

**PROPERTY RIGHTS BEYOND PROPERTY LIMITS: An Analysis of the Right to
Unobstructed View in Kenya.**

By
VALERIE MITCHELLE TAKAH
083889

Prepared under the supervision of
[MR. DESMOND TUTU]

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University Law School


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DECLARATION

I, VALERIE MITCHELLE TAKAH, 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: *takah*
Date: *6/06/2018*

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


Signed:
Date: *6/6/18*

For:
MR.DESMOND TUTU

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DEDICATION

I would like to dedicate this dissertation to the Almighty God for his grace and mercy and to my Family fro always believing and reminding me that are I am capable.

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I am sincerely thankful to the Almighty God for strength to pull through this study.

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ABSTRACT

Land use planning regulations in developing countries often fail to achieve greater efficiency and equity in the use of urban land. As a result plans often bear little or no relation to the people's needs and wishes and they are in any case distorted by limited implementation and their rigid nature. These problems are exacerbated, particularly in the face of rapid change, by lack of consistent overall policy framework and failure to involve the public in the formulation of laws and regulations which affect their interests.

This study seeks to evaluate whether Kenyan Law is capable of securing the right to an unobstructed view from property in Kenya. The Study analyses the Land use planning system in the United Kingdom with particular focus on London which has protected views in order to reserve its identity.

It can be concluded that, the Kenyan Land use planning system has not yet adopted the 'bottom - up' approach in the formulation of regulations. Hence, interests such as, an unobstructed view cannot be protected.

ABBREVIATIONS

NEMA-National Environment Management Authority

EMCA-Environmental Management and Coordination Act

LIST OF CASES

William Aldred's Case (1610).

Dennis v Davies, 2009 EWCA.

Myburgh v Jamison (1861).

Tod-Heatley v Benham (1888) 40 CH D 80

Ndlambe Municipality v Lester and Others [2012] 3 All SA 441(ECG).

Kiluwa Limited and Suleiman Said Shahbal v The Commissioner of Lands and Others [2012] e KLR.

Pearl Beach Hotel Limited and another V Kenneth Stanley Haji & 2 others [2017] e KLR.

LIST OF LEGAL INSTRUMENTS

Constitution of Kenya (2010)

Draft National Land Use Policy (2016)

Physical Planning Act (Act No. 9 of 1996)

Physical Planning Bill (2015)

Environmental Management and Coordination Act (Act No.8 of 1999)

Urban Areas and Cities Act (Act No.13 of 2011)

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

Environment and Land Court Act (No.19 of 2011)

County Governments Act (Act 17 of 2012)

The Integrated National Land use Guidelines, 2011

Mombasa County Government First County Integrated Development Plan (2013-2017)

The Mombasa County Decentralised Structures Bill (2017)

ENGLAND

Town and Country Planning Act, 1909.

Town and Country Planning (Interim Development) Act, 1943.

Town and Country Planning Act, 1947.

Town and Country Planning Act, 1990.

Localism Act, 2011.

Neighbourhood Planning Act, 2017.

London Plan, 2016.

London View Management Framework, 2012

CHAPTER ONE

INTRODUCTION

1.1 Background of the Study

Property as noted by John Cribbett is a concept that is truly in transition as human beings toil in fulfillment of their needs, new rights and duties emerge based on property.¹ Hence this transitional nature, too has an impact on what property and property right mean. The acquisition of property rights is informed and mostly influenced by society.² For example, the institution of private property is an unmistakable index of social progress, this is because it originated because of social reasons; it has grown under continual subjection to the social sanction.³ This then led to the need to uniformly regulate property. This need to regulate how property and society interact led to the emergence of various doctrines of law over the years.

One salient doctrine in Property Law is *Cuius est solum eius est usque ad coelom el ad inferos* which is an ancient common law doctrine which means, he who owns the land owns everything reaching up to the very heavens and down the depth of the earth.⁴ Blackstone in his commentaries opines that there is nothing which so generally, strikes the imagination, and engages the affections of mankind, as the right to property; or that sole and despotic dominion which one man claims and exercises over the external things of this world, in total exclusion of the right of any other individual in the universe.⁵

The exclusive nature of property is the most defining character of property ownership. However over the years, changes in land use have led to states coming up with regulations on land use planning, hence interfering with the absolute and exclusive nature of property ownership. Land use planning in Kenya can be traced to the colonial era when the colonial government, confronted by

¹ Cribbett J, *Concepts in transition: The search for a new definition of Property*, University of Illinois Law Review, Illinois, 1986, 1.

² Kariuki F, Otieno S., and Ng'etich R, *Property law*, Strathmore University Press, Nairobi, 2016, 132.

³ Cribbet J and Johnson C, *Principles of Law of Property*, 3ed, Foundation Press, New York, 1989, 7.

⁴ *Bury v Pope* [1587] Croz Eliz 118, 78 E.R. 375.

⁵ Blackstone Commentaries on the Laws of England.

a rapidly urbanizing country, found it necessary to formulate laws that would regulate the nature of spatial planning in the country.⁶ The Town Planning Act was enacted to regulate planning on towns and urban areas.⁷ However, later, there was a need to broaden the scope of planning to include the preparation of plans for broader areas or regions, hence the Land Planning Act of 1968 was enacted.⁸ These legislations, however could not cope with the changing planning needs. Hence in 1996, the Physical Planning Act was enacted to fill the loopholes.⁹ This law repealed the two previous legislations, making it the main law on land use planning in Kenya to date.¹⁰

Land use planning looks into the future, identifying the long term uses that land can be put into to ensure maximum returns in the long-run.¹¹ It also aims at balancing competing interests over land among various stakeholders ensuring consensus building that promotes sustainability.¹² The protection of the right to an unobstructed view from property at the Kenyan Coast has led to conflicts between neighbours. This is because the realisation of this right limits a land owners right to use their land as they please.

In English law the right to a view does not exist as it would unduly interfere with the neighbouring land owners building rights.¹³ However this right can only be secured by way of a registered servitude or a similar right deriving from contract or legislation.¹⁴ Such a circumstance would be where the neighbours had signed a covenant to protect the right to a view, such covenant must go further than merely common law nuisance.¹⁵

This study is geared towards analysing the manner in which the right to an unobstructed view from property can be protected in Kenya. It is guided by the Lockean Social Contract Theory which

⁶ Tom Ojienda, *Conveyancing Principles and Practice*, Law Africa Publishing Ltd, Nairobi, 2010,301.

⁷ Tom Ojienda, *Conveyancing Principles and Practice*, 301.

⁸ Tom Ojienda, *Conveyancing Principles and Practice*, 301.

⁹ Tom Ojienda, *Conveyancing Principles and Practice*.302.

¹⁰ Tom Ojienda, *Conveyancing Principles and Practice*, 302.

¹¹ Oludayo A, *Environmental Law and practice in Nigeria*, University of Lagos Press, Lagos, 2014,476.

¹² Kariuki F, Otieno S., and Ng'etich R, *Property law*, 385.

¹³ *William Aldred's Case* (1610).

¹⁴ *Myburgh v Jamison* (1861).

¹⁵ *Tod-Heatley v Benham* (1888) 40 CH D 80.

seeks to show how individuals agree to have unequal private property even if the Earth and all its natural resources in the initial state of nature “belong to Mankind in common”.¹⁶

1.2 Statement of problem

Under Article 40 of the Constitution, The Parliament has a duty to enact laws that guarantee the quiet and peaceful enjoyment of property by individuals without interference from others.¹⁷ Article 42 of the Constitution provides that every person has a right to a clean and healthy environment, which includes the right; to have the environment protected for the benefit of present and future generations through legislative and other measures as contemplated.¹⁸ However, in outlining the rights that a property owner has, it’s important for the laws to provide for measures that enable individuals in certain circumstances, to agree amongst each other to secure the right to an unobstructed view from property. The Kenyan legal framework fails to do so. With particular focus on Mombasa which is a tourist destination, the protection of its beautiful oceanic view could be beneficial to the county. However the Kenyan planning laws fall short of enabling the realization of the right to an unobstructed view from property.

1.3 Purpose of the Study

The purpose of this study is to find out if it is justifiable to secure the right to an unobstructed view from property to the detriment of the adjacent neighbours land use rights in the Kenya Coast.

1.4 Hypotheses

The Hypotheses in the study are that;

1. The Kenyan Laws have failed to justify instances when the right to an unobstructed view from property can be recognized.
2. The Failure of the laws to secure the right to a view is as a result of very little involvement of the public in the formulation of laws that guide their interest in property.

¹⁶ Widerquist K, ‘Lockean Theories of Property: Justification for Unilateral Appropriation’, *Public Reason*, (2010), 6.

¹⁷ Article 40, *Constitution of Kenya* (2010)

¹⁸ Article 42, *Constitution of Kenya* (2010)

1.5 Research Objectives

The specific objectives of the study are:

- (i) To analyse the current legal framework on land use planning in Kenya and whether it is capable of guaranteeing the right to an unobstructed view from property.
- (ii) To assess how English Laws managed to secure the right to an obstructed view from property regardless of this right not being inherent.
- (iii) To recommend measures that will justify the realization of the right to an unobstructed view in Kenya.

1.6 Justification of the study

At common law, the General rule is that a property owner does not enjoy an inherent right to a view from their property¹⁹, unless that right is secured by way of a registered servitude or a similar right deriving from contract or legislation.²⁰ In other jurisdictions such as South Africa, the courts position with regards to the right to a view is that this right can only be granted in cases where the obstruction of a view has a detrimental effect to the use, enjoyment and value of the property.²¹

In Kenya, there is no standing as to how the right to a view is handled. In *Kiluwa Limited and Suleiman Said Shahbal v The Commissioner of Lands and Others*, the court allowed for orders to stop the blockage of the oceanic view from the Apartments owned by the petitioners on grounds that it violated the petitioners' right to use public property.²² However this was not the case in *The Pearl Beach Hotel Limited and another V Kenneth Stanley Haji & 2 others*, the case also involved a petitioner who is an apartment owner who built his apartments guaranteeing that the tenants will have the oceanic view from the balcony of their apartments. The Petitioner also has a rooftop restaurant which had the view of the Indian Ocean and Fort Jesus. The petitioner having found no legal ground to sue the respondent, they opted to sue the respondent for breach of environmental and physical planning regulation on building which on investigation, it was concluded that the

¹⁹ Foster J. Tara, 'Securing a Right to a View: Broadening the Scope of Negative Easements' 6 *Pace Environmental Law Journal* (1988), 275.

²⁰ *William Aldred's Case* [1610] All ER Rep 622.

²¹ *Ndlambe Municipality v Lester and Others* [2012] 3 All SA 441(ECG).

²²[2012] e KLR.

respondents hadn't breached any of the environmental and physical planning regulations.²³ The Court then did not give orders for the protection of the right to a view on claims that it would interfere with the respondent's right to land use.²⁴

Hence, it appears as though the Kenyan Courts interpretation of property rights is strictly based on the protection of inherent rights and not any other rights that enable the achievement of the inherent rights or that could be beneficial to the land use.

1.7 Literature Review

For the purpose of this study, literature means and includes, constitutions, statutes, policies, books, articles, journals, dissertations, and online sources. The study will focus on the material listed above as the source of its literature review.

Lee Anne Fennell, in her book '*The Unbounded Home, Property values beyond Property Lines*' believes the value and meaning of property extends beyond its property lines and this poses a threat to the personal autonomy that home owner's desire.²⁵ She then shows how new understandings of homeownership and innovations that increase the flexibility of property law can address critical issues of neighbourhood control and community composition that haven't been resolved for decades.²⁶ She suggests, devising of tradable entitlements to engage in acts with aesthetic impacts, and even tradable entitlements relating to associations with preferred neighbours and peers.²⁷

Dawn Reynolds while analyzing the *Dennis versus Davies* case was of the view that even though the general position is that there is no right to a view, it's only fair that in exceptional circumstances the court takes note of the fact that the development by neighbours had been designed so that each and every property would benefit from the view.²⁸

Unger Christopher in his article, *Ancient Light in Wrigleyville: An Argument for the Unobstructed View of a National Pastime*' believes there are things that we individually and culturally have

²³[2015] eKLR.

²⁴[2017] eKLR.

²⁵ Fennell, L A, 'The Unbounded Home, Property Value beyond Property Lines' *University of Chicago Public Law & Legal Theory Working Paper* (2009),10.

²⁶ Fennell, L A, 'The Unbounded Home, Property Value beyond Property Lines', 1-10.

²⁷ Fennell, L A, 'The Unbounded Home, Property Value beyond Property Lines', 3.

²⁸<https://www.wrighthassall.co.uk/knowledge/legal-articles/2010/04/10/right-view/> on 16 January 2017.

come to regard as significant in that the destruction of such things dislocates and dispirits us.²⁹ He believes public policy is the determinant of property rights to light, air and view.³⁰ Where the proper balance is struck, thereby creating a right to a view that is beneficial to the public this outweighs its restrictive cost; the courts should not hesitate to legalize the right.³¹ It's his view that states should recognize the interest that lies in land that has scenic views and be careful to give adequate consideration to view obstruction when compensating individuals in eminent domain cases, hence zoning regulations should only be formulated considering the realm of health and welfare but also aesthetic and vie preservation.³²

Carolina A. Koch in her dissertation titled, '*The Right to A view: Common Law, Legislation and the Constitution*' was of the view that by granting individuals the right to a view it will only add value to one individual unlike if the neighbouring property owners were allowed to develop without limits it would lead to public interest at large.³³ According to her, the law attaches more value to the right to build and develop on one's land than to the enjoyment of the property. This type of thinking does not justify the importance of protection of the right to a view as it does not serve an important public purpose.³⁴ However, Carolina is of the view that the existing right to a view can be protected with a servitude, a restrictive covenant, a restrictive condition or in terms of legislation.³⁵

In conclusion, Lee Fennell's view of property and property rights clearly takes not of the transitional nature of property. Hence the protection of the right to a view by the mechanisms suggested by Carolina Koch, should be encouraged for the benefit and realization of individual's right to a clean and healthy environment in their neighbourhoods. Unger believes, public policy is that best determines whether certain rights should be recognized in a neighbourhood. Hence the

²⁹ Unger C. Stephen, 'Ancient Light in Wrigleyville: An Argument for the Unobstructed View of A National Past Time' 48 *Indiana Law Review* (2005), 533.

³⁰ Unger C. Stephen, 'Ancient Light in Wrigleyville: An Argument for the Unobstructed View of A National Past Time', 543.

³¹ Unger C. Stephen, 'Ancient Light in Wrigleyville: An Argument for the Unobstructed View of A National Past Time', 549.

³² Unger C. Stephen, 'Ancient Light in Wrigleyville: An Argument for the Unobstructed View of A National Past Time, 549.

³³ Koch C, 'The Right to a View: Common Law, Legislation and the Constitution, Unpublished Doctor of Law thesis, Stellenbosch University, December 2012,274.

³⁴ Koch C, 'The Right to a View: Common Law, Legislation and the Constitution, 275.

³⁵ Koch C, 'The Right to a View: Common Law, Legislation and the Constitution, 241.

property regime of states should be flexible to ensure that certain rights are actualized for public purposes where deemed fit.

1.8 Limitation of the study

This study seeks to rely on London for the comparative study. London is the capital city of England and stands on the Thames, its primary geographical feature, a navigable river which crosses the city from the south-west to the east. Mombasa on the other hand, is a city on the coast of Kenya. The difference between the topography of these two cities is a limiting factor this study.

1.9 Outline of the dissertation and its flow of argument

Chapter one

This chapter introduces the topic of study. It deals with the background of the study, the statement of the problem, the hypothesis, the objectives, literature review, and justification of the study and the flow of arguments.

Chapter two

This chapter will look into the theoretical framework from which the study derives. The theories shall include John Locke's Social Contract Theory and critics from other theorist. This chapter also deals with the methodology relied on during the study.

Chapter three

This chapter entails a discussion on the legal framework on land use planning in Kenya. It will examine whether the current laws and institutions can within their powers provide for the protection of the right to a view from property.

Chapter four

This chapter deals with a comparative analysis of the Kenyan land use planning system and that of the United Kingdom with regards to the protection of the right to a view from property. The United Kingdom just like Kenya does not recognise an inherent right to a view from property. However, the United Kingdom has been able to establish protected view in its municipal jurisdiction of City of London. This chapter will also examine the dearth in Mombasa's municipal Laws with regards to protection of views from property.

Chapter five

This being the final chapter of the dissertation, it provides for a conclusion and will briefly consider policy justifications for the existence of a right to a view. These policy considerations will be based on what the United Kingdom has set up for the justification of the right to a view. This chapter will also explore the possibilities of protecting the right to a view regardless of not being an inherent right.

CHAPTER TWO

2.0 Introduction

This Chapter examines the social contract theory and how it justifies the realization and protection of the right to an unobstructed view from a property. The social contract theorist believe the origin of many societal institutions such as property is due to general agreements freely entered into by equal and independent individuals living in a state of nature.

In Kenya, the right to an unobstructed view from a property is considered a mere incidental advantage, hence the law strongly protects the neighbours' right to land use from interference. In *Pearl Beach Hotel Limited and another v Kenneth Stanley Hajj and 2 others* due to lack of legal remedies to claim the right to an unobstructed view, the claimant opted to file the suit on claims that his adjacent neighbour had not adhered to environmental and planning regulations, the court however ruled that the adjacent neighbour had adhered to environmental and planning regulations, hence the claimants application was dismissed.³⁶

2.1 Social Contract Theory

John Locke, a Social contract theorist, believed men are born free in that they are free to do what they wished and equal in the sense that they would agree on ways of life without the government's intervention.³⁷ He believed, private property is created when a person mixes his labour with raw materials of nature.³⁸ John Locke viewed property rights as rights which could be generated and sustained by individuals through their labour and exchange and these rights he thought could be recognized in a human community without the benefit of any edicts of positive law.³⁹ Historically, in other jurisdictions such as United Kingdom, the right to an unobstructed view's realization was first through voluntary agreements between communities before parliament enacted regulations

³⁶[2015] eKLR.

³⁷ John Locke, *The Second Treatise of Government*, 1689.

³⁸ <http://lockeandsmith.org/about/johnlocke/> on 30 November 2017.

³⁹ Waldron J, 'To Bestow Stability upon Possession' in Penner J and Smith H, *Philosophical Foundation of Property Law*, 1ed, Oxford University Press, Oxford, 2013, 1.

aimed at securing the right to an unobstructed view from property.⁴⁰ Locke however points out that it is not a complete state of liberty as the laws of nature existed and everyone ought to obey.⁴¹ Given the implications of the law of nature, there were limits as to how much property one can own, one is not allowed to take more from nature than one can use, thereby leaving others without enough for themselves.⁴² John Locke believes through reason and tolerance, human beings were enabled to obey and learn about the law of nature.

Locke believed governments had no right to dispose of citizen's property arbitrarily as property precedes government.⁴³ This shows that property rights were generated using the bottom to up approach.⁴⁴ Positive law was only needed to recognize and accommodate the existence of property rights that were already well established. According to Locke the reason why men entered into society was for the preservation of their property.⁴⁵ Hence, the state should not be the determinant of whether a certain property right should be enforced or not but the individuals.⁴⁶

Richard Epstein agrees that the correct starting point is the Lockean position that property rights come from the bottom up; meaning from the affected individuals in a certain property before the state realizes the property right as positive law.⁴⁷ In his account of the modern democratic view, property rights are arbitrary assemblages of rights that the state creates for its own instrumental purposes, and which it can undo almost at will for the same instrumental end. Property rights are not gifts of the state, he says they have legal standing quite apart from human rule.⁴⁸

John Locke in his book *The Second treatise* criticises the bottom to up approach, in that, he believes it could be disadvantageous to the individuals.⁴⁹ Hence he suggests that, it is better for the consent

⁴⁰ *Dennis v Davies* EWCA Civ 1081[2009].

⁴¹ <https://www.libertarianism.org/publications/essays/john-lockes-theory-property-problems-interpretation> on 30 November 2017.

⁴² <http://www.legalservicesindia.com/article/article/john-lockes-social-contract-theory-1726-1.html> on 30 November 2017.

⁴³ <http://asderathoslchaimclassicalliberalism.blogspot.co.ke/2010/01/john-locke-two-treatises-of-government.html?m=1> on 21 January 2018.

⁴⁴ Waldron J, 'To Bestow Stability upon Possession' 2.

⁴⁵ Waldron J, 'To Bestow Stability upon Possession' 2.

⁴⁶ Waldron J, 'To Bestow Stability upon Possession' 2.

⁴⁷ Waldron J, 'To Bestow Stability upon Possession' 2.

⁴⁸ Waldron J, 'To Bestow Stability upon Possession' 2.

⁴⁹ Waldron J, 'To Bestow Stability upon Possession' 3.

to property rights to be from a community and not the individual as some people may starve regardless of God having provided for them in plenty.⁵⁰ This takes into account the fact that individual needs as related to property can be diverse in different areas and it's only the communities affected that can guarantee the realization of certain rights such as the right to an unobstructed view and not the state. The state should only aim at enabling the community agree on a sustainable use of their property.

Harold Demsetz's '*Toward a Theory of Property Rights*', seeks to give a justification of why there is change in property rights.⁵¹ Demsetz an economist believed the emergence of new property rights takes place when the cost of possessing them exceeds the cost obtaining them.⁵² Demsetz in his article made an analysis on the economics of common ownership, in which he asserts the benefits and losses due to over exploitation of a resource is shared equally by everyone in the community. This theory of property ownership led to people being liable for the mistakes of others caused by breach of the law. This led to individual ownership, as explained by John Locke in his social contract theory. Individuals could trade with the commoners and other individuals the benefits achieved and acquire what they need. The absolute protection of land use approach limits the ability of land owners to acquire and purchase certain rights from their neighbours such as the right to an unobstructed view.

Demsetz and Locke's accounts differ in that the latter pictures the society as completely liberal without governmental intervention. Unlike Demsetz who envisioned a norm of respect for possession that developed on its own without enforcement.⁵³ The right to an unobstructed view in Kenya should be allowed to develop on its own where the community deems fit with the assistance of the state. Unless its realization is likely to lead to disadvantages to the community.

David Hume's view on the respect of property rights and the rights of individual ownership in particular were aimed at solving the problem of exploitation.⁵⁴ This led to the enactment of

⁵⁰ Locke J, *Second Treatise*, 1689, 27.

⁵¹ Bell A and Parchomovsky G, 'A Theory of Property' 90 *Cornell Law Journal* (2005), 548.

⁵² Demsetz H, 'Toward a Theory of Property Rights' 57 *American Economic Journal*, (1967).

⁵³ Krier J, 'Evolution Theory and the Origin of Property Rights' 95 *Cornell Law Journal* (2009), 149.

⁵⁴ Krier J, 'Evolution Theory and the Origin of Property Rights', 151.

different legislation aimed at securing against exploitation of property and basically ensuring that individual owners enjoy quiet and exclusive possession of their property.

Blackstone's conception portrays that a property owner has sole and despotic dominion over their property to the exclusion of others.⁵⁵ However, on analysing the Commentaries on the Law of things in the era of Blackstone, Schorr believes the most important characteristic of property is not that it is absolute but exclusive in nature.⁵⁶ This is in view of the fact that many doctrines that were against the absolute nature of property ownership.⁵⁷ The view of property as absolute ownership has been termed by legal thinkers as not a satisfactory model to show what property is.⁵⁸ This is because over the years, many doctrines have been developed that interfere with the absolute view of property. Legal realist then moved towards the metaphor of property as a 'bundle of sticks'.⁵⁹

Honor'e believed Property comprised of the following bundles of rights; *Ownership comprises the right to possess, the right to use, the right to manage, the right to the income of the thing, the right to the capital, the right to security, the rights or incidents of transmissibility and absence of term, the prohibition of harmful use, liability to execution, and the incident of residuary: this makes eleven leading incidents.*⁶⁰ Honor'e however argues that these incidents are essential features of the full concept of property.⁶¹ This concept allowed for the disintegration of the institution of property based on the rights each individual had over property. This approach has the advantage of permitting property to mean as much as and as little as the situation requires.⁶² This means a property owner could own the right to a view and the law should aim at securing this bundle of right.

Alexander and Penalver critique the bundle of rights metaphor arguing that this conception of property as bundles of rights will turn property into a disaggregated collection of narrowly defined rights, causing us to lose sight of the connection of those rights to things.⁶³The right to a view is

⁵⁵ William Blackstone, *Commentaries on the Laws of England*, 1765-69.

⁵⁶ Schorr B.D, 'How Blackstone Became a Blackstonian' 10 *Theoretical Inquiries in Law* (2009), 106.

⁵⁷ Schorr B.D, 'How Blackstone Became a Blackstonian', 107.

⁵⁸ Singer W, *Entitlement: The Paradoxes of Property*, Yale University Press, Connecticut, 2000, 29.

⁵⁹ Singer W, *Entitlement: The Paradoxes of Property*, 9-10.

⁶⁰ Coleman J, *Reading in the Philosophy of Law*, Garland Publishing, New York, 1999, 562-574.

⁶¹ Coleman J, *Reading in the Philosophy of Law*, 562-563.

⁶² Lee Anne Fennell, 'The Unbounded Home, Property Values beyond Property Lines', 11.

⁶³ Kariuki F, Otieno S., Ng'etich R., *Property Law*, Strathmore University Press, 2016, 6.

connected to a thing be it the ocean, mountain or any other beautiful scenery, hence its realization cannot lead to it losing connection to a thing. Clearly neither the Blackstonian nor the bundle of sticks concepts of property offer a useful normative guidance in resolving land use disputes, because neither approaches focuses on the appropriate function of property.⁶⁴Hence a balance of the applicability of the two concepts of law is likely to guarantee the transitional nature of property.

Conclusion

Today, exclusion from property has to go hand in hand with the right of control of things.⁶⁵ This is done through controlling the performances of individuals. Exclusion is pointless on its own if performance or land use is not the main focus. Exclusion only becomes valuable when it enables property owners use property in a certain way.⁶⁶ Hence, the function of property rights create opportunity, where diverse endeavours can be undertaken by an owner without interference. The right to a view can be termed as one of the ‘diverse endeavours’ that particular land owners may be granted by an order of the court, regardless of it not being provided for by the law.⁶⁷ The law should provide for mechanisms that allow communities or neighbourhoods when coming up with their development plans, to agree on the realization of certain rights that may be beneficial to them, such as, the right to an unobstructed view from property.

⁶⁴ Lee Anne Fennell, *The Unbounded Home property Values beyond Property Lines*, 12.

⁶⁵ Lobhouse L and Gore C., *Property: Its duties and rights: Historically, Philosophically and religiously regarded*, Macmillan Publishing Ltd, London, 1913.

⁶⁶ Lee Anne Fennell, *The Unbounded Home, Property Values beyond Property Lines*, 12.

⁶⁷ <https://www.lyonsdavidson.co.uk/property-owners-right-view/> on 20 January 2017.

2.2 Research methodology

The study is conducted based on the qualitative method of research in order to meet the objectives and answer the questions posed by the study. The mode used was that of content analysis that is using various sources of materials such as books, journals, articles, internet searches and the current legislation that deals with the securing of the right to an unobstructed view.

Data Collection and Analysis

Data was collected from articles, journals, books, legislation and internet searches. They yielded good results in informing the study and provided a base for which the objectives are tackled. The information also enabled the formulation of a pattern and theme that the study would follow in covering the research objectives. The information received was analyzed with accordance with the themes brought about by the data collection. It also enabled the evaluation of the credibility or usefulness of the information received.

CHAPTER 3

THE LEGAL FRAMEWORK

3.0 Introduction

This chapter seeks to analyse the current Kenyan legal and institutional framework governing land use planning and management in Kenya. This Chapter will also analyse the possibility of the framework allowing for the realisation of the right to an unobstructed view from property in Kenya.

The Kenyan laws and regulations have so far failed to adequately involve the public in the formulation of laws and regulations that affect their land uses.⁶⁸ This has resulted in conflicting interests among adjacent neighbours. Land uses keep developing each year and there is a need for the law to accommodate these changes by allowing for the protection of certain rights such as the right to unobstructed view from property. The Kenyan law however, does not accommodate the possibility that certain rights could be protected in a neighbourhood for the benefit of the property owners around that areas.

3.1 National Laws

3.1.1. The Constitution of Kenya, 2010

The Constitution provides that every person has the right to have their environment protected for the benefit of present and future generation through legislative and other measures.⁶⁹ Article 66 of the Constitution provides the nation may regulate the use of any land, or any interest in or right over any land, in the interest of defence, public safety, public order, public morality, public health, or land use planning.⁷⁰ Parliament is required to enact legislation ensuring that investments in property benefit local communities and the economies.⁷¹ Hence public participation and involvement in the formulation of these legislation enables individuals secure certain interest they may have in land, such as the right to an unobstructed view.

⁶⁸ Fennell A.L, 'The Unbounded Home, Property Values Beyond Property Lines', 10.

⁶⁹ Article 42, *Constitution of Kenya* (2010).

⁷⁰ Article 66 (1), *Constitution of Kenya* (2010).

⁷¹ Article 66 (2), *Constitution of Kenya* (2010).

The Constitution also establishes a devolved system of governance and tasks the counties with various functions on land use planning.⁷² The Constitution states that only the county assembly may receive and approve plans and policies for the management and exploitation of the county's resources, infrastructure and institutions.⁷³ The Constitution however does not go in depth to explain how the national and county planning will be undertaken and leaves the details to be dealt with in other related acts.

3.1.2 The Draft National Land Use Policy, 2016

The Draft National Land Use Policy forms basis for the preparation of a coherent and coordinated National Spatial Plan and other land use plans which are to take account of the existing situations, environmental impacts and the need for globalization.⁷⁴ The policy appreciates the need to ensure that land use planning is a continuous process in order to accommodate the constantly changing situations and the varying competing interests for land.⁷⁵ Planning laws ought to be flexible in order to embrace emerging issues such as the right to an unobstructed view from property.

3.1.3 The Physical Planning Act, 1996

The Physical Planning Act provides for the preparation and implementation of physical development plans and for connected purposes. The Act establishes the office of the Director of Physical planning who is tasked with the formulation of proper physical development plan.⁷⁶ The Local authorities under the act, shall have the power to prohibit or control the use and development of land and buildings in the interests of proper and orderly development of its area and to formulate by-laws to regulate zoning in respect of use and density of development.⁷⁷ By the mention of the local authorities, it is clear that the Act is not aligned to ensure compliance with the constitutional provisions on devolution. This led to Parliament drafting the Physical Planning Bill, 2015. This Bill aims at incorporating the county government in planning through for example the establishment of county offices such as the County Physical Planning Liaison Committee.⁷⁸

⁷² Article 184, *Constitution of Kenya* (2010).

⁷³ Article 185, *Constitution of Kenya* (2010).

⁷⁴ Section 2.1 (b), *Draft National Land Use Policy* (2016).

⁷⁵ Section 2.1 (c), *Draft National Land Use Policy* (2016).

⁷⁶ Section 4, *Physical Planning Act* (Act No. 9 of 1996).

⁷⁷ Section 29, *Physical Planning Act* (Act No. 9 of 1996).

⁷⁸ Section 78, *Physical Planning Bill* (2015).

3.1.4 The Environmental Management and Coordination Act, 1999.

The Environmental Management and Coordination Act (the Act) is an act of Parliament establishing a legal and institutional framework management of the environment. EMCA is aimed at organizing land use in order to provide preconditions for a good living environment and to enable the achievement of sustainable development. EMCA defines the Environment to include the physical factors of the surrounding of human beings including, land, water and the atmosphere.⁷⁹ The act defines Natural resources to include wildlife, water and landscapes. The Right to a view from property is highly dependent on the visibility of the landscape of an area.

EMCA provides that an audit should be carried out to determine the net worth or value of the natural resources in Kenya, their utilization and conservation and make recommendations from this findings to the relevant authorities with respect to land use planning.⁸⁰ The Act provides that the minister may declare a coastal zone to be a protected area and impose such restrictions as he considers necessary to protect the coastal zone.⁸¹ The Minister may issue general and specific orders, regulations or standards for the management of coastal zones.⁸² NEMA is mandated to prepare a survey of the Coastal Zone and thereafter develop an integrated national coastal zone management plan every two years based on survey report.⁸³ The Act also requires that the Management Plan shall include an inventory of all areas within the coastal zone of scenic value or of value for recreational and cultural purposes in the coastal zones.⁸⁴

3.1.5 The Urban Areas and Cities Act, 2011

The Urban Areas and Cities Act was passed in order to govern and manage urban areas and cities. The Act stipulates the principles of governance and management of urban areas and cities to include; institutionalized active participation by its residents in the management of the urban areas and city affairs.⁸⁵ The management of a city and municipality are vested in the county government

⁷⁹ Section 2, *Environmental Management and Coordination Act* (Act No.8 of 1999).

⁸⁰ Section 9, *Environmental Management and Coordination Act* (Act No.8 of 1999).

⁸¹ Section 42(2), *Environmental Management and Coordination Act* (Act No.8 of 1999).

⁸² Section 42(3), *Environmental Management and Coordination Act* (Act No.8 of 1999).

⁸³ Section 55, *Environmental Management and Coordination Act* (Act No.8 of 1999).

⁸⁴ Section 55(4), *Environmental Management and Coordination Act* (Act No.8 of 1999).

⁸⁵ Section 11(d), *Urban Areas and Cities Act* (Act No.13 of 2011).

and administered on its behalf by a board, a manager and such other staff as the county deems fit.⁸⁶ The board of a city or municipality shall, within its area of jurisdiction, make bylaws or make recommendations for issues to be included in by-laws; it shall ensure participation of the residents in decision making, its activities and programs among others.⁸⁷ The Act also provides that residents of a city, municipality or town may deliberate and make proposals to the relevant bodies or institutions on; proposed issues for inclusion in county policies and county legislation;⁸⁸ the proposed development plans of the county and of the national government.⁸⁹ The Act encourages high public participation, hence this provides reason to conclude that, current issues such as the protection of the right to a view from property in a neighbourhood can speedily be resolved.

3.1.6 The County Government Act, 2012.

The County Government Act was passed to further elaborate on the powers, functions and responsibilities of the county government.⁹⁰ County planning is meant to ensure effective use of land in the county and also align development within the county with the wider national spatial planning requirements.⁹¹ The County assembly is tasked with the approval of the County Development Planning.⁹² The County Executive Committee is responsible for land use planning in the county. The Act provides for the need for public participation in the formulation of the plans.⁹³ Each county is to formulate a county integrated development plan, county sectoral plans, county spatial plans, and cities and urban areas plans.⁹⁴

A County is required to come up with a development framework which shall contain strategies and policies which shall indicate desired patterns of land use within the county and set out basic guidelines for the land use management system in the county taking into account article 67(2) of the Constitution.⁹⁵ In the case of a city or a municipal, the plan is to be the instrument for the development facilitation and development control within the respective city or municipality.⁹⁶

⁸⁶ Section 12, *Urban Areas and Cities Act* (Act No.13 of 2011).

⁸⁷ Section 21, *Urban Areas and Cities Act* (Act No. 13 of 2011).

⁸⁸ Section 22 (ii) *Urban Areas and Cities Act* (Act No. 13 of 2011).

⁸⁹ Section 22 (v), *Urban Areas and Cities Act* (Act No 13 of 2011).

⁹⁰ Part V, *County Governments Act* (Act 17 of 2012).

⁹¹ Section 105, *County Governments Act* (Act 17 of 2012).

⁹² Section 8 (1) (e), *County Governments Act* (Act 17 of 2012).

⁹³ Section 105 (1), *County Governments Act* (Act 17 of 2012).

⁹⁴ Section 107, *County Government Act* (Act 17 of 2012).

⁹⁵ Section 110, *County Government Act* (Act 17 of 2012).

⁹⁶ Section 11, *County Governments Act* (Act 17 of 2012).

3.1.7 The Integrated National Land Use Guidelines, 2011

This guidelines were drafted by NEMA with an aim that they will provide a viable bottom up harmonization strategy, which will inform the enactment, review or amendments of regulations, Standards and Laws on Land use. This guidelines identify gaps, overlaps, sectoral conflicts and examine land use patterns and trends and further strive to materialize harmony and build synergies to ensure sustainable land use and natural resource management in Kenya.⁹⁷The guidelines are drafted based on the principle of decentralization, which encourages public participation.⁹⁸

In reference to Coastal Zones, the guidelines provide for control of activities which result in beach loss and encourage developments that preserve the beach or enhancements by developing zoning plan that will limit developments along the shoreline to parks, compatible open space uses and promote the conservation of coastal forests.⁹⁹ The Guidelines require that no storey building should be allowed in the front row, this should be followed by a row of two storeys in the second row in that order and that the existing building should be restricted to comply with the approved zonation.¹⁰⁰ The guidelines seek to introduce, the control ribbon development, where beach front plots are aligned in a continuous row to provide each plot with a sea view, however this results in a continuous urban sprawl and which might encroach into scenic attractions and environmentally sensitive areas.¹⁰¹

⁹⁷ *The Integrated National Land use Guidelines* (2011), 1.

⁹⁸ *The Integrated National Land Use Guidelines* (2011), 2.

⁹⁹ *The Integrated National Land Use Guidelines* (2011), 10.

¹⁰⁰ *The Integrated National Land Use Guidelines* (2011), 10.

¹⁰¹ *The Integrated National Land Use Guidelines* (2011), 10.

3.2 The Institutional framework

3.2.1 National Environmental Management Authority

NEMA is an institution established under the EMCA as the principal instrument of Government for the implementation of all policies relating to environment.¹⁰² Its core functions include; to promote the integration of environmental considerations into development policies, plans, programmes and projects, with a view to ensuring the proper management and rational utilization of environmental resources, on sustainable yield basis, for the improvement of the quality of human life in Kenya.¹⁰³

In Land use Planning, NEMA is required to establish and review land use guidelines and to examine land use patterns to determine their impact on the quality and quantity of natural resources among others.¹⁰⁴

3.2.2. The National Land Commission

The Constitution provides for the establishment of the National Land Commission.¹⁰⁵ In relation to land use planning, the commission is to conduct research related to land use of natural resources and make recommendations to appropriate authorities.¹⁰⁶ The Commission is also to monitor and have oversight responsibilities over land use planning throughout the country.¹⁰⁷

3.2.3 National Environmental Tribunal

It is an institution established under Part XII of EMCA. The tribunal is established to review administrative decisions made by NEMA relating to issuance, revocation or denial of licence and conditions of licence.¹⁰⁸ The tribunal also gives legal opinions to NEMA on complex matters where the Authority seeks such advice. In addition, the Tribunal has power to change or give an order and direction regarding environmental issues in dispute.¹⁰⁹

¹⁰² Section 9, *Environmental Management and Coordination Act* (Act No.8 of 1999)

¹⁰³ https://www.nema.go.ke/index.php?option=com_content&view=article&id=2&Itemid=137 on 31 January 2018.

¹⁰⁴ https://www.nema.go.ke/index.php?option=com_content&view=article&id=2&Itemid=137 on 31 January 2018.

¹⁰⁵ Article 67, *Constitution of Kenya* (2010).

¹⁰⁶ Section 5 (d), *National Land Commission Act* (Act No. 5 of 2012).

¹⁰⁷ Section 5 (h), *National Land Commission Act* (Act No. 5 of 2012).

¹⁰⁸ Section 125 (1) *Environmental Management and Coordination Act* (Act No. 8 of 1999).

¹⁰⁹ Section 125, *Environmental Management and Coordination Act* (Act No. 8 of 1999).

3.2.6. The County Physical Planning Offices

They are charged with the preparation of county spatial plans; the preparation of spatial plans for undesignated urban areas; coordinating planning within designated urban, cities and municipal areas; the implementation of planning policies, strategies and standards; participating in and supporting national, regional and inter-county plans; the development control and enforcement of compliance and monitoring and evaluation of county spatial development planning.

3.2.7. The Environment and Land Court

The ELC courts were established by an Act of Parliament to hear and determine disputes relating to the environmental and the use and occupation of, and title to land.¹¹⁰In relation to land use planning, the court has original and appellate jurisdiction to hear and determine such disputes.¹¹¹

Conclusion

Kenya being a two tier government has to ensure that the powers, functions and responsibilities of the two governments and the relevant institution go hand in hand. The existing planning laws and regulations in Kenya are a replica of the British Town Planning laws. It has become difficult to understand and implement these laws as they were moulded to operate in different conditions from those found in Kenya.¹¹²Since Independence, the governments have done little to harmonise the planning laws and instead ended up formulating more laws which were reactive rather than proactive to land-use issues.¹¹³

Devolution provides an opportunity to reform land use planning institutions at a decentralized level. As such, each county has a county assembly to formulate and approve appropriate policies for the management and administration of each county.¹¹⁴ Due to the close proximity with the citizens, the county is best placed to adjudicate conflicts on land uses between adjacent land

¹¹⁰ Section 4, *Environment and Land Court Act* (No.19 of 2011)

¹¹¹ Section 13 (2) (a), *Environment and Land Court Act* (No.19 of 2011)

¹¹² Matunda J, 'Sustainable Management of Riparian Areas in Kenya: A Critique of the Inadequacy of the Legislative Framework Governing The Protection of Sustainable Management of Riparian Zones in Kenya' Unpublished LLM Thesis, University of Nairobi, November 2015, 29.

¹¹³ Aggrey Daniel Maina Thuo, 'Geneology of Land Ownership, Use and Management Problems in Kenya during the Pre-August 200 Constitution Period. A review' *2 International Journal of Engineering Research & Technology*, (2013), 1540.

¹¹⁴ Victor Ouna, Land Governance in Urban Areas of Nairobi City County, 2017 World Bank Conference on Land and Poverty, 20-24 March 2017, Available online.

owners. Devolution therefore provides a unique opportunity for influencing the development of the counties.

County governments can leverage on their resources to establish strong institutions that will plan and guide development activities to achieve social stability and economic growth based on the needs and priorities of each county.¹¹⁵

¹¹⁵ Victor Ouna, Land Governance in Urban Areas of Nairobi City County, 2017 World Bank Conference on Land and Poverty, 20-24 March 2017, Chapter 2, Available online.

CHAPTER 4

COMPARATIVE STUDY

4.0 Introduction

Like, Kenyan Law, English law does not recognize an inherent right to the existing view from property.¹¹⁶ However, the United Kingdom's legal framework has enabled the protection of designated views in certain areas such as London.¹¹⁷

This study will focus on English law, with particular focus on London's Local Planning Laws for a comparative study on the protection of the right to an unobstructed view from property because; first, it has the same point of departure as Kenyan Law, namely that a property owner does not have an inherent right to the existing view from their property; secondly, both states have devolved governments and finally, the United Kingdom has established protected view areas in London which have been protected for years.¹¹⁸ The justification of choosing London, regardless of its topography is that, London unlike other cities in the world regardless of not bordering an ocean or a sea has regulations for the protection of views.

This Chapter seeks to, first, analyse the evolution of English Law on Planning. Secondly, analyse the local planning laws in London and how they guarantee protection of the designated protected views. Thirdly, analyse the local planning laws in Mombasa County and evaluate whether they are capable of protecting the right to unobstructed view from property. Then finally conclude by comparing the local planning laws of London and Mombasa with regards to the protection of the right to an unobstructed view from property.

4.1 The Evolution of planning laws in England

Previously in the United Kingdom, land planning was governed by rules of Equity and common law.¹¹⁹ However, over the years the urban areas began to be overcrowded and it became difficult to control the land uses. This led to the enactment of 1909 Town and Country Planning Act which required that local authorities to prepare planning schemes in order to control land use.¹²⁰

¹¹⁶ <https://www.wrighthassall.co.uk/knowledge/legal-articles/2010/04/10/right-view/> on 31 January 2018.

¹¹⁷ <https://www.wrighthassall.co.uk/knowledge/legal-articles/2010/04/10/right-view/> on 31 January 2018.

¹¹⁸ <https://edition.cnn.com/2017/09/21/world/st-pauls-london-protected-views/index.html> on 3 February 2018.

¹¹⁹ R.E. Meagarry, 'Town and Country Planning in England: A Bird's Eye View' 13 *Case Western Reserve Law Journal* 4(1962), 620.

¹²⁰ *Housing, Town Planning and Country Act*, 1909.

However, there were defects with this planning system; first, planning was not mandatory, in that certain areas would have a planning schemes and others would not have any and secondly, once a town planning scheme had been made it was difficult to alter it.¹²¹ Hence, there was no uniformity in planning which was the main goal of coming up with legislation.

In 1943, The Town and Country Planning (Interim Development) Act was enacted with the objectives to; first, it abolish all the areas of no control and convert them into interim development control areas and secondly, eliminate a notorious defect in the process of interim development control, where the developers would take advantage of the period of preparation and approval of a planning scheme and develop however objectionable it was.¹²² Such developments upon the enactment of the Act, were to be discontinued. The Act required developers to apply to get permission to develop during the interim development control period.¹²³

In 1947, another Town and Country Planning Act was enacted to put a halt to all development of land unless and until planning permission was obtained.¹²⁴ The Act made development plans compulsory.¹²⁵ The Act made zoning exclusive hence there was no hierarchy of uses that would interfere with the zoning system.¹²⁶ The Development plans were to act as merely as highly persuasive guides but were not laws.¹²⁷ Hence, the Development plans were not decisive in nature and everything has to be decided and determined on application. This was aimed at curing the defect of the plans being rigid.

The Town and Country Planning Act 1990 was passed in order to consolidate the 1947 Act and the amendments that had been passed throughout the years.¹²⁸ The Planning and Compulsory Purchase Act 2004 is an act that was passed to amend and repeal significant parts of the existing planning and compulsory purchase legislations such as the Town Planning Act of 1990 and

¹²¹ R.E. Meagarry, 'Town and Country Planning in England: A Bird's Eye View', 622.

¹²² R.E. Meagarry, 'Town and Country Planning in England: A Bird's Eye View', 623.

¹²³ R.E. Meagarry, 'Town and Country Planning in England: A Bird's Eye View', 623.

¹²⁴ E.F. Roberts, 'The Reforming of Planning Law, Land Use and the United States' 62 *Cornell Law Journal* (1976), 202.

¹²⁵ R.E. Meagarry, 'Town and Country Planning in England: A Bird's Eye View', 626.

¹²⁶ R.E. Meagarry, 'Town and Country Planning in England: A Bird's Eye View', 626.

¹²⁷ R.E. Meagarry, 'Town and Country Planning in England: A Bird's Eye View', 629.

¹²⁸ https://en.wikipedia.org/wiki/Town_and_Country_Planning_Act_1990 on 20 January 2018.

introduced reforms such as the abolition of Local Plans and Structure Plans and their replacement with Local Development Frameworks.¹²⁹

Later, the Localism Act of 2011 was enacted in England, to facilitate the devolution of decision-making powers from central government control to neighbouring authorities and communities.¹³⁰ The Act embraced the 'bottom up' approach and wanted the government and the locals to cooperate in order to ensure efficient planning is achieved.¹³¹ This Act paved the way for the implementation of the neighbourhood plans. These plans are created on an ad-hoc basis by citizens from self-organizing communities known as Neighbourhood Forum.¹³² Neighbourhood Plans cannot interfere with already approved Core Strategies and Local Plans.¹³³

In 2017, parliament enacted the Neighbourhood Planning Act which has provisions to strengthen neighbourhood planning by making the local government's duty to support neighbourhood groups be more transparent by improving the process for reviewing and updating plans.¹³⁴ Hence, this implies that certain developments may or may not be allowed depending on the neighbourhood development plan of a specific area.¹³⁵

Over the years, it can be observed that there has been an increase in the degree of citizen participation in the formulation of planning laws in the United Kingdom.¹³⁶ Through neighbourhood development plans citizens have been able to protect specific areas from types of changes that interfere with their most valued things or attributes.¹³⁷ The Neighbourhood forums have entered into restrictive covenants among themselves in order to protect what is most valuable to their specific areas, such as views. In London, for example, specific views of St.

¹²⁹ https://en.wikipedia.org/wiki/Planning_and_Compulsory_Purchase_Act_2004 on 20 January 2018.

¹³⁰ <http://www.assembly.wales/Research%20Documents/16001%20%20Comparison%20of%20the%20planning%20systems%20in%20the%20four%20UK%20countries/16-001.pdf> on 18 January 2018.

¹³¹ http://planninghelp.cpre.org.uk/planningexplained/subnationalplanning?gclid=CjwKCAiA7ovTBRAQEiwAo8dPcQ1JLb9CX_hkB9VKZefrYh7EdLkEaGnLsI1RieBqptQhAi-Lr-g6yBoCHFMQAvD_BwE on 20 January 2018.

¹³² <https://www.blakemorgan.co.uk/news-events/blog/neighbourhood-planning-act-2017-summary-changes/> on 20 January 2018.

¹³³ <http://www.assembly.wales/Research%20Documents/16001%20%20Comparison%20of%20the%20planning%20systems%20in%20the%20four%20UK%20countries/16-001.pdf> on 18 January 2018.

¹³⁴ <https://www.blakemorgan.co.uk/news-events/blog/neighbourhood-planning-act-2017-new-rules/> 20 January 2018.

¹³⁵ Section 8, *Neighbourhood Planning Act*, 2017.

¹³⁶ R.E. Meagarry, *Town and Country Planning in England: A Bird's Eye View*, 637.

¹³⁷ <http://www.sandbachneighbourhoodplan.org.uk/benefits/> Accessed 31st January 2018.

Paul's Cathedral which are of historic importance are protected by restrictions designed to stop new buildings from obstructing the vistas.¹³⁸

In *Dennis v Davies* case, the case concerned a residential development on Heron Island on The Thames. The riverside view was central to the marketing and design of the estate from the very beginning.¹³⁹ Mr. Davies proposed to erect a three storey side extension to his building. He obtained a planning permission, but a number of the neighbours objected to his project. His project was going to significantly reduce the riverside view from some of the neighbouring properties as well as restricting the feeling of openness around the estate generally. There existed restrictive covenants with regards to constriction around the Heron highland which each resident was required to abide by. The neighbours bought a claim for an injunction, relying upon the nuisance and annoyance covenant. The court held that the restriction of some of the neighbours' view was significant enough to amount to a nuisance or annoyance.¹⁴⁰ However, the importance of restrictive covenants in the context of land use planning has been reduced by the extension of planning controls that place restrictions on the use of land.¹⁴¹ Nevertheless, planning controls do not override existing restrictive covenants.

4.2. An analysis of London's Local Planning Laws in relation to the protection of existing views from property.

London is home to some of the most precious and cherished views on earth. They have developed from layers of history as the city has evolved and hence are treated with care and respect.¹⁴² In London, the Borough councils and Corporation of the City of London are in charge of planning aimed at protecting the views.¹⁴³ The London Plan and the London view Management Framework, which are the main local laws on planning, provide that any development in the background of St. Paul's should be 'subordinate to the cathedral and that the clear sky background profile of the

¹³⁸ <https://edition.cnn.com/2017/09/21/world/st-pauls-london-protected-views/index.html> on 31 January 2018.

¹³⁹ Faulkner B, 'A Room with a View' *New Law Journal*, (2010), 245.

¹⁴⁰ Faulkner B, 'A Room with a View', 246.

¹⁴¹ C Harpum, S Bridge and M Dixon, *Megarry & Wade: The Law of Real Property*, 7 ed, Sweet & Maxwell, London, 2008, 1378.

¹⁴² <https://www.architectsjournal.co.uk/news/outrage-over-som-skyscraper-that-destroys-view-of-st-pauls/10015058>.article on 2nd February 2018.

¹⁴³ Barry Denyer-Green and Navjit Ubhi, *Development and Planning law*, 4ed, Elsevier Ltd, Oxford, 2010, 53.

upper part of the dome remains'.¹⁴⁴ Any New development near the designated protected view areas should not be overly intrusive, unsightly or prominent to the detriment of the view.¹⁴⁵

Even though the Greater London Authority is not the Planning Authority, the Mayor of London has certain powers in relation to planning. These include spatial development strategy, and acting as a statutory consultee on certain significant planning applications.¹⁴⁶ The London Mayor is also tasked with the role of reviewing the strategic views of these important landmarks, such as St Paul's Cathedral, situated in Central London.¹⁴⁷ The Mayor is mandated to prepared supplementary planning guidance on the management of the designated views.¹⁴⁸ This led to the establishment of the London View Management Framework which seeks to designate, protect and manage the designated views.¹⁴⁹ Developers in London not only have to check whether they have adhered to the Environmental requirements but also whether their development or use of their land will obstruct the existing views and any loss of view of the identified land marks.¹⁵⁰

In London the views are managed by organisations such as the Royal Parks, Historic Royal Palaces, A world Heritage Site Management Committee of the dean and Chapter in case of St. Paul Cathedral.¹⁵¹ They are to be consulted by the local authority in case a development is likely to interfere with the views.¹⁵² The organisations involved in the management of the views enters into restrictive covenants with the community in order to restrict any developer subject to the covenant from carrying out certain acts such as erection of buildings that would interfere with the view.¹⁵³ The *Aldred's Case*, confirms that the right to a good view is imprecise hence it's difficult to protect unlike when there is a restrictive covenant involved.¹⁵⁴

¹⁴⁴ <https://www.theguardian.com/uk-news/2016/nov/23/london-mayor-urged-to-act-over-tower-that-compromises-st-pauls-view> on 2 February 2018.

¹⁴⁵ Policy 7.12, *London Plan*, March 2016.

¹⁴⁶ Barry Denyer-Green and Navjit Ubhi, *Development and Planning law*, 4ed, Elsevier Ltd, Oxford, 2010, 53

¹⁴⁷ Policy 7.11, *London Plan*, March 2016.

¹⁴⁸ Policy 7.11(E) *London Plan*, March 2016.

¹⁴⁹ *London View Management Framework*, March 2012, 1.

¹⁵⁰ *London View Management Framework*, 8.

¹⁵¹ *London View Management Framework*, 9.

¹⁵² *London View Management Framework*, 9.

¹⁵³ <http://www.lindermeyers.co.uk/restrictive-covenants-building-or-extending-a-nuisance-or-annoyance/> on 21 January 2018.

¹⁵⁴ Mark Davys, *Land Law*, Palgrave Macmillan, 9ed, London, 2015, 119.

The Localism Act of 2011, also enabled people of the same neighbourhoods to be involved in the planning of London. For example, in 2016, the Neighbourhoods that had signed a restrictive covenant with the Charity of Richmond Park filed a petition to stop construction of the skyscraper which is said to be violating the planning guidelines that have been protecting the historic view of St. Paul's Cathedral.¹⁵⁵ In addition to this the neighbourhood forums also come up with proposals for a neighbourhood development plan. The neighbourhood forums must comprise of a minimum of 21 people who live, work or are councillors in a neighbourhood.¹⁵⁶ Neighbourhood development plans do not take effect unless there is a majority of support in a referendum of the neighbourhood. They also have to meet a number of conditions before they can be put to a community referendum and legally come into force.¹⁵⁷ They must have regard to national planning policy; be in general conformity with the Mayor's strategic policies, as well as those of their local boroughs and be compatible with the European Union's obligations and human rights requirements.¹⁵⁸

In Conclusion, the Neighbourhood planning in London is believed to have shifted the balance of power in planning, in that it is no longer centralised but decentralised. Hence, individuals in a neighbourhood are able to protect certain rights that are beneficial to them such as the Right to an unobstructed view from property.¹⁵⁹

4.3 An analysis of Mombasa County's Local Planning Laws and whether they secure the right to an unobstructed view from property.

Mombasa the gateway to Eastern and Central Africa, is famous for its beaches, architecture and Swahili culture. It is a principal tourism, economic and transit hub handling imports and exports for the larger Eastern and Central Africa. Mombasa County as a whole contributes to over 14 per cent of annual tourism in Kenya and hence it is an areas for significant growth opportunities for

¹⁵⁵<https://www.theguardian.com/uk-news/2016/nov/23/london-mayor-urged-to-act-over-tower-that-compromises-st-pauls-view> on 2nd February 2018.

¹⁵⁶ Greater London Authority, *Beyond Consultation; The role of neighbourhood plans in supporting local involvement in planning*, February 2012, 14.

¹⁵⁷ Greater London Authority, *Beyond Consultation; The role of neighbourhood plans in supporting local involvement in planning*, February 2012, 14.

¹⁵⁸ Greater London Authority, *Beyond Consultation; The role of neighbourhood plans in supporting local involvement in planning*, February 2012, 21.

¹⁵⁹ Greater London Authority, *Beyond Consultation; The role of neighbourhood plans in supporting local involvement in planning*, February 2012, 20.

Mombasa County.¹⁶⁰ Being a tourist destination, the reservation of beautiful scenery views of its landmarks could be very beneficial to the county and Kenya as a whole. However, Mombasa County's deteriorating infrastructure and congestion is eroding its image, hence there is a need to efficiently plan this county in order to ensure that it can accommodate emerging rights such as the right to an unobstructed view from property.¹⁶¹

The Kenyan Constitution 2010 stipulates that one of the objectives of the counties is to encourage the involvement of communities and community organisations in the matters of County Government.¹⁶² The county government should cooperate with the national government and the residents of Mombasa in coming up with measures that will guarantee efficient land use planning of the county and hence develop the tourism sector.¹⁶³

The Mombasa County Integrated development plan of the year 2013 to 2017, provides that, the Mombasa County's Department of Land, Housing and Physical Planning should come up with a spatial framework that shall also take into account the future in order to achieve the county's vision.¹⁶⁴ The Department of Land, Housing and Physical Planning function as stipulated in the integrated development plan shall include; to come up with a well-coordinated program which is to include; development of relevant policies and legislations; county preparation and implementation of the Master Plan; coordination of development, development control and decision making in order to enhance the aesthetic value of Mombasa city as a beautiful tourist destination.¹⁶⁵

Mombasa County on 9th April 2016, launched a 40 year City Development Master Plan.¹⁶⁶ The plan aims at addressing traffic congestion, flooding due to poor drainage, insecurity, poor solid waste management and poor urban environment that has increasingly an eyesore to both residents and visitors.¹⁶⁷ The Plan stipulates that Mombasa County shall be zoned into residential,

¹⁶⁰ *Mombasa County Government First County Integrated Development Plan*(2013-2017), 30

¹⁶¹ *Mombasa County Government First County Integrated Development Plan* (2013-2017), 30

¹⁶² *Mombasa County Government, First County Integrated Development Plan* (2013-2017), iv.

¹⁶³ *Mombasa County Government First County Integrated Development Plan* (2013-2017), 32.

¹⁶⁴ *Mombasa County Government First County Integrated Development Plan* (2013-2017), xv.

¹⁶⁵ *Mombasa County Government First County Integrated Development Plan* (2013-2017), xvi.

¹⁶⁶<http://barakafm.org/2015/10/29/mombasa-county-unveils-a-40-year-city-development-master-plan/> on 2 February 2018.

¹⁶⁷<http://barakafm.org/2015/10/29/mombasa-county-unveils-a-40-year-city-development-master-plan/> on 2 February 2018.

recreational, educational, commercial and public purpose zones.¹⁶⁸The Master Plan aims at establishing a city situated on the beach front known as the Petro city. This city is designed offer quality living and promote tourism.¹⁶⁹The Mombasa County Master Plan does not provide for the protection of views in the county.

In 2017, The Mombasa County Decentralized Structures Bill, was introduced into the county assembly. The Bill aims at decentralising the functions and provision of services of the county government through delineating and establishing of decentralised units.¹⁷⁰ The County government is to be divided into the following decentralised units; the city, to be administered by a city manager; sub-counties, to be administered by a sub-county administrators; wards, to be administered by the ward administrators; villages, to be administered by the village administrators and such other devolved units as the county executive committee may approve.¹⁷¹ The decentralised units; functions shall include among others; facilitating public consultation in policy formulation and other county initiatives; disseminate and implement county and national government policies.¹⁷²

Mombasa County still has a lot to be done in order to achieve effective planning and hence it's difficult for certain individual interest such as the right to unobstructed view from property to be protected. Recently in 2016, Mombasa County announced that they plan to refurbish building in the Old Town, in a move intended to improve the image of the ancient town.¹⁷³ However, conservationist are against the construction of these buildings as they will not be in harmony with the old ones. The enacting of the Mombasa County Decentralised Structure law could be a good step towards involvement of the communities in the formulation and management of the county. Hence it will bring the government closer to the people and hence people's ideas and interest are likely to be accommodated and protected.

¹⁶⁸ <https://www.youtube.com/watch?v=3OIhJCB2LOA> on 2 February 2018.

¹⁶⁹ <https://www.youtube.com/watch?v=3OIhJCB2LOA> on 2nd February 2018.

¹⁷⁰ Section 3, *The Mombasa County Decentralised Structures Bill* (2017)

¹⁷¹ Section 8, *The Mombasa County Decentralised Structures Bill* (2017).

¹⁷² Section 9, *The Mombasa County Decentralised Structures Bill* (2017).

¹⁷³ <https://www.nation.co.ke/lifestyle/dn2/Houses-in-Mombasas-Old-Town-to-be-revamped/957860-2981100-1411m3f/index.html> on 3 February 2018.

Conclusion

The Decentralisation of governments offers numerous advantages as a model of governance. This type of governance provides a framework which facilitates and stimulates local sustainable development throughout the county.¹⁷⁴ Decentralization facilitates greater popular participation in governance and also facilitates the tailoring of solutions for local problems to local conditions.¹⁷⁵

London just like Mombasa is involved in many activities, such as tourism and commercial ventures. However, London plan differs from that of Mombasa in that, it is very precise in its wording, and hence its plan is more effective. The Mombasa plan on the other hand takes a very general approach when addressing land planning, hence it is hard to guarantee the protection of certain interests by its residents such as the right to a view from property. London appreciates its unique and defining aspects and has regulations to manage these aspects. In contrast, Mombasa County does appreciate the presence of historic sites but has no regulations to protect their view.

In London, there is more community involvement in the planning and management of the city through the neighbourhood forums unlike for Mombasa where even the residents are unaware of the decentralised county structures.¹⁷⁶ The County of Mombasa is yet to sign into Law the Mombasa County Decentralised Structures Bill which aims at decentralising the functions, powers and responsibilities of the County Government.¹⁷⁷ This bill may encourage more public participation and conflict management through the decentralised units.¹⁷⁸ Property is an institution that is always in transition, hence conflicts on their use are bound to happen. The community or individual being the ones directly affected are in a better place to legislate on the issue that is dear to them. The issue of the right to unobstructed view from property has led to many conflicts among developers whose property is near the beach front in Mombasa County. The County government should provide for mechanisms that will ensure more community involvement in decision making.

¹⁷⁴ Keith M, "Advantages and Disadvantages of Local Government Decentralization" Guyana, 25 to 28 June 2002, 8, Available online.

¹⁷⁵ Keith M, "Advantages and Disadvantages of Local Government Decentralization" Guyana, 25 to 28 June 2002, 9, Available online.

¹⁷⁶ <http://www.monitor.co.ke/2015/08/01/mombasa-residents-unaware-decentralized-county-structures/> on 22 January 2018.

¹⁷⁷ Section 3, *Mombasa County Decentralised Structures Bill* (2017).

¹⁷⁸ Section 9, *Mombasa County Decentralised Structures Bill* (2017).

CHAPTER 5

SUMMARY, CONCLUSION AND RECOMMENDATIONS

Introduction

This Chapter will give a conclusion of the study based on a concise summary of the findings previous chapters. It shall propose the necessary recommendations that would improve the framework dealing with land use planning in Kenya in order to make the system more comprehensive, efficient and effective. Hence facilitate the securing of certain rights such as the right to an unobstructed view from property where the neighbourhood deems fit for their own benefit. The study sought to assess of whether the Kenyan laws are capable of securing the right to an unobstructed view from property just as the United Kingdom has regardless of this right not being an inherent right to property ownership.

5.1 Summary of the findings

This study was premised on two hypotheses. The first hypothesis was that the failure of sufficient grounds in law to claim the right to an existing, unobstructed view from property has led to people filing cases on environmental and physical planning defects. The second hypothesis was that the current Kenyan Law has failed to justify the possibility of the right to a view being recognised.

The preceding Chapters have sought to test the accuracy of the hypotheses set. Chapter 1 of the study sets out the scope of the study by setting out the statement of the problem, the objectives of the study. Chapter 2 of the study is premised on the Social Contract Theory in which it is concluded that property being an emotive issue, it is better for the individuals would decide on the applicable laws before the Authority imposes on them laws that they do not seem to understand and that do not protect unique interest they may have in property such as the right to an obstructed view from property.¹⁷⁹

The reliance on the Social Contract Theory was justified in Chapter 4 which involved a study of the Evolution of Planning laws in England, with specific focus on London which has had protected

¹⁷⁹ <http://www.iep.utm.edu/soc-cont/> on 1 February 2018.

views for centuries. Globally, there is no recognition of an inherent right to a view but London through its local planning laws has been able to protect certain designated views that have an influence on London's heritage. London's local planning involved active participation by the residents through neighbouring forum hence it was easy to secure certain rights such as the right to unobstructed view from property upon negotiating.

Chapter 3 and 4 of the study clearly show the defects in the Kenyan Laws on planning. It emerged that the Kenyan planning laws are too rigid, they do not seem to encourage practical public participation in the formulation and implementation of laws, the laws seems to involve very minimal consultation with individuals in various sectors in Kenya. This then leads to particular interests such as the view from property not having a standing in the law.

Furthermore, it emerged from chapter 3 and 4 of the study that the county governments which are more close to the citizens are yet to enact laws which will enable decentralisation of power, which is the aim of devolution. It has been eight years since devolution was adopted in Kenya and counties like Mombasa which play a critical role in Kenya's economy are yet to pass laws on the management of land uses that are dear to them. The Mombasa County Integrated Development Plan does not seem to portray a balance between the modernisation of the county and the preservation of the counties culture and heritage. The Mombasa County's location, culture and heritage are what define Mombasa County hence, its county government should seek to protect them.

The strict protection of the right to build rather than the enjoyment of incidental views does not allow for the possibility that a particular property development may be designed to enhance the unimpeded views that can be observed from there and that the protection of these views may enhance instead of restrict development of the surrounding area. Case law indicates that there may indeed be instances where the recognition of an inherent right to the existing, unobstructed view would promote an essential public purpose or would enhance instead of restrict development.¹⁸⁰ The exceptional cases where a right to a view is acknowledge because it would enhance development would only apply in specific developments planned around certain views and would involve reciprocal duties and entitlements similar to those that are usually protected by restrictive

¹⁸⁰ *Pearl Beach Hotel Limited and another V Kenneth Stanley Haji & 2 others* [2017] eKLR.

conditions. The Protection of views in these instances would not cause arbitrary deprivation in terms of Article 40, since the right to continue enjoying the existing view will have to be registered, for example by a restrictive covenant as is the case in London, for the sake of legal certainty and enforceability against successors in title. Hence this will ensure sustainable development of the area for the benefit of the current and future generations.

Conclusion

From the overall study, it can be concluded that there is need for consolidation laws in order to ensure that incidental rights such as the right to an unobstructed view from property can be protected where it is beneficial. Kenya as a country having embraced the idea of devolution, should encourage the counties to involve the communities in decision making. Hence, this will enable protection of certain rights that are dear to them such as the right to an unobstructed view from property.

5.2 Recommendations.

This study makes several recommendation to address the challenges of planning which then affect the realisation of the right to unobstructed view from property. This recommendations are based on the findings of the study.

First, there is need to review and consolidate all planning laws and regulations in order for the idea of devolution to be embraced and also to ensure that the laws are precise in order to deal with the specific problems of particular areas in Kenya.

Secondly, there is need for improvement of the enforcement of planning laws in order for land use planning to cater for future land use activities. Recently, due to corruption, development permits have been issue for haphazard developments with threaten the achievement of sustainable development goals.

Lastly, active public participation in land use planning is an important aspect in ensuring achievement of the socio-economic objectives of the public in terms of development. Public participation takes into account the views of the public on how they wish their land uses are managed for their own benefit. This bottom up approach of governance enables harmonious realisation and protection of specific interests of the public, such as the protection of the right to an unobstructed view in Mombasa.

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