce rules that ensure safety and security of everyone, even the weakest who are then able to survive.⁵⁶

The Constitution of Kenya, 2010 recognizes rights in land as provided in Article 60(1) (b) that land shall be held, used and managed in accordance with the principle of security of land rights. Therefore, the government in accordance to the social contract theory has a duty to protect the land rights of its citizens. Furthermore, Article 60 (2) of the Kenyan Constitution provides that the principles set out in the National Land Policy including security of rights must be implemented in legislation.⁵⁷ Land grabbing is the illegal and unfair acquisition of land.⁵⁸ The lack of address of this problem means that there is no protection of land rights, a duty of the government.

1.7.2 Legal theory

A second theory that the study seeks to use is the Legal theory. According to this theory, the law takes precedence in defining what property is, hence, property is what the law considers and recognizes as law.⁵⁹ According to Jeremy Bentham, real rights were the product of real laws while imaginary rights were the product of imaginary laws.⁶⁰ Therefore, a right is the child of law.

A right can be defined as a legally recognized interest in a person or a thing.⁶¹ Since property manifests itself as rights it is then recognized by law and can be protected by law.

Bentham goes further and states that: *Property and law are born together and die together; before laws were made there was no property hence take away laws and property ceases.*⁶²

⁵⁵ <http://www83.homepage.villanova.edu/richard.jacobs/MPA%208300/theories/social%20contract.html>, September 20 2017.

⁵⁶ McCartney, Parent, *Ethics in Law Enforcement*.

⁵⁷ Article 60 (2), *Constitution of Kenya*, 2010.

⁵⁸ Environmental Justice Organisations, Liabilities and Trade (EJOLT), *The many faces of land grabbing: Cases from Africa and Latin America*, Report No 10.

⁵⁹ Kariuki F, Ouma S, Ng'etich R, *Property Law*, Strathmore University Press, Nairobi 2016, 36.

⁶⁰ Schofield P, *Jeremy Bentham's 'Nonsense upon Stilts'*, University College London.

⁶¹ Kariuki F, Ouma S, Ng'etich R, *Property Law*, 3.

Therefore following Bentham's arguments, it is the law that gives one a sense of security enabling an individual to acquire a thing and keep it as his own.⁶³

For proper security of land rights, the definition of rights to land and the way in which individuals acquire them must be clear and equitable.⁶⁴ Since proper enforcement of property land right is key to the social and economic development of a country, to say that land is contributing to the development of the economy of Kenya, the laws regarding land must be clearly defined and must protect the right of individuals to land.

1.7.3 Economic Theory of Property

The third theory that the study seeks to use is the economic theory of property. According to this theory, it is assumed that happiness may be measured in monetary terms, hence, private property exists to maximize the overall wealth of the society.⁶⁵

Richard Posner, a law and economics scholar defines law as 'the rights to an exclusive use of valuable resources'.⁶⁶ Therefore, the law enforces property rights to motivate individuals to utilize resources efficiently.

According to Posner, an efficient property law system must have three central components, that is, *Universality* where all property is owned by someone, *exclusivity* where the law recognizes the absolute right of the owner of land to bar others from using the owner's resources and *transferability* where property rights are freely transferable. A property law system that has the above components facilitates a free market exchange hence the value of a resource is maximized.⁶⁷

This theory is key in this study because it shows the importance of land in the economy of Kenya. As stated earlier, most economic activities in Kenya revolve around the use of land, mainly through agriculture. Therefore, where there is an efficient property law system

⁶² Bentham J, *Principles of the Civil Code; Chapter 8: of Property*.

⁶³ Kariuki F, Ouma S, Ng'etich R, *Property Law*, 36.

⁶⁴ http://documents.worldbank.org/curated/en/485171468309336484/310436360_20050007003345/additional/multi0page.pdf, on October 18 2017.

⁶⁵ Sprankling J, *Understanding Property Law, LexisNexis*, 3rd Edition, 2012, 18.

⁶⁶ Sprankling J, *Understanding Property Law*, 18.

⁶⁷ Kariuki F, Ouma S, Ng'etich R, *Property Law*, 41.

individuals have the security to maximize the resources of the land leading to the development of the economy of Kenya.

1.8 RESEARCH METHODOLOGY

This study is library based through literature review. It uses both primary and secondary sources of information. The Constitution of Kenya (2010), statutes, policies and on land shall form part of the primary sources of information. Reports written as a result of the commissions established to inquire about the land injustices in Kenya will form part of the secondary sources of information. Books, journals, papers and online resources on land in Kenya, all written by various scholars also forms part of the secondary sources.

This methodology is important to the study because various scholars have written on the subject matter and are therefore a reliable source of valuable information that gives an understanding on the subject matter.

1.9 CHAPTER BREAKDOWN

Chapter 1: Introduction

This chapter introduces and gives an explanation of the problem and the purpose of the study. It will include: The background of the problem; the statement of the problem; the purpose of the study; the research questions and hypothesis; the theoretical framework and methodology; a summary of the chapters;

Chapter 2: Theoretical Framework

This chapter provides and discusses a set of theories. These theories will provide an entry point into the research problem and to establish the vision to which the problem is directed.

Chapter 3: Historical Background of Land grabbing in Kenya

This chapter looks at the history of land grabbing in Kenya during the colonial era and the post-independence era. This will provide an understanding of the problem of land grabbing in Kenya.

Chapter 4: Limitations of the Current Land Laws in addressing the problem of land grabbing

This chapter analyses and discusses the research questions set out. It provides a discussion of the issues addressed in the research questions.

The chapter also discusses the findings that are analysed on the basis of the research questions, specific objectives and hypotheses and the results will be analysed in line with the literature review and the theoretical framework.

Chapter 5: Conclusion and Recommendations

This chapter makes the conclusions of the study and also provides recommendations on how the land laws should address the issue of land grabbing in Kenya.

CHAPTER 2

THEORETICAL FRAMEWORK

2.1 INTRODUCTION

This chapter discusses three theories which shades a light on the role of proper land laws to protect the rights to property of individuals.

2.2 THEORETICAL FRAMEWORK

2.2.1 SOCIAL CONTRACT

The Social Contract Theory has been proposed by various philosophers, however, the study seeks to rely on three main philosophers, that is, Thomas Hobbes, Jean-Jacques Rousseau and John Locke.

THOMAS HOBBS

Hobbes theory of instituting government through social contract is reliant to his concept of liberty, will, representation and contract.⁶⁸ He relates will to liberty and states that a human person has no hindrance to do what he desires.⁶⁹

According to Hobbes, in the state of nature, people only act in their own personal interest and they will only pursue what they perceive to be in their own best interest.⁷⁰ In the *Leviathan* Hobbes describes that in the state of nature:

“There is no place for industry, because the fruit thereof is uncertain; and consequently no culture of the earth...; and which is worst of all, continual fear, and danger of violent death; and the life of man, solitary, poor, nasty, and brutish and short”.⁷¹

Therefore, the people choose to appoint and submit to a ruler or authority so as to be able to live in a civil society which is conducive of their own interests.⁷²

The necessity of an absolute authority in the form of a sovereign followed the brutality of the state of nature which was intolerable thus, rational men would be willing to submit themselves to

⁶⁸ Evers W, *Social Contract: a critique*, pergamon press, 1977.

⁶⁹ Evers W, *Social Contract: a critique*.

⁷⁰ Internet Encyclopaedia of Philosophy, *Social Contract Theory*.

⁷¹ Hobbes T, *The Leviathan*, 1660.

⁷² Internet Encyclopaedia of Philosophy, *Social Contract Theory*.

absolute authority⁷³. In the state of nature, there is no security and the strong will survive while the weak perish⁷⁴. According to Thomas Hobbes, without a government that is capable of functioning as a referee over all human beings, the members of the society are condemned to exist in a state of chaos and civil war as they would seek only what is in their individual interests, therefore, it is a need to create a government or a sovereign⁷⁵. Hence, through the social contract, the society has a collective understanding that it is in the interest of everyone to enforce rules that ensure safety and security of everyone, even the weakest who are then able to survive⁷⁶. The social contract is manifested in our society through the establishment of the government and laws. These laws include the Constitution of Kenya and the statutes relevant to protection of land rights. The Social Contract is important because it shows the relationship between the authority and the citizens, where the citizens have a responsibility to abide by the rules and regulations on land and on the other hand, the government has a duty to protect the land rights of its citizens.

JEAN-JACQUES ROUSSEAU

Rousseau begins by stating that 'man is born free but everywhere he is in chains.'⁷⁷ He believed that in the state of nature, man was born free, however, due to the progress of civilization, freedom has been substituted by dependence and economic and social inequalities⁷⁸. Therefore, since it is impossible for individuals to go back to the original state of nature in order to regain their freedom, it can be regained by submitting the individual wills for the collective will that is created through agreement with other free and equal people⁷⁹.

Rousseau states that the members of a society are accorded certain rights in return for giving up certain freedoms which they would otherwise possess in the state of nature, that is, where lawlessness reigns.⁸⁰

⁷³ Friend C., *Social Contract Theory*, Internet Encyclopaedia of Philosophy, Hamilton College.

⁷⁴ McCartney S, Parent R, *Ethics in Law Enforcement*.

⁷⁵ <http://www83.homepage.villanova.edu/richard.jacobs/MPA%208300/theories/social%20contract.html>, on November 20 2017.

⁷⁶ McCartney, Parent, *Ethics in Law Enforcement*.

⁷⁷ Rousseau JJ, *The Social Contract*, 1762, translated in 1782 by G D H Cole.

⁷⁸ Internet Encyclopaedia of Philosophy, *Social Contract Theory*. <http://www.iep.utm.edu/soc-cont/>, November 20 2017.

⁷⁹ <http://www.iep.utm.edu/soc-cont/>, on November 20 2017.

⁸⁰ <http://www83.homepage.villanova.edu/richard.jacobs/MPA%208300/theories/social%20contract.html>

He states that there should be a relationship between citizens who will provide each other with protection which is backed by the community and at the same time will preserve the will and the liberty of the individuals.⁸¹ Since then citizens become sovereign they are able to enact laws which reflect the common interests and values of the people.

Sovereign power belongs to the people of Kenya and may be exercised directly or indirectly through the democratically elected representatives.⁸² Elected representatives have a duty to come up with laws and to revise laws that express the interests of the people and are beneficial to the citizens of Kenya. The land laws enacted in Kenya have to address land grabbing in order to secure the land rights of the people of Kenya.

JOHN LOCKE

According to Locke, the natural state men have perfect freedom to order their actions and dispose their possessions in any way they like without asking anyone's permission.⁸³ Therefore, in this state of nature, nothing but confusion and disorder follows. In order to limit this chaos, people agree to abandon some of their freedom.⁸⁴ Power is therefore given to a ruler or the government who enforce safety and security of the citizens who have appointed them. Consent of the people is signified by acceptance of benefits from the government such as holding property under the government's protection.⁸⁵

According to Locke, social contract brings together citizens who are then able to delegate enforcement of the natural law to a trustee for the sake of convenience.⁸⁶

He further states that if the government is not capable of fulfilling this task, it should be overthrown.

Despite the different approaches to the social contract by the philosophers, on common thing is that the citizens come into agreement to surrender some of their freedom to a government who in return provide security to the liberty and property of the individuals. Following the arguments of Hobbes, without the laws to protect the rights of individuals, there will be no motivation to carry out activities such as farming due to the fear of losing the property to others who desire it. Since

⁸¹ Evers W, *Social Contract: a critique*.

⁸² Article 1 (1) and (2), *Constitution of Kenya*, 2010.

⁸³ Locke J, *the Second Treatise of a Civil Government*.

⁸⁴ Locke J, *the Second Treatise of a Civil Government*.

⁸⁵ Evers W, *Social Contract: a critique*.

⁸⁶ Evers W, *Social Contract: a critique*.

one of the key source of living for many people in Kenya revolves around land, it is important for there to be proper laws that protect land rights.

The Constitution of Kenya, 2010 recognizes rights in land as provided in Article 60(1) (b) that land shall be held, used and managed in accordance with the principle of security of land rights. Therefore, the government in accordance to the social contract theory has a duty to protect the land rights of its citizens. Furthermore, Article 60 (2) of the Kenyan Constitution provides that the principles set out in the National Land Policy including security of rights must be implemented in legislation.⁸⁷ Land grabbing is the illegal and unfair acquisition of land.⁸⁸ Not addressing the problem of land grabbing means that there is no protection of land rights, a duty of the government.

2.2.2 LEGAL THEORY

A second theory that the study seeks to use is the Legal theory. According to this theory, the law takes precedence in defining what property is, hence, property is what the law considers and recognizes as property⁸⁹. According to Jeremy Bentham, real rights were the product of real laws while imaginary rights were the product of imaginary laws.⁹⁰

A right can be defined as a legally recognized interest in a person or a thing.⁹¹ Since property manifests itself as rights it is then recognized by law and can be protected by law.

Bentham goes further and states that: *Property and law are born together and die together; before laws were made there was no property hence take away laws and property ceases.*⁹²

Therefore following Bentham's arguments, it is the law that gives one a sense of security enabling an individual to acquire a thing and keep it as his own.⁹³ Without the law providing sanctions that protect the property of rights of individuals, there is no security.

⁸⁷ Article 60 (2), *Constitution of Kenya*, 2010

⁸⁸ EJOLT, *The many faces of land grabbing; Cases from Africa and Latin America*, Report No. 10

⁸⁹ Kariuki F, Ouma S and Ng'etich R. *Property Law*, Strathmore University Press, Nairobi 2016, pg. 36

⁹⁰ Schofield P, *Jeremy Bentham's 'Nonsense upon Stilts'*, University College London.

⁹¹ Kariuki F, Ouma S and Ng'etich R. *Property Law*, pg. 3

⁹² Bentham J, *Principles of the Civil Code; Chapter 8: of Property.*

⁹³ Kariuki F, Ouma S, Ng'etich R. *Property Law*, 36.

For proper security of land rights, the definition of property to rights to land and the way in which individuals acquire them must be clear and equitable.⁹⁴ Since proper enforcement of property land right is key to the social and economic development of a country, to say that land is contributing to the development of the economy of Kenya, the laws regarding land must be clearly defined and must protect the right of individuals to land.

The Hans Kelsen's basic norm theory states that legal norms exist in a hierarchy in which each norm extracts its validity from the other immediately above it.⁹⁵ All the other norms obtain validity from the basic norm.⁹⁶ The constitution of Kenya is the supreme law and binds all people and state organs in Kenya.⁹⁷ Supremacy, according to Kelsen's basic norm theory, means that the Constitution is the norm above all others, and through it other sources of law acquire validity.⁹⁸ It is therefore important that the Constitution to clearly define land as a form of property for it to be binding even to other sources of law.

2.2.3 ECONOMIC THEORY OF PROPERTY

The third theory that the study seeks to use is the economic theory of property. According to this theory, it is assumed that happiness may be measured in monetary terms, hence, private property exists to maximize the overall wealth of the society.⁹⁹ This theory looks at a more specific source of happiness compared to the Utilitarianism theory of property vaguely states that property exists to maximize the overall happiness of individuals.¹⁰⁰

Richard Posner, a law and economics scholar defines property as 'the rights to an exclusive use of valuable resources'.¹⁰¹ Therefore, the purpose of law is to enforce property rights to motivate individuals to utilize resources efficiently. Efficiency means the value of the property is

⁹⁴ http://documents.worldbank.org/curated/en/485171468309336484/310436360_20050007003345/additional/multi0page.pdf

⁹⁵ Mbondenyei M K, Ambani JO, *The New Constitutional Law of Kenya: Principles, Government and Human Rights*, 46.

⁹⁶ Mbondenyei M K, Ambani JO, *The New Constitutional Law of Kenya*, 46.

⁹⁷ Article 2(1), *Constitution of Kenya*, 2010.

⁹⁸ Mbondenyei M K, Ambani JO, *The New Constitutional Law of Kenya*, 47.

⁹⁹ Sprankling J, *Understanding Property Law, LexisNexis*, 3rd Edition, 2012, 18.

¹⁰⁰ Sparkling J, *Understanding Property Law*, 16.

¹⁰¹ Sparkling J, *Understanding Property Law*, 18.

maximized. Therefore, the law should ensure that there is voluntary commercial transactions among buyers and sellers of goods.

According to Posner, to ensure efficient utilization of resources, an efficient property law system must have three essential attributes. These are: -

- *Universality* where all property is owned by someone,
- *Exclusivity* where the law recognizes the absolute right of the owner of land to bar others from using the owner's resources and
- *Transferability* where property rights are freely transferable. A property law system that has the above components facilitates a free market exchange hence the value of a resource is maximized.¹⁰²

A good illustration is using an individual whose economic activity is agriculture. Where there is no efficient property law system, the individual would be reluctant to carry out agriculture because of lack of security of the property, for instance, the fear that a third party can take away his land rights.¹⁰³ However, where there is an efficient property law system, it will recognize that the piece of land is owned by the individual, that the exclusive rights to bar others from using the land resources and also the law shall recognize that the individual has a right to transfer the property rights to another individual.¹⁰⁴

Securing land rights and improved access to farmers decreases their risk of expulsion and promotes investment into land.¹⁰⁵ According to a report, in 2009 the number of people dependent on food aid due to poverty rose to around 3.5 million.¹⁰⁶ The report stated that a major contribution to poverty is lack of access to land.¹⁰⁷ Since a large population depend on agriculture as their source of livelihood, the growing inequality of land ownership has contributed to the poverty levels in Kenya.¹⁰⁸

¹⁰² Kariuki F, Ouma S and Ng'etich R. *Property Law*, 41.

¹⁰³ Sparkling J, *Understanding Property Law*, 18.

¹⁰⁴ Sparkling J, *Understanding Property Law*, 18.

¹⁰⁵ Jambor A, Babu S, *Competitiveness of Global Agriculture: Policy Lessons for Food Security*, Springer 2016, 181.

¹⁰⁶ Food First Information and Action Network, *Land Grabbing in Kenya and Mozambique: A report on two research missions- and a human rights analysis of Land grabbing*, 2010.

¹⁰⁷ Food First Information and Action Network, *Land Grabbing In Kenya and Mozambique*, 2010, 17.

¹⁰⁸ Food First Information and Action Network, *Land Grabbing In Kenya and Mozambique* 2010, 17.

A major critique to this theory is the assumption that human happiness can be measured using monetary terms as certain basic needs such as the dignity, honour and respect cannot be quantified.¹⁰⁹

This theory is key in this study because it shows the importance of land in the economy of Kenya. One of the key goals set out as part of the Vision 2030 is socio-economic and political development. Respect for property rights to land owned by individuals, communities and companies is an important driver of rapid economic transformation in Kenya.¹¹⁰

¹⁰⁹ Sparkling J, *Understanding Property Law*, 19.

¹¹⁰ Kenya Vision 2030, *a Globally Competitive and Prosperous Kenya*, 2007, 21.

CHAPTER 3

HISTORY OF LAND GRABBING IN KENYA

3.1 INTRODUCTION

In order to understand the problem of land grabbing in Kenya, it is important to know the genesis of the problem. This chapter discusses land ownership in Kenya before colonialism, the cause of land grabbing during the Colonial period and finally the contribution of the post-colonial governments to the problem of land grabbing in Kenya.

3.2 LAND OWNERSHIP BEFORE COLONIZATION

Before colonization, land was held communally by the different ethnic communities and was governed by Customary Law.¹¹¹ Land was allocated by tribal elders to families for cultivation or grazing depending on the need of the families and in accordance with traditional customs and practices.¹¹² Where there was need for more land, the communities either acquired unoccupied land peacefully or through conquests by inter-tribal wars and yet the defeated community did not have difficulty finding alternative land in unoccupied areas as the population was still low.¹¹³

Any land-related disputes between families or communities were dealt with by the community elders.¹¹⁴

3.3 ORIGINS OF LAND RELATED PROBLEMS DURING THE COLONIAL PERIOD

Land related problems started with changes in land tenure brought by the British government. The British government enacted rules on acquisition of land through the Inland Land Acquisition Act (1894).¹¹⁵ Some of the effects of the act were:

It vested all unoccupied land including lands over which indigenous communities shifted back and forth for cultivation and grazing.¹¹⁶

¹¹¹ Njuguna H, Baya M, *Land Reforms in Kenya: An Institution of Surveyors of Kenya (ISK) Initiative*.

¹¹² Messah O, Gachaba L. M., *Factors leading to squatter problem in Rift Valley Province in Kenya*, Kenya Methodist University, 2013, 49.

¹¹³ *The TJRC Report*, 2013.

¹¹⁴ Messah O, Gachaba L. M., *Factors leading to squatter problem in Rift Valley Province in Kenya*, 49.

¹¹⁵ *The TJRC Report*, 2013, 192.

¹¹⁶ *Land Acquisition Act, 1894*.

It allowed the acquisition of land for construction of government premises and roads.¹¹⁷

It gave power to the commissioner to allocate lands to settlers and leases not exceeding 21 years.¹¹⁸

It had the effect of converting land that had not been claimed by individuals or the colonial administration into Crown Land. This meant that the land belonged to the Queen of England and could therefore lease to anyone for a term.¹¹⁹

The period in which the settlers could lease land was extended from 21 years to 99 years through the passing of the East African Land Regulations.¹²⁰ This lease was later extended to 999 years.¹²¹ This regulation was restrictive because the Commissioner could only alienate lands that were no longer in use by the native tribes.¹²² Therefore, the East Africa Order in Council (1901) was enacted giving the Commissioner the full authority to alienate Crown Lands in order to be used by the influx of the Settlers in Kenya.¹²³ The act defined Crown lands as any land owned and acquired by the queen of lands.¹²⁴ The Crown Land Ordinance (1902) was enacted which gave power to the Commissioner to acquire land including native land and sell to the settlers on lease.¹²⁵ The Ordinance enabled the settlers to acquire lands up to 1000 ha.¹²⁶ The settlers equated uncultivated land to unoccupied land not understanding the shifting nature of occupation of land in the communities therefore, took these lands for themselves.¹²⁷

Apart from acquiring land through laws, the colonial government acquired ownership through agreements. They include:

The Anglo- Maasai Agreements.

These were agreements made between the Maasai elders and the British governments made first in 1904 and a second one in 1911.

¹¹⁷ *Land Acquisition Act, 1894.*

¹¹⁸ *Land Acquisition Act, 1894.*

¹¹⁹ *Land Acquisition Act, 1894.*

¹²⁰ *East African Land Regulations, 1897.*

¹²¹ Elkins C, *Imperial Reckoning: The Untold Story of Britain's Gulag in Kenya*, Henry Holt and Company, New York, 2005.

¹²² *The TJRC Report*, 2013, 193.

¹²³ *The TJRC Report*, 2013, 193.

¹²⁴ Section 1, *East Africa Order in Council*, 1901.

¹²⁵ Section 31, *the Crown Land Ordinance*, 1902.

¹²⁶ Section 4, *the Crown Lands Ordinance*, 1902.

¹²⁷ *The TJRC Report*, 2013, 195.

In the 1904 agreement, the Maasai elders agreed with the British governments to surrender their prime grazing lands and move to Laikipia.¹²⁸ The elders were uneducated and did not fully understand the impact of their agreement which was considered binding on the part of the British administrators.¹²⁹

In 1911, the Maasai elders signed an agreement that gave away the land they occupied in Laikipia to settlers who found the lands attractive.¹³⁰ The Maasai moved on a harsh journey southwards where many people and livestock died along the way, however, the land was not able to sustain their livelihood.¹³¹ The Maasai tried to challenge the matter before a court stating that the elders were uneducated and therefore lacked the capacity to enter into a valid agreement and therefore wanted to return to their northern highlands and be compensated for the loss of their livestock.¹³²

Their claim was rejected as the court stated that the agreements were between the Crown and the representatives of the Maasai and therefore since this was an act of the state, the Court found itself unable to grant relief to the Maasai as it was a municipal court.¹³³ This same argument was used in the Court of Appeal thus, the Maasai were not compensated for the losses they had made or the land they had lost.¹³⁴

Consequently, the Crown Lands Ordinance (1915) was passed two years after the court's decision. The act prohibited land transactions between settlers and Africans without prior consent from the governor.¹³⁵ The Act also brought all land under the control of the Crown.¹³⁶ By declaring all lands Crown land, land including those occupied by the Native communities became easily alienated from customary systems without compensation.¹³⁷

¹²⁸ Hughes L, *Moving the Maasai: A colonial misadventure*, Palgrave Macmillan, 2006.

¹²⁹ Hughes L, *Moving the Maasai*.

¹³⁰ Hughes L, *Moving the Maasai*.

¹³¹ Hughes L, *Moving the Maasai*.

¹³² Hughes L, *Moving the Maasai*.

¹³³ *The TJRC Report* 2013, 198.

¹³⁴ *The TJRC Report*, 2013, 198.

¹³⁵ *Crown Lands Ordinance*, 1915.

¹³⁶ *The TJRC Report*, 2013, 199.

¹³⁷ Veit P, *Focus on Land in Africa: History of Land Conflicts in Kenya*.

The colonial government contributed to the land problem in Kenya through the establishment of the Native reserves.¹³⁸ The reserves were lands set aside for the exclusive occupation and use by indigenous communities.¹³⁹ The reserves were a tool used by the colonial administration to alienate prime land used by the local communities thus exposing them to land scarcity and landlessness.¹⁴⁰ It also became a source of conflicts among the communities because the reserves created a sense of exclusive domains from which various tribes sought to exclude other communities from occupation.¹⁴¹

In order to confer official recognition of existence of the native reserves the Kenya Native Areas Ordinance (1926) was passed.¹⁴² Therefore, by introducing the native reserves, the colonial administration was able to take over the community lands that were left behind and made it available to the increasing number of white settlers.¹⁴³

Multinational corporations such as James Finlay Company Limited which was formerly known as the African Highlands Produce Company Ltd. and Unilever Kenya Limited formerly known as Brooke Bond acquired land mainly in the Rift Valley region for example, Kericho, in order to cultivate tea for a lease of 999 years.¹⁴⁴ These lands were acquired at the expense of the African Communities that were settled in these regions.¹⁴⁵

Due to the dispossession of land of the natives, there arose the African freedom movement called the Mau Mau that was led by the Kikuyu community.¹⁴⁶ The movement attacked various officials serving in the colonial government in order to regain ownership of their land and also to regain freedom.¹⁴⁷

The Mau Mau uprising compelled the colonial government to reconsider their policies and practices in relation towards Africans' land, hence the Swynnerton Plan was developed in

¹³⁸ Elkins C, *Imperial Reckoning: The Untold Story of Britain's Gulag in Kenya*, 2005.

¹³⁹ Overton JD, *Social Control and Social Engineering: African Reserves in Kenya 1895-1920*.

¹⁴⁰ Elkins C, *Imperial Reckoning: The Untold Story of Britain's Gulag in Kenya*, 2005.

¹⁴¹ *The TJRC Report*, 2013, 199.

¹⁴² *Kenya Gazette*, 13 October 1926, 1244.

¹⁴³ Elkins C, *Imperial Reckoning: The Untold Story of Britain's Gulag in Kenya*, 2005.

¹⁴⁴ *The TJRC Report*, 2013, 208.

¹⁴⁵ *The TJRC Report*, 2013, 208.

¹⁴⁶ Elkins C, *Imperial Reckoning: The Untold Story of Britain's Gulag in Kenya*, 2005.

¹⁴⁷ Elkins C, *Imperial Reckoning: The Untold Story of Britain's Gulag in Kenya*, 2005.

1954.¹⁴⁸ The plan regarded the traditional system of tenure as one that promoted fragmentation of land holding into units that were not economical and thus stated that its purpose was to provide solutions that would improve and make the land tenure systems contribute to the economic development of the colony.¹⁴⁹ Thus, Africans were allowed to buy land and acquire titles in the White lands and also were able to cultivate cash crops for the purpose of export.¹⁵⁰ However, this plan introduced a totally different system of land tenure through land registration and completely disregarded the customary land tenure of the various African community.¹⁵¹

3.4 LAND GRABBING IN KENYA DURING THE POST - COLONIAL PERIOD

The native communities believed that after independence, they would regain ownership of their lands at no cost.¹⁵² However, the new government imposed on the people of Kenya an alien system of land tenure, different from the customary system of land tenure, it also embraced laws which were in favour of alienation of land from the African for the benefit of the British administration and its European settlers.¹⁵³

There are various actions that contributed to the problem of land grabbing in Kenya after independence. They include:

Settlement schemes

During the Lancaster conferences, the colonial government and the Kenyan politicians made agreements of resettling the natives on various farms that were owned by the settlers.¹⁵⁴ This land was to be acquired on purchase and the source of fund was the British government and international institutions such as the World Bank.¹⁵⁵ Examples of these schemes include:

¹⁴⁸ Globalblackhistory, *Land Issues and the Agricultural Economy in Kenya after 1945*, September 2016. <http://www.globalblackhistory.com/2016/09/land-issues-agricultural-economy-kenya-1945.html>, on January 20 2018.

¹⁴⁹ *The TJRC Report*, 2013, 211.

¹⁵⁰ <http://www.globalblackhistory.com/2016/09/land-issues-agricultural-economy-kenya-1945.html>

¹⁵¹ *The TJRC Report*, 2013, 211.

¹⁵² *The TJRC Report*, 2013, 214.

¹⁵³ Onyango P, *Balancing of Rights in Land Law: A Key Challenge in Kenya*, 2014.

¹⁵⁴ Veit P, *Focus on Land in Africa: History of Land Conflicts in Kenya*.

¹⁵⁵ *The TJRC Report*, 2013, 209.

Mackenzie scheme which was named after Bruce McKenzie, the minister of Agriculture after independence. The purpose of the scheme was to enable the Kenyan natives to farm.¹⁵⁶ However, persons had to contribute money in order to benefit from the scheme.¹⁵⁷ This did not go in line with the communities who expected to regain ownership of their lands at no cost.¹⁵⁸

Since one had to contribute monetary terms, it led to imbalanced allocation of land where the wealthy Africans and ex-loyalists of the outgoing colonial administration were the only ones who benefited.¹⁵⁹ This was a major cause of land problems in Kenya because land fell into new hands other than those it customarily belonged to as most of the customary owners either did not see the justification for buying land they considered theirs, or did not have the capital to purchase their land.¹⁶⁰

The One Million Acre scheme was established on the basis of agreement between the British Administration and the Kenyan elites.¹⁶¹ Its purpose was to settle down the landless Africans and at the same time compensate the settlers for their farms.¹⁶² Land was not given freely to the Africans as they had to purchase it using their money or through a loan, hence, the poor were left out as they could not raise the amount of money required.¹⁶³

This scheme did not resolve land problems faced by the Africans in Kenya, it increased the conflicts over lands as the rich and those connected in the public and private sectors were the ones who benefited from the scheme.¹⁶⁴

The Independence Constitution and adopted land laws

Towards independence during the Lancaster conferences, the main issue discussed was restoration of land to the African communities in their regional enclaves and therefore there was negotiation for regional government between the African representatives and the colonial

¹⁵⁶ *The TJRC Report*, 2013, 208.

¹⁵⁷ *The TJRC Report*, 2013, 208.

¹⁵⁸ *The TJRC Report*, 2013, 207.

¹⁵⁹ *The TJRC Report*, 2013, 210.

¹⁶⁰ *The TJRC Report*, 2013, 208.

¹⁶¹ *The TJRC Report*, 2013, 213.

¹⁶² *The TJRC Report*, 2013, 213.

¹⁶³ *The TJRC Report*, 2013, 214.

¹⁶⁴ *The TJRC Report*, 2013, 215.

government.¹⁶⁵ In the drafting of the independence constitution, the regional governance structure, Majimbo system, was agreed.¹⁶⁶ However, the immediate post-colonial government introduced radical changes to the constitution. Some of the changes include:

A regional governance structure had been agreed upon during the Lancaster house conference.¹⁶⁷ However, there were amendments of the sections of the Majimbo constitution which eroded the regional basis of recovery of communal lands, and therefore, land vested in these regions were under the central control of the president, commissioner of lands and the minister in charge of lands and settlement.¹⁶⁸

Central government had the power to unilaterally take over the trust lands, thus weakening the regional governments who had the role of holding the trust lands in trust for the ethnic groups.¹⁶⁹

The power of compulsory acquisition of land was vested on the state for public purposes.¹⁷⁰ This power was misused by the state officials who resorted to illegal and irregular allocations of the land acquired by the state.¹⁷¹

At independence, the fundamentals of colonial tenure system of land remained unchanged and the legal structure basically remained the same.¹⁷²

Apart from the legislations that were adopted by the post-colonial government from the British administration. Various laws were enacted. The laws that were repealed by the new land acts were: The Indian Transfer of Property Act (1882), The Government Lands Act, The Registration of Titles Act, The Land Titles Act, The Registered Land Act, The Wayleaves Act, and The Land Acquisition Act.

The above laws were repealed and replaced by: The Land Act (2012), The Land Registration Act (2012) and the National Land Commission Act (2012)

¹⁶⁵ *The TJRC Report*, 2013, 209.

¹⁶⁶ *The TJRC Report*, 2013.

¹⁶⁷ <http://www.commonlii.org/ke/other/KECKRC/2001/1.html>, on January 20 2018.

¹⁶⁸ *The TJRC Report*, 2013, 210.

¹⁶⁹ *The TJRC Report*, 2013, 210.

¹⁷⁰ Section 75, *Constitution of Kenya (repealed)*.

¹⁷¹ *The TJRC Report*, 2013, 210.

¹⁷² *The TJRC Report*, 2013.

Allocations of land were dictated by as many as 42 land laws including those stated above which incoherent and inconsistent.¹⁷³ A land parcel could be registered under two different statutes, both legal but overlapping on the same space, and hence recorded in separate land registries.¹⁷⁴

Too many land laws created loopholes in which various land injustices went unpunished.¹⁷⁵ A good example of loopholes in the law is in the Land Adjudication Act of 1968. Land certificates issued under the **Land Adjudication Act (1968)** defined plots by general boundaries, while leaseholds and registered titles were defined by fixed boundaries, hence, it created opportunities for corruption where landowners in collusion with land surveyors could apply for official boundary corrections, enlarging their lands into the acquired titled land which appears blank on the registry index map.¹⁷⁶

Moreover, these laws gave unlimited power to state officers on the handling and management of public land hence were able to acquire land illegally for themselves and also for others associated with them.¹⁷⁷ For instance, under the Government Lands Act, only the president could sign documents to grant title and he could also delegate these powers to the Commissioner of Lands.¹⁷⁸ Hence, the Commissioner of Lands could allocate local authority with land without proper consultation and end up with the problem of double allocation of the same pieces of land.¹⁷⁹

Due to all these land related injustices, there was a push for major land reforms. One way was through the creation of the Ndung'u Land Commission which gave recommendations such as the review of the laws relating to land and the establishment of the National Land Commission.¹⁸⁰ The enactment of the Constitution of Kenya (2010) led to the establishment of the National Land Commission¹⁸¹ and also the enactment of the 2012 land laws.¹⁸²

¹⁷³ O'Brien E, *Irregular and Illegal land acquisition by Kenya's elites: Trends, processes, and impacts of Kenya's land grabbing phenomenon*, January 2011, 7.

¹⁷⁴ Home R, *Colonial Township Laws and Urban Governance in Kenya*, Cambridge University Press, 2012.

¹⁷⁵ Home R, *Colonial Township Laws and Urban Governance in Kenya*.

¹⁷⁶ Home R, *Colonial Township Laws and Urban Governance in Kenya*.

¹⁷⁷ <http://www.bowmanslaw.com/insights/a-snapshot-of-the-new-land-laws-in-kenya/>, on January 20 2018.

¹⁷⁸ Njuguna H, Baya M, *Land Reforms in Kenya: An Institution of Surveyors of Kenya (ISK) Initiative*.

¹⁷⁹ Njuguna H, Baya M, *Land Reforms in Kenya: An Institution of Surveyors of Kenya (ISK) Initiative*.

¹⁸⁰ Africa Centre for Open Governance (AFRICOG), *Mission Impossible? Implementing the Ndung'u Report*, June 2009.

¹⁸¹ Article 67, *Constitution of Kenya*, 2010.

3.5 CONCLUSION

This chapter has reviewed the historical background of the problem of land grabbing in Kenya.

It has shown that the introduction of new systems of governing land by the Colonial government contributed to land grabbing in Kenya. This is because, the colonial laws disregarded the already established customary laws that were used by the native communities to manage their lands. The land laws were also a tool of oppression of the native communities as these laws gave power to the government to control land and also to alienate the native communities from their lands.

Secondly, it has shown that schemes that were originally intended to resettle the native communities, ended up contributing to land grabbing as the lands ended up away from the original owners into the hands of the rich elites and those close to the government officials who had the ability to purchase land from the settlers.

Thirdly, the chapter has shown that the laws imposed on the native communities during colonization were adopted after independence, hence power to control and administer land was in the hands of the government officials who took lands for themselves.

Lastly, the chapter has shown that there were very many laws governing land administration in Kenya which were contradictory and inconsistent hence created loopholes used to aid in land grabbing by those in power.

¹⁸² Article 68, *Constitution of Kenya*, 2010.

CHAPTER 4

LIMITATIONS OF THE LAND LAWS IN ADDRESSING THE PROBLEM OF LAND GRABBING IN KENYA

4.1 INTRODUCTION

The chapter will review the legal framework on land, which are: the Constitution of Kenya (2010), the Land Act (2012), the Land Registration Act (2012) and the National Land Commission Act (2012). The chapter will also review the Institutional framework on land, that is, the National Land Commission and the Ministry of Lands. The chapter explores their viability in dealing with land grabbing in Kenya. Finally, the chapter explores the limitations of the current land laws to deal with the problem of land grabbing in Kenya.

Due to the poor state of land management and the need to address the historical land injustices there was push for land reforms in Kenya.¹⁸³ Various steps were taken to bring reforms to the land sector, including the adoption of the National Land Policy.

National Land Policy (2009)

This is also known as Sessional Paper No. 3. The paper identified the critical land issues facing the country and also provides proposals for administrative reforms and legislative action to bring the desired land reforms.¹⁸⁴ The policy states that lack of a policy has led to problems such as existence of very many land laws that are inconsistent and incompatible.¹⁸⁵

The NLP noted that the pre-2010 Constitution viewed land as a category of property and did not recognize its uniqueness, hence, the NLP argued that land should be anchored in the Constitution and treated as a constitutional issue.¹⁸⁶ It also stated that since the Constitution did not establish an efficient institutional framework for land ownership, administration and management, failures such as lack of accountability in land governance leading to irregular allocation of public land

¹⁸³ 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.

¹⁸⁴ Muwongo A, Kamunyori S, Choi N and Kahindo L, *In search of Land*.

¹⁸⁵ *Sessional Paper No 3 of 2009 on National Land Policy*, 1.

¹⁸⁶ *Sessional Paper No 3 of 2009 on National Land Policy*, 10.

and also protection of private property rights even where the rights were acquired in an illegitimate manner.¹⁸⁷

The NLP redefined the categories of land from government land, trust land and private land to public land, community land and private land.¹⁸⁸ It called for the repeal of the various laws regarding the management and registration of land.¹⁸⁹ The NLP also provides that to resolve historical land injustices, the government needs to review laws and policies that were adopted by the post-independence governments that exacerbate the historical land injustices.¹⁹⁰

4.2 REVIEW OF THE CURRENT LEGISLATION RELATED TO LAND

4.2.1 CONSTITUTION OF KENYA (2010)

The provisions of land are found in Articles 60 to 68. It has classified land into three categories, that is, Public land, Private land and Community land.¹⁹¹

The COK adopted many of the recommendations laid out in the NLP.¹⁹² The Constitution has outlined the principles of land policy.¹⁹³ One of the principles outlined is that land shall be held in an equitable, efficient, productive and sustainable manner in accordance with the principles of equitable access and security of land rights.¹⁹⁴

The constitution has also established the National Land Commissions and has states its roles including management of public land and to initiate investigations into the present or historical land injustices.¹⁹⁵

It also provides that the parliament should revise, consolidate and rationalize existing land laws.¹⁹⁶

¹⁸⁷ *Sessional Paper No. 3 of 2009 on National Land Policy*, 10.

¹⁸⁸ *Sessional Paper No. 3 of 2009 on National Land Policy*, 13.

¹⁸⁹ Muwongo A, Kamunyori S, Choi N and Kahindo L, *In search of Land*, October 2016, 14.

¹⁹⁰ *Sessional Paper No. 3 of 2009 on National Land Policy*, 42.

¹⁹¹ Articles 62, 63 and 64, *Constitution of Kenya*, 2010.

¹⁹² Muwongo A, Kamunyori S, Choi N and Kahindo L, *In search of Land*, October 2016, 15.

¹⁹³ Article 60, *Constitution of Kenya*, 2010.

¹⁹⁴ Article 60 (1), *Constitution of Kenya*, 2010.

¹⁹⁵ Article 67, *Constitution of Kenya*, 2010.

¹⁹⁶ Article 68, *Constitution of Kenya*, 2010.

4.2.2 THE LAND REGISTRATION ACT NO. 3 OF 2012

The purpose of this law is to revise, consolidate and rationalize the registration of title to land and to give effect to the principles of devolution.¹⁹⁷

According to the act, the rights of a proprietor, whether acquired through first registration or subsequently, shall be indefeasible.¹⁹⁸

Certificate of ownership to be held as conclusive evidence of absolute and indefeasible ownership of the land rights.¹⁹⁹ However, this does not apply where the title was obtained through fraud, or misrepresentation, or when the title was acquired through illegal means.²⁰⁰

The RLA provides for the administration of the Land registries and no other written law unless provided by the Act shall apply to registered lands.²⁰¹ This is a major reform in the land sector where registration of all land titles is under one act of parliament, contrary to the previous legislations where registration was governed by various statutes.

4.2.3 THE LAND ACT NO. 6 OF 2012

The act is aimed at giving effect to the provisions of Article 68 of the Constitution of Kenya, and also to revise, consolidate and rationalize land laws; and also to provide for sustainable administration and land-based resources and for connected purposes.²⁰²

The Act gives the National Land Commission or the Cabinet Secretary power to make rules where applicable to ensure the better carrying out of the Act.

The act also provides for the functions of the NLC and the ministry of lands. Some of the functions of the Ministry include: to develop policies on land upon recommendation of the NLC; to monitor and evaluate land sector performance; to facilitate implementation of land policy and

¹⁹⁷ Preamble, *Land Registration Act*, 2012.

¹⁹⁸ Section 25 (1), *Land Registration Act*, 2012.

¹⁹⁹ Section 26 (1), *Land Registration Act*, 2012.

²⁰⁰ Section 26 (2), *Land Registration Act*, 2012.

²⁰¹ Section 5, *Land Registration Act*, 2012.

²⁰² Preamble, *Land Act*, 2012.

reforms.²⁰³ Neither the Ministry nor the NLC can work in isolation, through recommendations and supervisions shows a check-and balance relationship between the two institutions.²⁰⁴

Functions of the NLC include: To identify public land, prepare and keep a database of all public land; and to share data with the public and relevant institutions in order to discharge their respective functions and powers under the act.²⁰⁵ The act requires to involve the public in its undertakings, this shows the sovereignty of the people of Kenya as provided in Article 2 of the COK. This is crucial in the administration and management of land in Kenya.²⁰⁶

4.2.4 THE NATIONAL LAND COMMISSION ACT NO. 5 OF 2012

The NLP proposed the enactment of this act to grant operational autonomy of the NLC, so that it is accountable to the Parliament for its operations.²⁰⁷

This Act gives effect to Article 67 of the Constitution and establishes the NLC. The Act provides further functions and powers of the NLC.²⁰⁸

Some of the key functions of the NLC are alienation of public land on behalf and with the consent of the County and National governments and monitoring the registration of all rights and interests in land.²⁰⁹ This shows a check-and balance relationship between the NLC and the government.²¹⁰ Another function of the NLC is to receive, admit and investigate all historical land injustices.²¹¹

4.3 INSTITUTIONAL FRAMEWORK ON LAND

4.3.1 NATIONAL LAND COMMISSION

Before the NLC, the institutional framework was highly centralized, corrupt, and inefficient and lacked accountability, and also did not engender public participation in

²⁰³ Section 6, *Land Act*, 2012.

²⁰⁴ *In the Matter of the National Land Commission*, Advisory Opinion No. 2 of 2014.

²⁰⁵ Section 8, *Land Act*, 2012.

²⁰⁶ *In the Matter of the National Land Commission*, Advisory Opinion No. 2 of 2014, para. 320.

²⁰⁷ Kariuki F, Ouma S, Ng'etich R, *Property Law*, 2016, 340.

²⁰⁸ Preamble, *National Land Commission Act*, 2012.

²⁰⁹ Section 5, *National Land Commission Act*, 2012.

²¹⁰ *In the Matter of the National Land Commission*, Advisory Opinion No. 2 of 2014.

²¹¹ Section 15, *National Land Commission Act*, 2012.

land administration and management.²¹² Hence, one of the proposals of the NLP was the establishment of the NLC.²¹³

This is a Constitutional commission as it was created under Article 67 of the Constitution of Kenya 2010. The NLC is entrenched to ensure it is made accountable to the people of Kenya as proposed by the NLP.²¹⁴ The functions are also set out in Section 5 of the National Land Commission Act (2012).

The Commission is given mandate to carry out investigations on its own motion on historical land injustices and make recommendations for appropriate redress.²¹⁵

The commission is also supposed to recommend a National Land Policy to the national government and to advise it on a program for registration of title in Land in Kenya.²¹⁶

The NLC is given the mandate of alienation of public land on behalf or with the consent of national and county governments.²¹⁷

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.²¹⁸

Revocation of title is to be done by the registrar upon direction of the commission where there is impropriety or illegality of title.²¹⁹

The act provides for the recommendations to the parliament for an appropriate legislation for the investigation of historical land injustices.²²⁰

One of the national values and principles of governance set out in the COK is principle of public participation.²²¹ According to Justice Willy Mutunga, participation of people in governance will

²¹² Kariuki F, Ouma S, Ng'etich R, *Property Law*, 2016, 339.

²¹³ Republic of Kenya, *Sessional Paper no. 3 of 2009 on national land policy*, 55.

²¹⁴ Republic of Kenya, *Sessional Paper no. 3 of 2009 on national land policy*, 54.

²¹⁵ Article 67 (2) (e), *Constitution of Kenya*, 2010.

²¹⁶ Article 67 (2) (b), *Constitution of Kenya*, 2010.

²¹⁷ Section 5 (2) (a), *National Land Commission Act*, 2012.

²¹⁸ Section 14 (1), *National Land Commission Act*, 2012.

²¹⁹ Section 14 (5), *National Land Commission Act*, 2012.

²²⁰ Section 15, *National Land Commission Act*, 2012.

²²¹ Article 10 (2) (a), *Constitution of Kenya*, 2010.

make the state, its organs and institutions accountable, and hence makes the country more progressive and stable.²²² Public participation can be done through civic education.²²³

4.3.2 MINISTRY OF LANDS, HOUSING AND URBAN DEVELOPMENT

The ministry has three departments: Department of Lands; Department of Physical planning; and Department of Survey.²²⁴ The department of lands is further divided into land registration, administration and valuation.²²⁵ Land registration has various functions including registration of documents for all land transactions, issuance of title deed, and processing conversion of titles from one land statute to another.²²⁶

Its role is administration and management functions in the devolved system of government in liaison with the NLC, District Land Boards and Community Land Boards.²²⁷

The task of registering land titles lies with the national government and the ministry has the authority to issue land titles on behalf of the government.²²⁸

The Ministry is required to work hand-in-hand with the NLC, for instance, the Ministry is required to develop and facilitate land policies on the basis of advice and recommendations from the NLC.²²⁹

4.4 LIMITATIONS OF THE NLC AND THE MINISTRY OF LANDS

There have been conflicts between the Ministry of Land and the NLC in relation to land administration. Hence, the NLC sought clarification from the Supreme Court on what are its roles and what are the roles of the Ministry of Lands. 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.²³⁰ The court clarified that the power to register land title is vested in the government,

²²² *In the Matter of the National Land Commission*, Advisory Opinion No. 2 of 2014, para. 310.

²²³ *In the Matter of the National Land Commission*, Advisory Opinion No. 2 of 2014, para. 320.

²²⁴ <http://www.ardhi.go.ke/>, on 12 February 2018.

²²⁵ <http://www.ardhi.go.ke/>, on 12 February 2018.

²²⁶ <http://www.ardhi.go.ke/>, on 12 February 2018.

²²⁷ <http://www.ardhi.go.ke/>, on 12 February 2018.

²²⁸ *In the Matter of the National Land Commission*, Advisory Opinion No. 2 of 2014, para. 310.

²²⁹ *In the Matter of the National Land Commission*, Advisory Opinion No. 2 of 2014, para. 231.

²³⁰ *In the Matter of the National Land Commission*, Advisory Opinion No. 2 of 2014.

and the ministry had the authority to issue land titles on behalf of the government.²³¹ The Court did not acknowledge the fact that the ministry has in the past abused this responsibility and hence the role of the NLC in ensuring checks and balance should have been given proper credence.²³²

The Supreme Court stated that it is clear that the NLC bears the mandate in relation to land grievances with functions that are in nature consultative, advisory and safeguard-oriented.²³³ The NLC can only recommend creation of legislation to address historical land injustices but cannot act on this recommendations or implement them.²³⁴ Hence, if parliament does not act on the recommendations given by the NLC, historical and present land injustices may not be addressed.

Land Laws (Amendment) Act abolished the County Land Management Boards (CLMBs), which were seen as devolved entities of the NLC to manage public land in the county levels.²³⁵ This has hampered the role of NLC to manage public land unless it works directly with the county and national governments.²³⁶

4.5 LIMITATIONS OF THE CURRENT LAND LAWS TO DEAL WITH THE PROBLEM OF LAND GRABBING IN KENYA

This part of the chapter shall review the limitations of the current land laws in resolving land problems in Kenya.

Firstly, the LRA provides that a registered owner of land has absolute and indefeasible rights over that land.²³⁷ Similarly, the RLA provided that the rights of a registered proprietor remained absolute and indefeasible.²³⁸ This is despite the fact that the registration could have been obtained by fraud.

²³¹ *In the Matter of the National Land Commission*, Advisory Opinion No. 2 of 2014, 59.

²³² Kariuki F. Ouma S, Ng'etich R, *Property Law*, 2016, 375.

²³³ *In the Matter of the National Land Commission*, Advisory Opinion No. 2 of 2014, 314.

²³⁴ 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, November 2016.

²³⁵ Muwongo A, Kamunyori S, Choi N and Kahindo L, *In search of Land*.

²³⁶ Muwongo A, Kamunyori S, Choi N and Kahindo L, *In search of Land*.

²³⁷ Section 25 (1), *Land Registration Act*, 2012.

²³⁸ Section 143, *Registration of Lands Act*.

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The Commission of inquiry into the illegal and irregular allocation of land stated that a major contributor to land injustices was the fact that titles were indefeasible and absolute, and went farther to recommend that this provision should not be taken as absolute.²³⁹

The provision of indefeasibility of title stated in the LRA is similar to section 143 of the RLA despite the fact that this provision contributed to the irregular allocation of land.²⁴⁰ This therefore limits the ability of the LRA to deal with land grabbing as the title of a proprietor is absolute despite the fact that the title may have been acquired illegally.

Secondly, the LRA provides that the instruments previously used for the disposition of interest in land shall continue to be used and applicable law shall continue to be applied.²⁴¹ On the other hand, Article 109 of the Act, read together with the Schedule provide that laws applicable to section 107 are repealed. Clearly, there is a lack of clarity in the transitional provisions of the new laws and thus creates uncertainties.

Thirdly, the Land Act has made provisions to the transfer of unutilized land to landless.²⁴² A problem arises here where land that is already registered may be transferred.²⁴³ This gives an opportunity for land grabbing.

Fourthly, the NLC Act provides for the NLC to give recommendations to the parliament for an appropriate legislation for the investigation of claims arising out of historical land injustices.²⁴⁴ However, this provision does not give an obligation to the parliament to act on the recommendations given by the NLC.²⁴⁵ This has left the NLC as just a recommender for actions but has no power to implement the actions.

²³⁹ Africa Centre of Open Governance (AFRICOG), *Mission Impossible; Implementing the Ndung'u Report*, June 2009, 19.

²⁴⁰ AFRICOG, *Mission Impossible; Implementing the Ndung'u Report*, June 2009, 19.

²⁴¹ Section 107, *Land Registration Act*, 2012.

²⁴² Section 160 (2) (e), *Land Act*, 2012.

²⁴³ Atieno B, *Assessing the Effectiveness of the National Land Commission in Addressing Irregular and Illegal Allocation of Land in Kenya*, 2016.

²⁴⁴ Section 14, *National Land Commission Act*, 2012.

²⁴⁵ Atieno B, *Assessing the Effectiveness of the National Land Commission in Addressing Irregular and Illegal Allocation of Land in Kenya*, 2016.

4.6 CONCLUSION

This chapter has interrogated the limitations of the current land statutes in resolving the problem of land grabbing in Kenya. It has shown that despite a change in the law and minimizing of the registration regimes, the problem has not been addressed adequately. The chapter has also addressed the limitations in addressing the problem of land grabbing from an institutional perspective. With the enactment of the new land laws, much has not changed with regards to the concept of indefeasible title. The new land laws contain the concepts of indefeasible title and the protection of first registration even if done through fraud.

CHAPTER 5

RECOMMENDATIONS AND CONCLUSION

5.1 INTRODUCTION

This chapter will give a summary of the findings discussed in chapter four. It will provide recommendations regarding the resolution of the problem of land grabbing in Kenya and finally give conclusions of the study. This study has given a review of the current land laws in Kenya and also the institutional framework of land. The study has shown the limitations of the new land laws to deal with the problem of land grabbing in Kenya. It has also shown that the land institutions, particularly, the NLC is also limited in addressing the problem of land grabbing.

5.2 FINDINGS

Chapter four has looked at the findings of the study which are the limitations of the current land laws to address the problem of land grabbing. This section will give a summary of the findings.

The functions of the NLC are consultative and advisory in nature.²⁴⁶ Hence, can only give recommendations to the Ministry of Lands to address historical land injustices but cannot act on these recommendations or implement them.²⁴⁷

The concept of indefeasibility of title is still provided in the LRA.²⁴⁸ This does not follow the recommendation of the Commission into the Inquiry into Illegal and Irregular allocation of land that this provision should not be absolute as it was a major contributor to land injustices.²⁴⁹

The NLC Act gives power to the NLC to give recommendations to the parliament on claims arising out of historical land injustices.²⁵⁰ However, it does not give the NLC power to act on these recommendations or implement them.

²⁴⁶ *In the Matter of the National Land Commission*, Advisory Opinion No. 2 of 2014, 314.

²⁴⁷ 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, November 2016.

²⁴⁸ Section 24 (1), *Land Registration Act*, 2012.

²⁴⁹ AFRICOG, *Mission Impossible; Implementing the Ndung'u Report*, June 2009, 19.

²⁵⁰ Section 14, *National Land Commission Act*, 2012.

5.3 RECOMMENDATIONS

This study recommends the following in view of the foregoing discussions.

5.3.1 Amendment of Article 67 (2) (e) of the Constitution of Kenya

There is a need to amend this article so that the investigations carried out by the NLC on historical land injustices do not go in vain. Currently, the article only gives the NLC power to investigate and provide recommendations on the appropriate redress. The study recommends that the article should provide that the function of NLC includes to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices and provide recommendations that are binding for appropriate redress. Through this amendment, the NLC will not only have the power to provide recommendations, but also to act on these recommendations.

5.3.2 Amendment of the Land Laws.

Firstly, the concept of absolute and indefeasible title should be deleted from the Land Laws. This is because, persons who have acquired land through illegal means may also be protected under this provision.

Secondly, the RLA provides for the fresh registration of titles that were registered under the repealed laws.²⁵¹ However, it does not provide appropriate timelines. It causes confusion as to what laws are applicable to these lands before they are registered under the RLA. Therefore, the study recommends that the RLA provides a specific timeline for the fresh registration and also provide the clarification of what laws should be applied before registration. This will ensure uniformity in its provisions.

5.3.3 Establishment of CLMBs

The CLMBs were abolished by the Land Laws (Amendment) Act. These institutions were key in the effectiveness of the NLC in the county level. In order for the NLC to carry out its mandate of management and administration of public land on behalf of the county governments, it has to work closely with the county governments and one way is through the re-establishment of the

²⁵¹ Section 105, *Land Registration Act*, 2012

CLMBs or an institution at the county level. By having an institution at the County level, the NLC will be able to address any land grabbing problems facing particular countries.

5.3.4 Implementation of the Ndung'u and TJRC land reports

As discussed in chapter 1, various commissions were established in order to investigate historical land injustices and illegal acquisition of land and to give recommendations. The Njonjo report was published in 2003, the Ndung'u report in 2004 and the TJRC report in 2013. Despite these reports giving key recommendations to enhance land reforms in Kenya, most of them have not yet been recommended.

The Ndung'u land report recommended the computerization of land records.²⁵² Similarly, the TJRC report recommended that the NLC develop and maintain computerized inventory of land which is accessible to all Kenyans.²⁵³ This needs to be implemented by the NLC and the ministry of lands. This will ensure reduced cost in maintaining land records up to date and will ensure third party access which is important for instance, in ascertaining the ownership of land rights.²⁵⁴

The TJRC recommended that the NLC should formulate and implement guidelines in terms of the maximum acreage an individual or company can buy in respect of private land.²⁵⁵ Currently, the Land Act does not give the minimum or maximum land that can be bought by an individual or company in Kenya.²⁵⁶ Therefore, this needs to be implemented by giving a specific number of acres that can be bought.

5.4 CONCLUSION

Land in Kenya is one of the most important resources in Kenya, hence it is important for the problem of land grabbing to be resolved.

The main objective of the study was to determine the limitations of the current of land laws to deal with land grabbing and to give appropriate recommendations on how this problem can be resolved in Kenya.

²⁵² AFRICOG, *Mission Impossible; Implementing the Ndung'u Report*, June 2009, 14.

²⁵³ Kituo Cha Sheria, *Summary of the Truth Justice and Reconciliation Commission (TJRC) Report*, 2014, 48.

²⁵⁴ Goyal A, *Benefits of Land Registry Digitization*, April 2012.

²⁵⁵ Kituo Cha Sheria, *Summary of the Truth Justice and Reconciliation Commission (TJRC) Report*, 2014, 48.

²⁵⁶ Section 159 (1), *Land Act*, 2012.

The assumptions of the study was that first, the problem of land grabbing in Kenya has not been adequately addressed by the current land laws, secondly, that the institutions related to land, that is, the NLC and the Ministry of Lands are also limited in dealing with land grabbing in Kenya, and lastly, that for the problem of land grabbing to be resolved in Kenya, the limitations of the land laws must be addressed.

This study has proved these assumptions and has made appropriate recommendations.

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