

**TO ASSESS THE ROLE OF THE NATIONAL LAND COMMISSION
TO RESOLVE THE PROBLEM OF HISTORICAL LAND
INJUSTICES IN KENYA**

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

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JANUARY 2018

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ACKNOWLEDGMENTS

“Give thanks, in all circumstances; for this is God’s will for you in Christ Jesus.” 1st Thessalonians 5:18. I thank God for the Grace and strength he has given me through this journey.

I am greatly indebted to my Supervisor Mr. Smith Ouma for his guidance throughout this whole process and for his unending patience. To my family both nuclear and extended, without your support this would have been but a dream I will forever be grateful. To my late cat Nala you will forever be in my heart and thank you for the company.

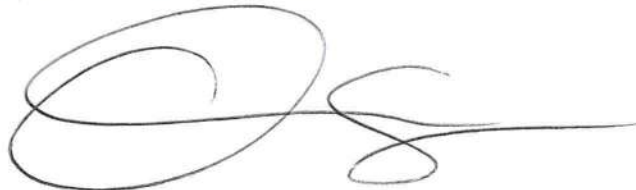
DECLARATION

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

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This ^{dissertation} ~~Research Proposal~~ has been submitted for examination with my approval as University Supervisor.



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ABSTRACT

Land matters are commonly dealt with by way of litigation. Historical Land injustices however, are complex because of the web of interests and rights involved; as such they cannot properly be resolved through litigation. Furthermore, Kenya's litigation process is adversarial whereas to adequately resolve these injustices a process that ensures a win-win solution is desired. This study, investigated: the use of Alternative Dispute Resolution pursuant to Article 252 (1) of the Constitution of Kenya to resolve historical land injustices; that is the power of the National Land Commission to utilize mediation, conciliation, and negotiation in addition to traditional dispute resolution mechanisms. The study analysed the Commission's powers as well as the inherent limitations of alternative dispute resolution in resolving land matters.

A qualitative approach was taken in examining research on Alternative Dispute Resolution and the history of Historical Land injustices. It established that one of the benefits of ADR that makes it a suitable option in resolving historical land injustices is that it looks at each dispute on a case by case basis; and the parties curve out the process to best meet their needs. The history of historical land injustices dates to Kenya as a British Protectorate and the laws enacted some of which were still in place after Kenya attained independence.

Kenya's' history showcases that various Commissions were established which made recommendations on how historical land injustices would be resolved ranging from a change in laws to the establishment of a commission to specifically investigate claims. The National Land Commission is mandated to carry out investigations into complaints after which its recommendations are furnished to the relevant authorities. Moreover, they have the duty to encourage parties to utilize Alternative Dispute Resolution. The procedure utilized to investigate claims was analysed in addition to the effect of the recommendations issued by the Commission. The Commission has no enforcement powers and relies on the relevant

authorities to implement its recommendations. History however, showcases that when enforcement is left to other parties' enforcement rarely takes place. The study thus recommends that the mandate of the National Land Commission as pertaining to historical land injustices is that it be established as a quasi-judicial body and as such will have the power to enforce its recommendations but under supervision of the High Court.

LIST OF ABBREVIATIONS

ADR	Alternative Dispute Resolution
CLMB	County Land Management Board
ELC	Environmental and Land Court
LTT	Land Title Tribunal
NLA	National Land Authority
NLC	National Land Commission
NLP	National Land Policy
TDRM	Traditional Dispute Resolution Mechanism

LIST OF CASES

Compar Investments Limited v National Land Commission [2016] eKLR

Isaka Wainaina & Another v. Murito wa Indagara & Ors (1922-23) 9(2) KLR

Joseph Letuya & 21 others v Attorney General & 5 others [2014] eKLR

Ledidi Ole Tauta & Others v Attorney General & 2 others [2015] eKLR

Mureithi v Attorney General & 4 others [2005] eKLR

National Land Commission Supreme Advisory Opinion [2015] eKLR

Ol Ole Njogo & Others v The Attorney General [1912] eKLR

Olalui Group Ranch v Twari Konchella and 608 others [2017] eKLR

Reverend Timothy Njoya And Others v Honourable Attorney General and Another [2004] eKLR

LIST OF STATUTES

Constitution of Kenya, 2010.

Community Land Act (2016).

Bomas Draft Constitution, (2004).

Government Lands Act, (1984).

Land Disputes Tribunals Act, (1990).

National Land Commission Act (Act No 5 of 2012)

National Land Commission, Historical Land Injustice Rules (2016).

National Land Policy (2009).

Sessional paper No.3 (2009).

Truth Justice and Reconciliation Commission Act (2008).

TO ASSESS THE ROLE OF THE NATIONAL LAND COMMISSION TO RESOLVE THE PROBLEM OF HISTORICAL LAND INJUSTICES IN KENYA

CHAPTER 1: INTRODUCTION TO THE STUDY

1.1: BACKGROUND OF THE PROBLEM

Historical land injustices refer to: grievances based on a violation of a right in land based on: law, policy, declaration, administrative practice, treaty or agreement; and resulted in the displacement of individuals from their habitual place of residence, occurred between **15th June 1895** when Kenya became a British Protectorate and **27th August when the 2010** Kenyan Constitution was promulgated; which has not been sufficiently resolved and subsists (**emphasis mine**).¹ These injustices led to and resulted in the disinheritation of communities from their land.² The injustices date back to colonisation where the presumption was that indigenous people had no right to land either as individuals or as groups: as is seen in *Isaka Wainaina & Another v. Murito wa Indagara & Ors*,³ the court ruled that: in accordance with the 1915 Crown Lands Ordinance in Kenya, Africans were mere tenants at the will of the Crown with temporary occupancy rights to land.⁴

¹ Section 15 (2), *National Land Commission Act* (Act No. 5 of 2012).

²The National Land Policy in Kenya, *Addressing Historical Injustices*, The Kenya Land Alliance (2004), 3.

³ *Isaka Wainaina & Another v Murito wa Indagara & Ors* [1923] KLR.

⁴ *Isaka Wainaina & Another v Murito wa Indagara & Ors* [1923] KLR.

When Kenya attained independence, it was expected that the transfer of power from colonial authorities to indigenous communities would lead to the restructuring of the land policies.⁵ However, this was not the case in entirety and furthermore, steps of action were not taken to resolve some of the injustices that its citizens were occasioned.

There thus existed a dire need for Kenya to restructure its land laws. The National Land Policy (NLP), cited that there existed a need to establish an efficient, accountable and equitable institutional land law.⁶

The manner through which land disputes have been dealt with in Kenya has been rather transformative. During pre-colonial Kenya, land disputes were resolved using Customary Law that is through Traditional Dispute Resolution Mechanisms (TDRM).⁷ Tradition refers to customs and beliefs handed down through word of mouth from one generation to another and includes customs and beliefs that belong to a sect of people. Some of the benefits of TDRM's are that: they are less complex, because of their common usage they have been tried and tested and therefore individuals within a community trust it as a conflict resolution mechanism, it gives parties to the conflict an opportunity to actively participate in the resolution of the conflict.⁸ Furthermore, this conflict resolution mechanisms are restorative and lead to the healing of communities.

In 1990, the Land Disputes Tribunal Act (Repealed by Act No. 20 of 2012) was enacted its

⁵ Sessional Land Paper No. 3 of 2009 on National Land Policy, August 2009.

⁶ Sessional Land Paper No. 3 of 2009 on National Land Policy, August 2009.

⁷ Ojwang JB, Constitutional development in Kenya: Institutional adaptation and social change, ACTS Press, Nairobi 1990, 19-21.

⁸ Dr. Kirema Mburungu and Prof. David Macharia, 'Resolving Conflicts using Indigenous Institutions, A case study of the Njuri-Njeke of Ameru Kenya', July 2015.

mandate was to limit the jurisdiction of magistrates' courts in certain cases dealing with land.⁹ The tribunal's jurisdiction was limited to land issues: the division of and the determination of boundaries, claims to occupy or work land, trespass to land.¹⁰ The tribunal would conduct hearings where parties to the disputes, and any possible witnesses would give their testimonies; and subsequently reach a decision in accordance to customary law.¹¹ The tribunal consisted of elders,¹² the tribunal's decision in addition to all the documents relied on needed to be filed before the magistrate's court for the decision to be considered binding, after which the decision was enforceable as per the Civil Procedure Code.¹³ This decision made by the tribunal was subject to the Appeal Committee, however, the decision made by the Appeal Committee was considered to be final with regard to matters of fact, an appeal at the High Court was considered final with regard to matters of law.¹⁴

Various Commissions existed before the establishment of the National Land Commission (hereinafter NLC or the Commission), which were responsible for the management of public land. The Government Lands Act, outlined how government land would be alienated. It prohibited the Commissioner of Lands from exercising powers that had been granted to the president,¹⁵ the Commissioner had delegated power and was responsible for determining who had access to land. However, because of the widespread manipulation, corruption and discrepancies in the manner through which Government land was alienated there existed a

⁹ Preamble, *Land Disputes Tribunals Act*, (1990).

¹⁰ Section 3 (1), *Land Disputes Tribunals Act*, (1990).

¹¹ Section 3 (4), *Land Disputes Tribunals Act*, (1990).

¹² Section 4, *Land Disputes Tribunals Act*, (1990).

¹³ Section 7 (1), *Land Disputes Tribunals Act*, (1990).

¹⁴ Section 8, *Land Disputes Tribunals Act*, (1990).

¹⁵ Section 7, *Government Lands Act*, (1984).

need for the decentralisation of land governance through legal reforms.¹⁶ Chapter 7 of the Bomas Draft provided for the establishment of the NLC whose functions include: to investigate disputes of land ownership, occupation and access to public land and to initiate investigations on its own accord or upon a complaint from any person or, an institution of persons on land injustices both present and historical and ensure appropriate redress.¹⁷ Furthermore the Commission was required to encourage the application of traditionally accepted systems of dispute resolution in land conflicts.¹⁸ The Wako Draft Constitution which came after, reiterated the same position with regards to Land matters.

The Advisory Opinion given by the Supreme Court reaffirmed that the NLC should be viewed as a fourth arm of government, which was created to cater for a specific need but was ultimately independent of the government. However, in understanding the nature of the Commission it was the court's opinion that: the 2010 Constitution of Kenya (hereinafter the Constitution) did not envisage independence as the term is generally used but rather the NLC is required to function in a collaborative and constitutional legal system and in performing its duty of resolving land disputes it is required to devise a consultative, advisory and safeguard oriented system.¹⁹

The establishment of the NLC was as a result of the promulgation of the 2010 Constitution of Kenya.²⁰ The NLC being an independent office, has constitutionally enshrined safeguards and as such: is only subject to the Constitution and the law, and is not subject to direction or

¹⁶ Advisory Opinion, In the Supreme Court of Kenya, 2nd December 2015.

¹⁷ Article 85(1), *Bomas Draft Constitution*, (2004).

¹⁸ Article 85(1) (i), *Bomas Draft Constitution*, (2004).

¹⁹ Advisory Opinion, In the Supreme Court of Kenya, 2nd December 2015.

²⁰ Article 67 (1), *Constitution of Kenya*, (2010).

control by any person or authority.²¹ It has the power to conduct investigations, use conciliation, mediation and negotiation as it carries out its functions.²²

1.2: STATEMENT OF THE PROBLEM

Different reforms have been used to try resolve historical land injustices, however because of the adversarial nature of litigation it is not best suited to deal with the issue; rather, focus should be put on Article 252 (1) (b) to try to resolve these injustices. This study seeks to showcase why Alternative Dispute resolution is better suited to definitively resolve land injustices.

1.3: JUSTIFICATION

Historical land injustices are commonly dealt with through litigation. Litigation in Kenya is adversarial and as such when a case is concluded there is a loser and a winner. Furthermore, historical land injustices are rather complex, this is a result of when they were occasioned, the parties involved, the fact that laws were used to actualize these injustices amongst others. Because of this the process used to resolve disputes should be flexible and ought to deal with each case based on its merits. The mechanisms outlined under Article 252 (1) are some of the powers the Commission has. ADR would look at each injustice on its own merit and would seek to curve a solution based on the needs and interests of each party has. Thus, as opposed to having a win-lose situation both parties would seek to win.

²¹ Article 249 (2), *Constitution of Kenya*, (2010).

²² Article 252, *Constitution of Kenya*, (2010).

1.3.1: RESEARCH OBJECTIVES

1. To outline conciliation, mediation and negotiation to tackle the question of historical land injustices.
2. To assess why litigation is not best suited to deal with historical land injustices.
3. To explore the benefits of the use of Article 252 (1) (b) to deal with land injustice.
4. To outline a possible strategy that the National Land Commission could implement to resolve the land injustices.

1.3.2: RESEARCH QUESTIONS

1. What challenges have been occasioned by adopting litigation when trying to resolve historical land injustices?
2. Why is litigation an inadequate mechanism to try resolve historical land injustices?
3. How prevalent is the use Alternative Dispute Resolution (ADR) when dealing with historical land injustices, and do parties to a dispute prefer ADR to litigation?
4. What structures should the National Land Commission put in place to ensure that the use of ADR runs efficiently?

1.4: LITERATURE REVIEW

This research review sthe literature categorically. Starting off with literature that showcases the complex nature of historical injustices; summaries of various reports and their analysis and recommendations with regards to how best to solve historical injustices; why ADR is better suited to solve the matter.

1.4.1: COMPLEXITY OF LAND DISPUTES

The Maasai community also referred to as the “*Maa*” are said on the 15th August 1904 and the 4th April 1911 to have signed the Anglo-Maasai agreement through their leader **Olonana Ole Senteu**.²³ The effects of this agreement are that they had agreed to relocate from the fertile grounds in Laikipia to a native reserve.²⁴ The validity of this agreement was challenged in the case of *Ole Njongo and Others v The Attorney General*,²⁵ where Maasai elders argued that the ‘agreement’ should be considered non-binding seeing as it was signed by a Maasai man whom under Maasai customs lacked authority to represent the Maasai community. The court in this case failed to go into the merits of the case, and ruled that:²⁶ “*it being a municipal court it did not have the jurisdiction to hear and finally determine the suit and thus the agreements of 1904 and 1911 being Acts of the State constituted International Law.*” The agreement thus stood and hence was binding to the Maasai community.

In 2010 the Maasai community lay claim over 500 Hectares of land within the Ngong Hills and instituted a suit that is *Ledidi Ole Tauta & Others v Attorney General & 2 others*²⁷. This case emanated from the ‘Maasai Agreements’ of 1904 and 1911. Some of the facts that were brought out are: whether: the petitioners in this case were the proper claimant; a claim concerning historical land injustices should be instituted as a land matter as opposed to a constitutional matter. The court through the Environment and Land Court (ELC) ruled that it had jurisdiction to listen to the matter. However, the court believed the case went against

²³ L. Hughes, *Land Alienation and Contestation in Kenya Maasai land*, 2013.

²⁴ L. Hughes, *Land Alienation and Contestation in Kenya Maasai land*, 2013.

²⁵ *Ole Njogo & Others v The Attorney General* [1912] 5 EAL.

²⁶ Expert Seminars on the Treaties Agreements and Other Constructive Arrangements Between States and Indigenous Communities, Geneva, 15-17 December 2003.

²⁷ *Ledidi Ole Tauta & Others v Attorney General & 2 others* [2015] eKLR.

the spirit of Article 69 (1) of the Constitution that is which gives the state an obligation to protect the environment. Justice Mumbi who was one of the presiding judges stated ‘the decision reached in this suit is bound to have far reaching consequences since there are many other communities in Kenya with similar historical claims which may now be vested in the public. The Petition if allowed would only benefit the Petitioners at the expense of the wider public who benefit from the forest’.²⁸ She went further to and pointed out that, the Constitution: acknowledged the possibility of historical injustices being occasioned in by previous government regimes; established the NLC and through Article 67(1) of the Constitution gave it the mandate to investigate historical injustices, make recommendations for redress and because of this the High Court should therefore not usurp its function.²⁹

In 1997 the Ogiek Community instituted a suit through the case of *Joseph Letuya & 21 others v Attorney General & 5 others*,³⁰ where they lay claim to East Mau forest claiming it to be their ancestral land. Their argument was that eviction would constitute a violation of their rights and that it prevented them from living in accordance with their culture; that is their right to development (right to live out the kind of life one values or has reason to value).³¹ The court in this case ruled in favour of the Ogiek community stating that: eviction was a violation of their rights. However, it could not issue orders. This is because pursuant to the Constitution of the NLC is the ONLY body constitutionally mandated to manage and alienate and allocate public land. The NLC had been given a period of 1 year in which to establish a register and identify the members who would thereafter be settled. It should be noted that it took 17 years before this judgment was proclaimed.

²⁸Statement by Justice Mumbi Ndungu, 27th January 2012, eKLR.

²⁹ *Ledidi Ole Tauta & Others v Attorney General & 2 others*, 2015, eKLR.

³⁰ *Joseph Letuya & 21 others v Attorney General & 5 others*, [2014] eKLR.

³¹ Amartya Sen, *Development as Freedom*, Oxford University Press, 1999, 36.

What this case illustrates is just how complex land matters are. This is because, they touch on matters that happened in the past whose effects are still being felt to date and it involves constitutional matters. Devising a formula or plan through which individual's rights with those of the society at large balance is rather hard. Litigation and the court system in general is bound by certain restrictions/limitations. Judges have judicial discretion but they too can be said to be limited with regards to what they can do. The Constitution envisages that the NLC should deal with historical land matters whereas at the same time cases pertaining to the same are being instituted in court. Judgments like that given in *Ledidi Ole Tauta & Others v Attorney General & 2 others* showcases that judges are hesitant to interfering and thus making determinative decisions pertaining to the subject. A creative system, that can freely consider this matter and make decisions on a case to case basis should thus be utilised. One such system is the use of ADR and in this case mediation, conciliation and negotiation.

1.4.2 TRUTH JUSTICE AND RECONCILIATION COMMISSION

The Truth Justice and Reconciliation Commission in their report expounded on various issues pertaining to historical land injustices. They were of the finding that: British colonial rule and the colonial administration adopted a divide and rule approach to the local population that created a negative dynamic of ethnicity, the consequences of which are still being felt today; and that furthermore they were responsible for the alienation of large amounts of highly productive land from the local population and removing them from their ancestral land.³²

Various independence governments were also responsible for illegal and irregular allocations of land.³³ The state was also responsible for the expulsion of indigenous

³² *Truth Justice and Reconciliation Commission*, 2013, Volume IV, 23.

³³ Republic of Kenya, *Truth Justice and Reconciliation Commission*, 25.

communities from their ancestral land is a violation of their land rights, and have as a matter of fact been discriminatory in nature.³⁴ Historical land grievances were the main driver of conflicts and ethnic tension,³⁵ this was evident in the 2008 as is seen from the Post-Election violence.

Some of the recommendations that the TJRC gave were that “*the Judiciary apologize to the people of Kenya for failing to address impunity effectively and perform its role of deterrence to prevent the perpetration of gross human rights violations, during the period between 12 December 1963 and 28 February 2008*”³⁶ This goes to show that in trying to solve historical land matters there’s a lot more at stake than trying to find one solution to the problem. ADR acknowledges that no two situations are the same, and therefore seeks to curve the process per the needs of the people.

1.4.3: MEANS OF RESOLVING HISTORICAL LAND INJUSTICES

Patricia Kameri Mbote, in her article “Righting Wrongs” examines the plausibility of using Restitution to try and solve some of the historical injustices occasioned by colonisation.³⁷ She acknowledges the fact that land ownership is a complex social institution and that it varies widely between and among cultures and therefore that it only makes sense if the people with whom the property rights holder lives recognize the right and vest it upon the individual enforceable against all those in violation of that right.³⁸ Further that restitution (the act of returning to the proper the owner property or monetary value)³⁹ can only be carried

³⁴ Republic of Kenya, *Truth Justice and Reconciliation Commission*, Recommendations chapter 1.

³⁵ Republic of Kenya, *Truth Justice and Reconciliation Commission*, 245.

³⁶ Republic of Kenya, *Truth Justice and Reconciliation Commission*, 216.

³⁷ Patricia Kameri Mbote, ‘*Riting Wrongs, confronting dispossessions in post-colonial context.*’

³⁸ William Cronon, *Changes in the land: Indians, colonists and the ecology of New England*, 1992.

³⁹ <http://dictionary.law.com/Default.aspx?selected=1831> accessed on 31 January 2017.

out within the context of concretized rights that are protected in law and that justice entails that the terms of restitution be mutually agreed by all concerned parties.

The question on how to deal with competing rights over land, has been dealt with from time immemorial. Pre-colonisation, different communities had their established methods of preventing and resolving conflicts. One such community is the Ameru community which had/has the Njuri-Ncheke (Ameru Council of elders). These elders had jurisdiction over disputes emanating from Meru and Tharaka-Nithi County. Research conducted by Dr Kirema Mbuguru and Prof David Macharia in '*Resolving Conflicts Using Indigenous Institutions*' showcased that some of the benefits of using indigenous dispute resolution mechanisms were that this mechanism, are restorative in nature and they lead to the healing of communities who have no option but to live together.⁴⁰ The rationale for this is that they have been tried and tested, as is seen in their long-standing nature. The Njuri-Ncheke are a representation of the customs and norms of the people, a representation of their ethical beliefs and the institution has the trust and backing of the community. Findings from the research showcased that: 62.5% of disputes brought before the Njuri-Ncheke are successfully resolved and this is attributable to the communities' admiration for the system because it is decentralized; the cooperation of elders with other justice systems (experts would be invited to Njuri-Ncheke sittings and could give their opinions).⁴¹ There existed a need to recognize the Njuri-Ncheke in order to strengthen its powers in terms of conflict resolution.

The Land Disputes Tribunals Act (now repealed), established the Land Disputes Tribunal which was mandated to deal with the following: land disputes, the division of and

⁴⁰ Dr Kirema Mbuguru and Prof David Macharia, '*Resolving conflicts using indigenous institutions :A case study of the Njuri-Ncheke of Ameru*', Kenya, 2016.

⁴¹ Findings, Dr Kirema Mbuguru, Prof David Macharia, '*Resolving conflicts using indigenous*'.

demarcation of land, including land held in common, a claim to occupy or work land, trespass to land.⁴² This Act can be said to have promoted indigenous dispute resolution; this is because the tribunal was composed of elders from the specific community,⁴³ customary law would be used to resolve the dispute,⁴⁴ the decision of the Tribunal and all accompanying documents had to be filed at the Chief's Magistrates court after which the court would enter a judgement and issue a decree which was enforceable as per the Civil Procedure Act.⁴⁵ An Appeal on a question of fact could be made to the Appeals Committee, and an Appeal on a question of law (other than Customary Law) could be made at the High Court.⁴⁶ The subsidiary legislation within the Act provided forms and rules that would govern how disputes were instituted and dealt with.

The repulsion of the Land Disputes Tribunals Act, through the enactment of the Environment and Land Court Act (ELC Act) led to confusion seeing as it led to a vacuum. This is because the ELC Act, did not have a provision outlining what would happen to cases that were pending before the Land Disputes Tribunal as well as those before the Chief Magistrate's Court that were awaiting the adoption of an award.⁴⁷ Furthermore there exist diverging views with reference to how pending appeals were to be dealt with: some courts have argued that the appeals ought to be transferred to lower courts and dealt with afresh whereas other courts have argued that the Environment and Land Court has the jurisdiction to hear the appeal.⁴⁸ What this goes to showcase is some of the uncertainty that comes with litigation.

⁴² Section 3 (1), *Land Disputes Tribunal Act* (1990).

⁴³ Section 4, *Land Disputes Tribunal Act* (1990).

⁴⁴ Section 3 (7), *Land Disputes Tribunal Act* (1990).

⁴⁵ Section 7, *Land Disputes Tribunal Act* (1990).

⁴⁶ Section 8, *Land Disputes Tribunal Act* (1990).

⁴⁷ *Masagu Ole Koitelet Naumo v Principal Magistrate's Kajiado Law Courts* [2014] eKLR.

⁴⁸ *Thomas Muthee and another v Nyaguthi Kaguthu* [2015] eKLR.

1.5 THEORETICAL FRAMEWORK

This dissertation, looks at historical land injustices from two viewpoints that is John Locke's theory on natural law with a focus on the the role of the state and Rawls' theory on justice and the original position.

1.5.1: JOHN LOCKE ON NATURAL LAW

The basis through which individuals lay claim and as such redress to historical land injustices is that: rights exist in nature as a matter of fundamental justice, independent of government.⁴⁹ The role of government is therefore to enforce natural law, and not to invent law. Individuals contract into a political society because of the uncertainties that exist within the state of nature where those who lacked the physical strength to protect themselves would lose their proprietary rights. They thus relinquish some of their rights to the government in exchange for protection. The state is thus responsible for protecting their rights. The legislature is the supreme body with the power to rectify defects that exist in the state of nature,⁵⁰ but they may not deprive individuals of fundamental rights because: the social contract does not give the government the power to do so; the government's role is to play a fiduciary role in safeguarding and enhancing this rights.⁵¹ It is thus an absurdity that the government that is supposed to preserve the property is the same government responsible for the injustices .⁵² Individual's dispossession of land as a result of laws and other governmental acts should not stand. This is because, those acts are a clear violation of individual's natural law right to

⁴⁹ John Locke ,*The second treatise of cvil government and a letter concerning toleration*. Oxford, B. Blackwell, 1948, 1632-1704..

⁵⁰ Farbrer and S, Sherry, *A history of the American Constitution*, 1990, 226.

⁵¹ J. Gales and W. Seatons, *The debates and proceedings in the Congress of the United States*, 1834, 349.

⁵² Madison, *The making of The American Republic: The great documents*, 1789, 1027-33.

property.

1.5.2: JOHN RAWLS: A THEORY OF JUSTICE

The principles of justice, are those that would be chosen by an individual in the “original position” in this hypothetical state a person is deprived of all their desires and self-interests; and it is assumed that this individual wants what other rational people want.⁵³ Through this justice is achieved through 3 cardinal ends:⁵⁴ the maximisation of liberty subject to such constraints as is necessary for the protection of liberty itself; the right to hold property should thus be respected. Justice in this case should include the equality of all, subject to differential treatment where inequality produces the greatest possible benefit for the least well off; third that justice must achieve a fair equality of opportunity and the elimination of all inequalities of opportunities based on the birth of wealth’s.⁵⁵

As was evident during the colonial period Africans were treated as second class citizens, and were considered to be subordinate to their colonial masters they therefore could not own property.⁵⁶ The presumption being that: the distribution of property during and after colonisation went against principle of equality; and that the distribution of property would have been significantly different had person's envisioned themselves to be in the “*original position*” in accordance to Rawls. Further this inequality was not for the benefit of those who were least well off. The State in trying to address this should put in place mechanisms that ensure the protection, respect and promotion of individual’s rights to their land and resources; this entails making amends where the taking of land was wrongful.⁵⁷

⁵³ John Rawls, *A Theory of Justice*, Cambridge, 2005,154.

⁵⁴ M.D.A. Freeman, *Llyod's introduction to jurisprudence*, 7th Edn, London Sweet & Maxwell, 523-534.

⁵⁵ John Rawls, *A Theory of Justice*, Cambridge, 2005, 302.

⁵⁶ *Isaka Wainaina & Another v. Murito wa Indagara & Ors*, [1923] Eklr.

⁵⁷ Patricia Kameri Mbote, *Righting Wrongs*.

1.6: ASSUMPTIONS

Some of the assumptions that have been made in carrying out this research are:

1. That the parties involved in resolving the historical injustices, will be cooperative and will focus on moving forward as opposed to clinging over hard held positions.
2. That there exist qualified individuals who can act as mediators.
3. That the settlements reached are enforceable.
4. That parties to the dispute have equal bargaining power.

1.7: RESEARCH METHODOLOGY

Various research methodologies were used in carrying out this research this include: desktop research analysis: on various reports made in Kenya in an aim to resolve historical land injustices, an analysis of the benefits of ADR in resolving land matters; and the use of an interview with the Deputy Legal Director of the NLC to understand some of the challenges they have had in investigating land matters.

1.8: LIMITATIONS

1. ADR as a process is specifically tailored to govern the process based on the needs of the parties, it is also governed by privacy laws and thus the process is private; unless provided otherwise parties are prohibited from disclosing information discussed during the process. With regards to using it to resolve historical injustices information as to its success or downfall may not be easily accessible to the public.

2. It is not possible to measure the success or failure of ADR with regards to trying to resolve historical injustices. This is because ADR does not envision failure (unless the parties fail to cooperate) unlike litigation which views matters: in terms of a win-lose; ADR looks at things in terms of a win-win situation. Immeasurable things like closure, and satisfaction are count as wins.

1.9: CHAPTER BREAKDOWN

The dissertation is structured as follows:

Chapter 1: Introduction to the Study

This chapter will provide an introduction into the study, the statement of the problem justification, objectives of the study, research questions, the hypothesis, the theoretical framework and the research methodology.

Chapter 2: The evolution of land dispute resolution mechanisms

This chapter will consider the different grievances that led to historical land injustices; Commissions that were established to resolve this issue and the recommendations made; and an analysis as to why they were unable to tackle the problem.

Chapter 3: Suitability of ADR in Resolving Historical Land Injustices benefits and limitations

This chapter will examine the suitability and benefits of using ADR to definitively resolve historical land injustices. It will also dwell on some of the limitations that are likely to be faced and how to overcome them.

Chapter 4: Findings

This chapter will showcase the findings of the interview conducted to investigate whether the provisions in law match the actual practice of the NLC.

Chapter 5: Conclusion and Recommendations

This chapter will make the conclusion of the study, and will come up with various recommendations pertaining to how Kenya, through the NLC should use ADR to try and resolve historical land injustices.

Bibliography

This will showcase my list of sources.

CHAPTER 2: EVOLUTION OF LAND DISPUTE RESOLUTION MECHANISMS

2.1: LAND POLICIES DURING COLONISATION

Indigenous ethnic groups in pre-colonial Kenya enjoyed their own unique forms of governance which were specific to them that is based on the specific indigenous group. However, after the settling of the Arabs within the coastal region of Mombasa, European Missionary activities, and the colonisation of Kenya by the Imperial British East Africa communities' unique form of governance was done away with in exchange for the divide and rule system of administration.⁵⁸

Land policies established by colonists were centred at establishing a dominant settler economy while conquering the African economy through Administrative and legal mechanisms.⁵⁹ A new form of land tenure was established where the State owned land, in this case the British Protectorate as a political entity, and thus granting subsidiary rights to property users and owners.⁶⁰ This land systems was based on English Property Law, and it neglected Customary Law, favoured large holdings of land which led to fragmentation of land into small holdings.⁶¹

In 1897 the Commissioner for the Protectorate, through the 1894 Land Acquisition Act appropriated all land within one mile of the Kenya-Uganda Railway, gave the Protectorate the power to compulsorily acquire any land for public purposes which included the erection

⁵⁸ Calestous Juma and J.B Ojwang, *In Land We Trust*, 1996.

⁵⁹ Paul Syagga, *Public land, historical land injustices and the new Constitution*, 2013, 4.

⁶⁰ Okoth Ogendo, *Tenants of the Crown: Evolution of agricultural law and institutions in Kenya*, Nairobi African Centre for Technology Studies Press, 1991.

⁶¹ Paul, 'Public land, historical land injustices and the new Constitution', 4.

of government buildings.⁶² The promulgation of the 1897 East Africa Land Regulation gave the protectorate administration the power to alienate land from natives and allocate it to settlers.⁶³ This was to encourage white settlement within Kenya which would then pay for the railway; certificates of occupancy were initially issued for a term not exceeding 21 years, which was extended to 99 years.⁶⁴ The 1902 Crown Lands Ordinance established Crown Land which defined Crown land as ‘all public land within the East African Protectorate, which was subject to the control of His Majesty by any agreements or treaties, or land that had been acquired under the Land Acquisition Act of 1894’. The Commissioner thus had the power to sell any freehold land within the protectorate to a willing purchaser; on the other hand, Customary Tenure systems were not considered to vest natives with any rights. This led to the disposition of land from the natives mostly of Kikuyu, Maasai and Nandi Communities.⁶⁵ An agreement was made the by Maasai leaders which forced the Maasai to vacate from their fertile lands in Suswa, Ol-Jr-Orok and Ol-Kalau areas and move to the Southern Ngong and Laikipia region.⁶⁶

2.2: POST-INDEPENDENCE LAND POLICIES

The government established the Swynnerton Commission which was tasked with investigating how African tenure systems could be used to contribute to the economic development of the colony.⁶⁷ The findings were that traditional land tenure systems within the African Reserves encouraged fragmentation of land into small units, which led to

⁶² Paul, ‘Public land, historical land injustices and the new Constitution’, 6.

⁶³ Okoth Ogendo, *Tenants of the Crown*.

⁶⁴ Land Acquisition Act (1894).

⁶⁵ Mortensen, *The White Man’s Country*, Partner News, 2004, 5.

⁶⁶ L. Hughes, *Land alienation and contestation in Kenya Maasai land*, 2013.

⁶⁷ Swynnerton R, *The Swynnerton report: A plan to intensify the development of African agriculture in Kenya*, 1955.

disputes and acted as a disincentive to long term capital investments.⁶⁸ The recommendations made were that land holding within the reserves ought to be consolidated into one; followed by subsequent adjudication of property rights in that land and the registration of individuals as the absolute owners of land that is adjudicated as theirs.⁶⁹ This would do away with the perceived uncertainty associated with customary land holding systems; and the net effect is that the consolidation of land and the issuance of titles closed avenues available to aggrieved landholders and dispossessed peasants.⁷⁰ This process led to increased agitation by natives who argued that there should be a return of land that had been taken by the settlers. A resettlement programme initiated by the government allocated land to squatters in parts of the country other than where they initially came from. This led to a perception where those allocated lands were ‘outsiders’ who had dispossessed the ‘insiders’ of their land thus leaving the ‘outsiders vulnerable.’⁷¹

The Njonjo Land Commission also known as the Commission into the inquiry into Land Law Systems was established in 1999, and was tasked with coming up with a National Land Policy framework, and new policy for the registration of land. Professor Okoth-Ogendo recommended the establishment of institutions, and subsequent evaluation and monitoring ought to be done in a periodic manner.⁷² The Commission recommended the establishment of: the National Land Authority (NLA) which would operate at a National level and be responsible for originating policies and administration of land in the country; and the District

⁶⁸ Swynnerton, *The Swynnerton report*.

⁶⁹ Swynnerton, *The Swynnerton report*.

⁷⁰ Patricia Kameri Mbote, *The land question in Kenya: the legal and ethical dimension*, Strathmore University and Law Africa, 2009, 11.

⁷¹ Patricia Kameri Mbote, *The land question in Kenya: the legal and ethical dimension*, 12.

⁷² Professor Okoth-Ogendo, *Land issues in Kenya: Agenda items from the 20th Century* (1999).

Land Authority which would be an independent body.⁷³ Also that Section 75 of the Independence Constitution recognized the sanctity of title should not be viewed as protecting illegally acquired land and that grabbed land ought to be repossessed.⁷⁴ Failure of public authorities to comply with the law was considered to be the major cause of land disputes.⁷⁵ Furthermore, the Ministry of Land and Resettlement was criticized for failure to solve the disputes but this was attributable to the lack of finances, and will-power. The Commission was disbanded a few days after issuing its report to the then President Moi.

Ndung'u Commission established in 2003, to investigate the illegal and irregular allocation of public land in Kenya. The Commission was required to: inquire into the allocation of public lands; collect evidence from ministry based committees and any other sources pertaining to the allocation of land; prepare a list of land unlawfully or irregularly acquired specifying the land and the person it was allocated to, the particulars of the allocation, and all subsequent dealings pertaining to the land. Its finding was that the post-colonial government led by Jomo Kenyatta used land formerly held by the settlers to build alliances, this intensified in the Moi regime.⁷⁶ The perpetrators of the illegalities and irregularities were mostly state officials.⁷⁷ The recommendations made by the Commission include: the establishment of a NLC vested with the power to allocate public land, establishment of a

⁷³ *Report of the Commission of Inquiry into the Land Law System of Kenya on Principles of a National Land Policy Framework, Constitutional Position of Land and New Institutional framework for Land Administration, Republic of Kenya, 2002.*

⁷⁴ Report of the Commission of Inquiry, 2002.

⁷⁵ Report of the Commission of Inquiry, 2002.

⁷⁶ Jacqueline M Klopp, *Pilfering the public the problem of land grabbing in contemporary Kenya: Africa Today* Volume 47, Number 1.

⁷⁷ Republic of Kenya, *Report of the commission of inquiry into the illegal/irregular allocation of public land. Government Press, Nairobi, (2004), 53.*

Land Titles Tribunal (hereinafter LTT) which would embark on the process of revoking and rectifying titles. The rationale for establishing the LTT was that titles that were allocated in an illegal and irregular manner ought to be considered void and hence a legal process should be used to revoke the titles; furthermore, that any titles allocated that went against the public interest were illegal and thus could be nullified.⁷⁸ The allocation of public land converted it from public-private land which was protected through Article 75 (previous Constitution) which was based on the **principle of sanctity of title** and Article 64 (2010 Constitution). The Commission viewed the principle as ‘fuelling illegal and irregular allocation of public land’.⁷⁹ Private property is protected from arbitrary confiscation without compensation, the Commission however viewed Article 75 as applying to private property that was acquired lawfully and through the regular processes.⁸⁰ **Article 68 of the Constitution gives parliament the power to enact legislation: that would enable the review of all grants or public land to establish their propriety or legality.**⁸¹ It can thus be argued that the establishment of the NLC through the NLC Act gives the NLC the power while dealing with historical land injustices to review public land which became private land as a result of allotment through a grant. The court’s decision in the case of *Mureithi v Attorney General*, was that held that the respondents (Attorney General, Commissioner for Lands, Nyeri District Land Registrar and the Catholic diocese) were **under no statutory duty** whatsoever to implement the recommendations of the Ndung’u Report and that the **President** after receiving the recommendation has **complete discretion** on what to do with the report; furthermore, that the court did not have the mandate to formulate and implement National Policy because that was within the mandate of the Executive and Parliament.⁸²

⁷⁸ Implementing the Ndung’u Land Report.

⁷⁹ Report of the Ndung’u Commission, 16.

⁸⁰ Implementing the Ndung’u Report, 19.

⁸¹ Article 68 (c) (v), *Constitution of Kenya* (2010).

⁸² *Mureithi v Attorney General & 4 others* (2005) eKLR.

The TJRC was established through the TJRC Act of 2008 led by Ambassador Bethwell Kiplagat. The main task of the Commission was to investigate into historical injustices, their cause, effect and thereafter make appropriate reforms. The report outlined that some of the things that were ailing Kenya is its land tenure system.⁸³ However, the commission was cognisant that the government lacked political will to implement recommendations issued by Commissions in a timely fashion, and that the government failed to implement the recommendations made.⁸⁴ To combat this, the recommendations issued should take a mandatory form. The standard used to determine whether an individual or institution should be held responsible the Commission employed a balance of probabilities,⁸⁵ outlined that it was not a court of law and thus its findings against an adversely affected person or individual should not be constituted as a finding of guilt.⁸⁶ Some of its findings pertaining to land include: *that between 1895 and 1963 the British Colonial administration in Kenya was responsible for violations of human rights, between 1963 and 1978 that President Jommo Kenyatta and his government were responsible for the illegal and irregular allocation of land by government officials and their allies, between 1978 and 2002 President Daniel Arap Moi presided over a government that was responsible for illegal and irregular allocation of land, and that between 2002 and 2008 President Mwai Kibaki presided over a government responsible for economic crimes and grand corruption (emphasis mine).*⁸⁷ Historical Land grievances were attributed to being the single most important driver of ethnic conflict and tension.⁸⁸

⁸³ Republic of Kenya, *Truth Justice and Reconciliation Commission*, letter of transmittal.

⁸⁴ Republic of Kenya, *Truth Justice and Reconciliation Commission*, 216.

⁸⁵ Republic of Kenya, *Truth Justice and Reconciliation Commission*, 2.

⁸⁶ Republic of Kenya, *Truth Justice and Reconciliation Commission*, 2.

⁸⁷ Republic of Kenya, *Truth Justice and Reconciliation Commission*, 7.

⁸⁸ Republic of Kenya, *Truth Justice and Reconciliation Commission*, 54-55.

The recommendations issued led to the establishment of the National Land Policy of 2009, which formed the basis of the 2010 constitutional provisions regarding Land. The policy report represented the views and opinions of experts of obtained through a consultative process including stakeholders drawn from: the public, private and civil society.⁸⁹ Historical land injustices were attributed to colonisation, and previous governments and thus comprising of a special category of land disputes they required special intervention. The recommendations made were that the function of the NLC should be to prepare and maintain a register on public land and related statistics, a LTT would determine would consider *bona fide* purchasers of land that was previously held as public or trust land.⁹⁰

2.3: POST 2010 LAND POLICIES

Article 62 (2) 2010 Constitution of Kenya established of the NLC.⁹¹ Its function to investigate historical land injustices is based on the principle that Sanctity of titles does not protect land which was acquired illegally or illegitimately. Furthermore, history showcased that there existed widespread belief that '*the state through its public service institutions is inefficient and wasteful in the management of land resources*'⁹². There existed little public trust in the state, because states' plunder of land resources was the norm and not an exception.

In determining the structure of the Commission the initial recommendation was: for the Commission to exercise powers similar to that of a subordinate court, any aggrieved party

⁸⁹ Republic of Kenya, *Sessional paper No. 3 of 2009 on National Land Policy*, 2009,ix.

⁹⁰ Sessional Land Paper, on National Land Policy (No. 3, of 2009),14.

⁹¹ Article 62 (2), *Constitution of Kenya* (2010).

⁹² Efficacy of establishing a National Land Commission in Kenya, Kenya Land Alliance (2005),7.

would have liberty to obtain enforcement orders from the court in relation to the decision rendered; officers working within the Commission would be granted immunity in order to facilitate entry, search or verification of any matter that fell within their functional jurisdiction and beyond the receipt of public funds the Commission would have the power to raise its own money.⁹³ However, the structure adopted was different from what previous commissions had stated; the Constitution provided that the Commission would be considered the custodian of public land,⁹⁴ would perform function as prescribed by national legislation,⁹⁵ and was considered an independent commission.⁹⁶ The LTT as had been outlined in the NLP was never established however, it can be inferred that the NLC Act in granting the Commission the power to investigate historical land injustices was in fact granting the Commission the power to review the manner in which land titles were issued.

The NLC, was thus given a broad mandate over all Public land in Kenya and it was required to:⁹⁷ *'manage public land on behalf of the National and county Government, recommend a national land policy to the national government, advice the national government on a comprehensive programme for the registration of titles within Kenya, conduct research related to land and land use and make recommendations to the appropriate authorities, initiate investigations, on its own complaint or on a complaint into present or historical land injustices and recommend appropriate redress'* amongst other functions. The Commission has however been criticized as being a toothless dog as was seen in 2013 where the president generated and issued land titles within the Kenyan Coast even after the NLC, the joint committee of the National Assembly, and the Senate's Departmental Committee for Lands

⁹³ Efficacy of establishing a National Land Commission in Kenya, Kenya Land Alliance (2005),10.

⁹⁴ Article 67 (2)(a), *Constitution of Kenya* 2010.

⁹⁵ Article 67 (3), *Constitution of Kenya* 2010.

⁹⁶ Article 248 (2)(b), *Constitution of Kenya* 2010.

⁹⁷ Section 5 (1), *National Land Commission Act* (2012).

and Delegated Legislation stressed that the NLC was the only constitutionally mandated body to issue out title deeds.⁹⁸

There have been diverging views on how to tackle the land question. Some proponents advocate that: land rights should be used as a basis to achieve broader goals of justice and equity whereas another group advocates that titles to land should be protected irrespective of how the land was obtained.⁹⁹

⁹⁸ <http://allafrica.com/stories/201409150527.html> accessed on 20 January 2018.

⁹⁹ Patricia Kameri Mbote, *The land question in Kenya: the legal and ethical dimension*, 1.

CHAPTER 3: SUITABILITY OF ALTERNATIVE DISPUTE RESOLUTION IN RESOLVING HISTORICAL LAND INJUSTICES

3.1: INTRODUCTION

Different land law policies, and recommendations made by the various commissions showcase that, the enactment of new laws was not an adequate solution to resolving historical land injustices; but rather as a matter of fact laws facilitated the disposition of land,¹⁰⁰ whereas other laws legalized the dispossession.¹⁰¹ Failure to adequately resolve this land issues has in the past resulted to ethnic violence.¹⁰² Land ownership is a complex social institution which varies amongst cultures; as such the recognition of an individual's right to property is important so as to ensure that the individual can rightfully exercise their right within a society and, the subsequent right to impose sanctions against those who violate the individual's rights.¹⁰³

Land conflicts, are commonly resolved through litigation, with the Environment and Land Court having jurisdiction over disputes relating to the environment and the use and occupation of, and title to land.¹⁰⁴ This is even though land conflicts drag on for years. Research showcases that 55% of land cases do not progress past the mentions stage and that the average duration for determining a case can be more than 10 years.¹⁰⁵ In 1998, Statistics from the Judiciary Central Planning and Project Unit showcase that there existed a backlog

¹⁰⁰Section 30, *Crown Lands Ordinance*, 1902.

¹⁰¹ Section 75, *Constitution of Kenya* (1973).

¹⁰² *Truth Justice and Reconciliation Commission*, 54.

¹⁰³ Patricia Kameri Mbote, *The land question in Kenya: the legal and ethical dimension*, 20.

¹⁰⁴ Article 162 (2) (b), *Constitution of Kenya* (2010)

¹⁰⁵ Geoffrey Nyamasenge, Muhammad Swazuri and Tom Chavangi, 'Alternative dispute resolution as a viable tool in land conflicts: A Kenyan perspective' (2017), 5.

of 6,551,451; 7,222,516 and 8,335,759 cases in the years 2004, 2005 and 2006 respectively.¹⁰⁶ This is a violation of the principle that justice ought to be delivered without undue delay.¹⁰⁷ This is attributable to the adversarial nature of Kenya's judicial system where parties are seen to be at opposing polarized positions; furthermore, lawyers are seen to have no intention of obtaining early court dates seeing as they benefit most from the long arduous process.¹⁰⁸ The implications of which are that it leads to a reduction in socio-economic development. Some of the recommendations made are that to try resolve the backlog of cases, ADR and court annexed mediation should be incorporated into the court process.¹⁰⁹

3.2: LACK OF TRUST IN THE JUDICIARY, AND JUDICIAL REFORMS

Following these statistics, and the general state of inefficiency within the court system there existed a need for judicial reformation. The major reforms happened in 2003 after the swearing in of President Mwai Kibaki and the establishment of the Integrity and Anti-Corruption Committee of the Judiciary (the Ringera Committee) which found that: the capacity of the judiciary as an independent and impartial arbiter of legal disputes had been compromised.¹¹⁰ The findings of the report showcased that citizens' lack of trust in the judicial system was well founded seeing as findings as of 30th August 2003 showcased that 3,234 judicial officers were found to be involved in corrupt acts that is 11 Judges of Appeal, 44 Judges of the High Court, 254 Magistrates, 15 Kadhis, 2,910 Paralegals, 152 Judicial

¹⁰⁶ Sustaining Judiciary Transformation, A service delivery agenda 2017-2022, Republic of Kenya (2017), 19.

¹⁰⁷ Article 159 (1)(b), Constitution of Kenya (2010).

¹⁰⁸ Anthony Gross, Mediation- A solution for the legal Sector crisis (2004), 4.

¹⁰⁹ Sustaining Judiciary Transformation, A service delivery agenda 2017-2022, Republic of Kenya (2017), 20.

¹¹⁰ Hon Mr. Justice (Rtd) Aaron Ringera, Corruption in the Judiciary, World Bank, Washington D.C, 25th April 2007.

Officers.¹¹¹ Following this various magistrates and judges were impugned whereas others resigned or challenged the decision to remove them.¹¹² What the various judicial reforms showcase is that there existed a need to establish an accessible, timely, efficient and effective justice system.¹¹³ Some of the things that hindered the efficiency of the courts, were that it was seen to be rather unfriendly and thus instilled phobia in people, and the court process was seen to be complex and opaque.¹¹⁴

3.3: BENEFITS OF ADR IN RESOLVING HISTORICAL LAND INJUSTICES

Alternative Dispute Resolution (ADR) is defined as, the resolution of a dispute out of court¹¹⁵ it includes: negotiation, early neutral evaluation, mediation, conciliation, reconciliation, fact finding, expert determination, private judging, arbitration amongst others.¹¹⁶ Some of the general characteristics of ADR are: it involves bringing parties to a dispute together to participate in the decision-making process; seeks to obtain win/win solutions; parties have control over the process, authority on the terms of the agreement; a third party is commonly utilized to assist the parties through the whole process.¹¹⁷ The use

¹¹¹ Hon Mr. Justice (Rtd) Aaron Ringera, *Corruption in the Judiciary*, 12.

¹¹² The Report of the Integrity and Anti-Corruption Commission.

¹¹³ Hon, Mr. Justice P Kihara-Kariuki, *Procedural reforms/innovations that enhance access to justice and ensure protection of rights in Kenya*, 4th November 2015.

¹¹⁴ Hon, Mr. Justice P Kihara-Kariuki, *Procedural reforms/innovations that enhance access to justice and ensure protection of rights in Kenya*, 4.

¹¹⁵ <http://thelawdictionary.org/alternative-dispute-resolution/> accessed on 20 September 2017.

¹¹⁶ Muigua K, *Setting Disputes through Arbitration in Kenya*, Glenwood Publishers Limited, 2012, 19.

¹¹⁷ David J Torrel, 'Viewpoint: Alternative dispute resolution in public land management' *Journal of Range Management* (1994).

of ADR is based on the **principle of subsidiarity** which provides that, smaller social bodies should be respected and encouraged to participate in the common good; only if this smaller bodies fail should larger bodies be allowed to intervene and even then they should do so without absorbing them.¹¹⁸

Benefits attributable to ADR are that the parties reclaiming power and responsibility from the hands of judges and lawyers into their own; they are thus primarily responsible for reaching a decision that both parties are agreeable to and hence preserve the relationship between parties.¹¹⁹ For the process to be successful, parties are required to take a principled approach as opposed to a positional approach.¹²⁰ Positional negotiation involves holding on to a fixed idea or position and arguing based on that irrespective of one's underlying interests; in principled negotiation parties seek to find a “win-win” solution to the problem and focuses on ensuring that the agreement meets both parties’ interests/needs.¹²¹ The rationale behind principled negotiation is: human beings are emotional creatures and as such people should be separated from the problem; the parties would hence be attacking the problem and not each other.¹²² The aim of negotiation is to meet people’s underlying interests which tend to be masked when people argue based on positions, optimal solutions thus consist of a wide range of possibilities which advance shared interests and creatively reconcile different interests.¹²³

¹¹⁸ Anthony Gross, *Mediation- A solution for the legal Sector crisis* (2004), 5.

¹¹⁹ J.G. Merrills, *International Dispute Settlement*, 4th edition, Cambridge University Press, Cambridge, 2005, 28.

¹²⁰ Roger Fisher, *William Ury, Getting to yes: Negotiating Agreement without giving in*, Second edition, Random House Business Books, 1991, 11.

¹²¹ Roger Fisher, *Getting to yes: Negotiating Agreement*, 12.

¹²² Roger Fisher, *Getting to yes: Negotiating agreement*, 11.

¹²³ Roger Fisher, *Getting to yes: Negotiating agreement*, 11.

Prior to the establishment of the NLC, there existed various tribunals that dealt with land matters; Land Disputes Tribunal, Natives Tribunal amongst others. Verdicts issued by the tribunals were binding but were not taken seriously, implemented or honoured.¹²⁴ The NLC has the power to use ADR quite broadly in carrying out its functions; furthermore, it is required to promote: the use of traditional dispute resolution mechanisms in land conflict,¹²⁵ use ADR in land dispute handling and the management of land,¹²⁶ also being an Independent commission means it has the powers necessary for conciliation, mediation and negotiation.¹²⁷ The NLC, in using ADR and TDRM's to resolve historical land injustices would ensure that justice is accessible to all and in particular poor people,¹²⁸ which is in conformity to the rule of law.¹²⁹ This is as opposed to formal conflict management that is ineffective as a result of the legal technicalities, complex procedures, high costs and delays,¹³⁰ an example being the Mbiyu Koinange case, which took 37 years to determine.¹³¹

3.4 ANALYSIS OF NEGOTIATION, MEDIATION, CONCILIATION

Alternative dispute resolution mechanisms are aimed at aiding parties to engage in a mutual problem solving initiative whereby parties cooperate to redefine the conflict and the

¹²⁴ Geoffrey Nyamasenge 'Alternative dispute resolution as a viable tool', 4.

¹²⁵ Section 5 (1)(f), *National Land Commission Act* (2012).

¹²⁶ Section 5 (2)(f), *National Land Commission Act* (2012).

¹²⁷ Article 252 (1) (c), *Constitution of Kenya* (2010).

¹²⁸ Kariuki Muigua and Francis Kariuki, 'ADR Access to justice and development in Kenya'.

¹²⁹ J. Michel, 'Alternative Dispute Resolution and the Rule of Law in International Development Cooperation, Justice & Development Working Paper Series', 2011, 2.

¹³⁰ International Commission of Jurists, 'Strengthening Judicial Reform in Kenya: Public Perceptions and Proposals on the Judiciary in the new Constitution', Vol. III (2002).

¹³¹ <http://www.nation.co.ke/news/Koinange-estate-row-back-to-High-Court/1056-4202198-8va4cvz/index.html> accessed on 27 December 2017.

relationship;¹³² it digs deeper into ascertaining the root cause of the problem. The first port of call for ordinary citizens when it comes to trying to resolve a dispute is negotiation.¹³³ It is an informal conflict resolution process that offers parties maximum control over the process; to enable them to identify and discuss the problem to reach an acceptable solution.¹³⁴ Parties can do this without the help of a third party. However, in the case the parties reach a deadlock they would then invite a third party to help them resolve their case and this then transforms to become mediation.¹³⁵ Mediation refers to a voluntary, non-binding dispute resolution process in which a neutral third party helps the parties to reach a negotiated settlement which when reduced to writing and signed by both parties becomes binding.¹³⁶ The benefits of which are that it encourages parties to find a solution that they are agreeable to, and hence it yields a win-win solution and preserves the parties relationship.¹³⁷ Conciliation on the other hand refers to a dispute resolution mechanism whereby a third party referred to as a conciliator brings parties together and aids them in resolving the dispute and hence repairing their relationship by clarifying perceptions, and pointing out misperceptions.¹³⁸ It is beneficial in that it helps to facilitate negotiation and would therefore work well in the case a relationship has been severed and is in need of restoration.¹³⁹ This is based on the fact that it is based on the principle of transitional justice

¹³² Kariuki Muigua, 'Effective justice for Kenyans: is ADR really an alternative', 14.

¹³³ M. Mwangi, 'Conflict in Africa: Theory, Processes and Institutions of Management', Nairobi: Centre for Conflict Research, 2006, 42.

¹³⁴ Kariuki Muigua, 'Effective justice for Kenyans: is ADR really an alternative', 16.

¹³⁵ M. Mwangi, 'Conflict in Africa: Theory, Processes and Institutions of Management', 115.

¹³⁶ P. Fenn, 'Introduction to Civil and Commercial Mediation, Chartered Institute of Arbitrators, Workbook on Mediation', CIArb, London, 2002, 10.

¹³⁷ J.G. Merrills, *International Dispute Settlement*, 28.

¹³⁸ Hussey-Dowling, 'Conciliation: Coming out of the shadows', (2009).

¹³⁹ <http://www.dispute-resolution-hamburg.com/conciliation/what-is-conciliation/> accessed on 20 December 2017.

which refers to ‘a set of practices, mechanisms, and concerns that arise following a period of conflict, civil strife or repression, and that are aimed directly at directly confronting and dealing with past violations of human rights and humanitarian law’.¹⁴⁰

3.4.1: ADMISSIBILITY OF CLAIMS

The Commission has jurisdiction over historical land injustice claims, provided that the claim meets the following admissibility criteria:¹⁴¹

1. *it is verifiable that the act complained of resulted in the displacement of the applicant or other form of historical land injustice,*
2. *the claim has not or is not capable of being resolved of being resolved through the ordinary court process on the basis that: the claim contradicts a law that was in place at the time the injustice began; or the claim is debarred under the Statute of Limitations Act*
3. *the claimant was either a proprietor or occupant of the land upon which the claim is based*
4. *no act or omission on the part of the claimant amounts to a surrender or renouncement of the right to the land in question*

The case of *Olalui Group Ranch v Twari Konchella and 608 others*,¹⁴² expanded on this by establishing under what circumstances the NLC could utilize ADR to resolve historical land injustices. The case involved a claim over a parcel of land alleged to have been illegally and irregularly allocated between 1980 and 1986; a court order had been issued to stay proceeding to allow for the NLC to try and resolve the dispute; however, the court vacated

¹⁴⁰ Kenya Human Rights Commission, ‘Transitional Justice in Kenya: A Toolkit for Training and Engagement’, 2010.

¹⁴¹ Admissibility Checklist Form, *Historical Land Injustice Rules* (2016).

¹⁴² *Olalui Group Ranch v Twari Konchella and 608 others* [2017] eKLR.

the stay of proceedings the reasoning being that the nature of ADR is voluntary and that not all the parties had agreed to the use of ADR. This showcases that for the NLC to successfully utilize ADR, **all parties need to have come to a consensus** that this is the form of dispute resolution mechanism they wish to engage in. However, to encourage parties to engage in ADR mechanisms, the former Chief Justice in 2010, through Gazette Number 51678, established a set of rules aimed at reducing the backlog of land cases and to aid the ELC in dealing with land matters. Rule 38 provides that: *in the interest of avoiding unnecessary costs and delay, the Court may on its own motion or with the agreement or requests of the parties direct that the disputes be resolved by the appropriate Alternative Dispute Resolution Mechanism including conciliation, mediation, arbitration and traditional dispute resolution mechanisms in accordance with Article 159 of the Constitution and Section 20 of the Environment and Land Court Act 2011 (emphasis mine).*¹⁴³ The success of ADR is seen to be dependent on the nature of the dispute and the legal mechanisms and institutions in place.¹⁴⁴

The NLC in its report “Devolving Land Governance” outlined the progress it had made in investigating claims to resolve historical land injustices; the Commission had participated in the review of a variety of policies and legislations from various stakeholders: and with the aid of the county governments the Investigations and Adjudication of Historical Land Injustices (Bill) was enacted (in 2016), in the Commission had initiated an inquiry into historical land injustices Taita Taveta County,¹⁴⁵ established the County Land Management Boards (CLMB) 87% of which were operable and ensured that citizens had access to

¹⁴³ Rule 28, Practice Directions on Proceedings in the Environment and Land Court and on Proceedings relating to the use and occupation of and title to land and other proceedings in other courts 25th July 2014

¹⁴⁴ Geoffrey Nyamasenge ‘Alternative dispute resolution as a viable tool’, 5.

¹⁴⁵ National Land Commission Report, Developing Land Governance, 2015-2016, 14.

reasonable services within all parts of the republic,¹⁴⁶ and furthermore, the Commission was in the process of developing a database to cover land conflict and monitoring amongst other things.¹⁴⁷ The report outlined that 360 disputes were successfully resolved by the CLMB, through the use of ADR the effects of which are: there was a reduced tension at the grassroots level, improved peace and unity, reduced violent/disruptive land disputes.¹⁴⁸ This acts as a testament to the fact that when society changes the manner through which it views disputes and incorporates ADR that it truly does work for the benefit of the whole society at large.

3.4.2: PROCEDURE FOR INITIATING A HISTORICAL LAND INJUSTICE CLAIM

The NLC Historical Land Injustice Rules showcase the process of investigating and resolving claims that arise out of historical land injustices. The Commission can: initiate investigations on its own initiative or upon a complaint,¹⁴⁹ make a public request by way of notice for the submission of claims arising out of historical land injustices,¹⁵⁰ request for particulars, documents or information from any person including a government department or state organ¹⁵¹ Claimants are required to lodge their claim through filling a form which lays out the particulars of their claim, they may provide the appropriate documentation to support their claim.¹⁵² On receiving the claim, the Commission files it in its register and may: admit the claim, reject the claim with reasons, refer the claims to other relevant

¹⁴⁶ Section 4 (3), National Land Commission Act (2016).

¹⁴⁷ Developing Land Governance, 2015-2016, 12.

¹⁴⁸ National Land Commission Annual Report, CLMB Performance Review FY 2015/2016.

¹⁴⁹ Article 67 (2) (e), Constitution of Kenya (2010).

¹⁵⁰ Section 5 (2), Historical Land Injustice Rules (2016).

¹⁵¹ Section 6, *Historical Land Injustice Rules* (2016).

¹⁵² Section 7, *Historical Land Injustice Rules* (2016).

institutions/mechanisms, consolidate claims of a similar nature.¹⁵³ As the Commission carries out its investigations it may place a restriction over the land that is subject to the historical land injustice claim.¹⁵⁴ Claims are assessed and interested persons are notified of the claim within a period of 90 days from when the claim was lodged.¹⁵⁵ A hearing is thereafter conducted by the Committee after which it makes recommendations as to the appropriate form of remedy that ought to be issued; a decision made by the Committee is considered to be a decision of the Commission.¹⁵⁶ The Committee is not bound by the strict rules of evidence,¹⁵⁷ furthermore it may make orders providing that parties at any stage of the proceedings but before the completion of the proceeding disclose various documents.¹⁵⁸ The Committee, through the Commission has the power to summon any person to appear before it in relation to an investigation or proceedings.¹⁵⁹ Cognisant of the fact that the nature of historical injustices is such that they could lead to insecurities, the Commission has the ability to make arrangements for the protection of witnesses.¹⁶⁰ Principles of a fair hearing dictate that generally hearings should be held in public with the exception of a few cases; following this the Committee may order that a part of the hearing be closed to the public and as such may only be attended by a select few.¹⁶¹ Decisions are rendered in writing with the reasons thereof within 21 days from the time investigations are concluded,¹⁶² it is thereafter

¹⁵³ Section 8, *Historical Land Injustice Rules* (2016).

¹⁵⁴ Section 9, *Historical Land Injustice Rules* (2016).

¹⁵⁵ Section 10 (1), *Historical Land Injustice Rules* (2016).

¹⁵⁶ Section 12, *Historical Land Injustice Rules* (2016).

¹⁵⁷ Section 14 (3), *Historical Land Injustice Rules* (2016).

¹⁵⁸ Section 17, *Historical Land Injustice Rules* (2016).

¹⁵⁹ Section 22 (1), *Historical Land Injustice Rules* (2016).

¹⁶⁰ Section 23, *Historical Land Injustice Rules* (2016)

¹⁶¹ Section 25 (1), *Historical Land Injustice Rules* (2016).

¹⁶² Section 26, *Historical Land Injustice Rules* (2016).

extracted and authenticate by the Commission;¹⁶³ after which the decision and recommendations made are published,¹⁶⁴ and furnished to the appropriate authorities to act under the redress recommended.

3.4.3: SETTLEMENT OF DISPUTES RELATING TO COMMUNITY LAND

The Community Land Act, provides that communities may utilize alternative methods of dispute resolution, including traditional dispute and conflict resolution mechanisms for settling a dispute involving community land.¹⁶⁵ Where the dispute is between two registered communities they are required at first instance to utilize internal dispute resolution mechanisms that is through the respective communities' by-laws.¹⁶⁶ The Act provides that “*Courts and other dispute resolution bodies SHALL apply the customary law prevailing in the area of the jurisdiction of the parties to a dispute in settlement of community land*”(emphasis mine).¹⁶⁷ The use of the word shall, showcases a mandatory nature as such the NLC would be bound to utilize Customary law to such disputes; however, parties to the dispute are also free to refer the dispute to mediation.¹⁶⁸ The mediation in this case would take place in private or in an informal setting and parties would have the ability to **‘participate in the negotiation and design the format of the settlement agreement’** (emphasis mine).¹⁶⁹ If an agreement is reached during the mediation, it would be reduced to

¹⁶³ Section 27 (1), *Historical Land Injustice Rules* (2016).

¹⁶⁴ Section 28, *Historical Land Injustice Rules* (2016).

¹⁶⁵ Section 39 (1), *Community Land Act* (2016).

¹⁶⁶ Section 39 (2), *Community Land Act* (2016).

¹⁶⁷ Section 39 (4), *Community Land Act* (2016).

¹⁶⁸ Section 40 (1), *Community Land Act* (2016).

¹⁶⁹ Section 40 (2), *Community Land Act* (2016).

writing and thereafter signed by the parties.¹⁷⁰ Parties could also agree that such disputes be referred to arbitration.¹⁷¹ The Act recognizes, that efforts to resolve the dispute through ADR could potentially fail as such where all efforts to resolve the dispute fail the matter could then be referred to court.¹⁷² The court could thereafter: confirm, set aside, amend or review the decision which is subject to the appeal or make an order in connection to the issue as it deems fit.¹⁷³ These provisions, strengthen the mandate of the NLC as pertaining to historical land injustices emanating from community land. Section 42 (1) of the Community Land Act “Where all effort of resolving a dispute under the Act fail, a party to the dispute may refer the matter to court”;¹⁷⁴ provides that the court is a place of last resort based on the principle of subsidiarity.

3.4.4: RECOMMENDATIONS AND ENFORCEMENT OF THE NATIONAL LAND COMMISSIONS DECISION

Upon the determination of a historical land injustice by the Commission, the Commission’s recommendations are passed onto the appropriate authorities who are required to act under the redress recommended within a period of three years.¹⁷⁵ The Act states “any authority mandated to act under the redress recommended **SHALL** be required to do so within three years” (**emphasis mine**). The general rule in interpreting Statute is the Literal rule; it provides that in interpreting statute courts should use the literal meaning of the words; the exception being if the literal word results in an absurdity.¹⁷⁶ As such the word “shall” should

¹⁷⁰ Section 40 (4), *Community Land Act* (2016).

¹⁷¹ Section 41 (1), *Community Land Act* (2016).

¹⁷² Section 42 (1), *Community Land Act* (2016).

¹⁷³ Section 42 (2), *Community Land Act* (2016).

¹⁷⁴ Section 42 (1), *Community Land Act* (2016).

¹⁷⁵ Section 15 (10), *National Land Commission Act* (2012).

¹⁷⁶ *Grey v Pearson* HL 9 March (1857).

be understood as being imperative or mandatory,¹⁷⁷ requiring the appropriate authorities to take the appropriate action based on the recommendations made.

On the contrary, it could be argued that this provision should not be read as such because the Constitution does not utilize mandatory language Article 67 (2) (e), states that the NLC has the power “to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices and recommend appropriate redress”. To rebut such an assertion, it should be noted that the Constitution cannot be interpreted as other statutes which are subordinate to it,¹⁷⁸ furthermore, the Constitution is the Supreme law of the Republic,¹⁷⁹ “it represents the will of the people and as such it is a living instrument with soul and consciousness it embodies certain fundamental values and principles and must be construed broadly, liberally and purposely or teleologically to give effect to those guiding principles”¹⁸⁰ (**emphasis mine**). As such, it can be inferred that though the Constitution does not explicitly state that the recommendations issued should be furnished to the appropriate authorities and the word SHALL (showcasing mandatory nature) is not utilized; it suffices that the Constitution provides that the NLC as an independent commission may perform and exercise any powers prescribed by legislation in addition to the functions and powers conferred to it by the Constitution.¹⁸¹ Thus, in interpreting the Constitution it would be inaccurate to argue that the intention of the legislature and of the people was not to limit the power of the NLC to merely carrying out investigations knowing that the recommendations would have no effect.

¹⁷⁷ <https://thelawdictionary.org/shall/> accessed on 19 January 2018.

¹⁷⁸ <http://www.ckadvocates.co.ke/2015/03/law-and-language-in-the-kenyan-perspective/> accessed on 19 January 2018.

¹⁷⁹ Article 2 (1), *Constitution of Kenya* (2010).

¹⁸⁰ *Reverend Timothy Njoya And Others v Honourable Attorney General And Another* [2004] eKLR.

¹⁸¹ Article 252 (1) (d), *Constitution of Kenya* (2010).

The NLC Act provides that the Commission may recommend a wide array of recommendations depending on the particular situation this include: restitution; compensation, if it is impossible to restore the land; resettlement on an alternative land; rehabilitation through provision of social infrastructure, affirmative action programmes for marginalized groups and communities; creation of wayleaves and easements; order for revocation and reallocation of the land; order for revocation of an official declaration in respect of any public land and reallocation; sale and sharing of the proceeds; refund to a bona fide third party after valuation; or a declaration and preservation orders including an injunction.¹⁸²

Adequate provisions exist within the law that is the Constitution, the National Land Commission Act, and the National Land Commission Rules to enable the Commission to carry out investigations pertaining to historical land injustices. The processing of claims and carrying out the investigations is in conformity with the due process of law and the principle of a fair hearing as enshrined in Article 50 of the Constitution to ensure that no party is adversely affected by such a claim. The Commission has various Alternative Dispute Resolution mechanisms at its disposal, it also encourages parties to take control of the process in drafting a solution. It is assumed that the decision agreed upon will be honoured by both parties, since the parties voluntarily agreed to utilize ADR as a dispute resolution mechanism. Furthermore, because the Commission will have already issued its recommendations the party found at fault will have an incentive to ensure that an agreement is reached upon for fear that if third parties (in this case the authorities furnished with the recommendations) act upon it the consequences could potentially be worse.

¹⁸² Section 15 (9), *National Land Commission Act* (2012).

CHAPTER 4: FINDINGS AND ANALYSIS ON THE POWERS OF THE NATIONAL LAND COMMISSION

4.1: DATA ANALYSIS

Article 67 (2) (e), and Article 251 (2) of The Constitution, read together with Section 15 of the NLC Act clearly outline the laws that mandate the NLC to resolve historical land injustices. That is the Commission may: initiate investigations on their own motion or on a complaint and recommend the appropriate form of redress,¹⁸³ and encourage the application of traditional dispute resolution mechanisms in resolving land conflicts.¹⁸⁴

An interview with the Deputy Director of Legal Affairs at the NLC was conducted to investigate whether the provisions that existed in law were equivalent to real time practice. The NLC operates in a similar manner as a quasi-judicial body, an example being how it carries out investigations into historical land injustices. The committee in carrying out hearings requires that all parties should disclose the documents it wished to rely on provided that they are not subject to privilege;¹⁸⁵ prior to giving evidence witnesses are required to take an oath of affirmation;¹⁸⁶ can issue notice to parties to appear before it to give evidence pertaining to the investigation,¹⁸⁷ this is similar to the court's power to subpoena a witness to give evidence; the committee is not bound by the strict rules of evidence;¹⁸⁸ furthermore, the Commission in issuing its decision is required to give the decision in writing, and state a summary of the relevant facts and the evidence adduced, the reasons thereof, and the

¹⁸³ Article 67 (2) (e), *Constitution of Kenya* (2010).

¹⁸⁴ Article 67 (2) (f), *Constitution of Kenya* (2010).

¹⁸⁵ Section 17, *Historical Land Injustice Rules* (2016).

¹⁸⁶ Section 21, *Historical Land Injustice Rules* (2016).

¹⁸⁷ Article 252 (3), *Constitution of Kenya* (2010).

¹⁸⁸ Section 14 (3), *Historical Land Injustice Rules* (2016).

remedies issued,¹⁸⁹ similar provisions exist within a court judgment.

4.1.1: NATIONAL LAND COMMISSION HEARINGS

As seen in the case *Compar Investments Limited v National Land Commission*,¹⁹⁰ in looking at the manner through which hearings are conducted, ‘the nature and scope of due process including the right to be heard should be examined within the context of each case and all that would be required to be done is to ensure a degree of fairness’¹⁹¹. The High Court has unlimited original jurisdiction in both civil and criminal matters,¹⁹² however, where a Statute has provided a remedy or procedure to a party then the court MUST exercise restraint and first give an opportunity to the relevant body or state organ to resolve the dispute as provided for by the relevant Statute; parties would thus be bound to follow the procedure provided by law before they could resort to a Court of Law because a Court of Law would have no jurisdiction to entertain the dispute.¹⁹³

4.2: RESOLVING HISTORICAL LAND INJUSTICES

The NLC operates through a two-tier system in looking at historical land injustices: one carrying out investigations into historical land injustices and making recommendations on the appropriate form of redress;¹⁹⁴ and two encouraging parties to utilize ADR to resolve historical land injustices.¹⁹⁵ The Commission can operate independently, reason being that it is subject only to the Constitution and the law and it is independent and not subject to the

¹⁸⁹ Section 26 (2), *Historical Land Injustice Rules* (2016).

¹⁹⁰ *Compar Investments Limited v National Land Commission* eKLR (2016)

¹⁹¹ *Compar Investments Limited v National Land Commission* eKLR (2016).

¹⁹² Article 165 (3) (a), *Constitution of Kenya* (2010).

¹⁹³ *The Speaker of the National Assembly v Karume* eKLR (2008).

¹⁹⁴ Article 67 (2) (e), *Constitution of Kenya* (2010).

¹⁹⁵ Article 67 (2) (f), *Constitution of Kenya* (2010).

direction or control of any person.¹⁹⁶

4.3: A CRITIQUE OF THE ENFORCEMENT OF NLC'S RECOMMENDATIONS

Neither the NLC Act nor the NLC Historical Injustice Rules refer to the existence of an enforcement mechanism; the lack of an enforcement mechanism as such is one of the major weaknesses of the NLC as was confirmed by the Deputy Legal Director.¹⁹⁷ The powers of the NLC are limited to carrying out investigations, after which they rely on the appropriate authorities to act on them. It can thus be said that the powers given to the NLC through the NLC Act are such that they ensure that the Commission “is all bark and no bite”. Reason being that the powers of the NLC are limited to making the recommendations and it does not have an enforcement mechanism. Furthermore, as the Constitution clearly outlines in Article 67 (2) (e), the NLC is to encourage parties to utilize ADR. Recommendations issued by the Commission and furnished to the relevant authorities could potentially not be acted upon by the relevant authorities; furthermore, parties could discard advice to utilize ADR and as such aggrieved parties would be forced to seek recourse through the court process. This is because as has been stated the nature of ADR is that it is voluntary and as such parties cannot be compelled to go through the process to reach an agreement;¹⁹⁸ though the complexity of historical land injustices make it is almost improbable that they can be resolved through the court process. Kenya’s court process being adversarial in nature and as such envisions a ‘win-lose’ situation whereas ADR views things through a ‘win-win perspective’ and is catered such as to best meet the parties needs be they tangible or intangible needs.¹⁹⁹ An example being an apology, one of the recommendations made by the

¹⁹⁶ Article 249 (2) , *Constitution of Kenya* (2010).

¹⁹⁷ Interview with Deputy Legal Director of the National Land Commission.

¹⁹⁸ *Olalui Group Ranch v Twari Konchella and 608 others* [2017] eKLR.

¹⁹⁹ Truth Justice and Reconciliation Commission, 216.

TJRC was that “the Judiciary apologize to the people of Kenya for failing to address impunity effectively and perform its role of deterrence to prevent the perpetration of gross human rights violations, during the *period between 12 December 1963 and 28 February 2008*”²⁰⁰ Also, some of the benefits of ADR and example being TDRM’s is that they are decentralized and as such claims brought to the specific dispute resolution panel can successfully be resolved and this is attributable to the communities’ admiration for the system.²⁰¹

As seen in the case of, *Mureithi v Attorney General*²⁰² the court outlined the position on the effects of the recommendations made by the commission of inquiry into the illegal and irregular allocation of public land (also known as the Ndung’u report) ; *the court held that “the respondents were under no statutory duty whatsoever to implement the recommendations of the Ndung’u Report and that the President after receiving the recommendation has complete discretion on what to do with the report”*²⁰³ (**emphasis mine**); the court also questioned whether in implementing the recommendations in accordance to both the constitution and the law, whether this ought to be done in one big leap or whether implementation should be staggered on a case by case basis. The court stated that, “*it did not have the powers to implement the recommendations issued by the Ndung’u report as it was not the function of the court to formulate and implement policy as this these powers lay with the Executive and Parliament*”²⁰⁴(**emphasis mine**). Recommendations issued by the NLC are likely to suffer a similar fate, in that recommendations could be given,

²⁰⁰ Truth Justice and Reconciliation Commission Report, 216.

²⁰¹ Findings, Dr Kirema Mbuguru and Prof David Macharia, *Resolving Conflicts Using Indigenous Institutions :A case study of the Njuri-Ncheke of Ameru, Kenya*, 4th June 2016.

²⁰² *Mureithi v Attorney General & 4 others* (2005) eKLR.

²⁰³ *Mureithi v Attorney General & 4 others* (2005) eKLR.

²⁰⁴ *Mureithi v Attorney General & 4 others* (2005) eKLR.

which end up having no effect and as such the process can be said to have been carried in futility. This is despite the huge array of resources put in place to that the process is efficient and is carried out as seamless as possible.

CHAPTER 5: CONCLUSION, FINDINGS AND RECOMMENDATIONS

5.1: CONCLUSION

The theories established by both John Locke and Rawls showcase the lens through which this dissertation has looked at resolving historical land injustices. Locke described the state of nature as the natural condition of mankind whereby there exists complete freedom and liberty to live out one's life as they deem fit; however, there existed no civil power to ensure that men obey the laws that exist in nature;²⁰⁵ and as such this could potentially devolve into war especially because of property.²⁰⁶ Individuals within a society then come together and cede some of their rights to the government in order to have their rights protected; however, in the case that the government fails to act in the citizens best interest the law in place is not considered to be binding.²⁰⁷

Within the context of Kenya, and having considered the history of historical land injustices there have been circumstances where the government failed manifestly, to act in the best interests of its citizens and as such it would justify individuals in rebelling against the governments. Examples ranging from when Kenya was a British colony, and the court making a judgment to the effect that "*All Africans, were mere tenants at the will of the crown with no more than temporary occupancy rights*"²⁰⁸ what this meant therefore, was that natives' rights to land was not recognized.²⁰⁹ The "Maasai Agreements" of 1904 and 1911 also showcases the apprehension that exists in allowing natives lay claim to parcels of land;

²⁰⁵ Michael Freeman, *Lloyd' introduction to jurisprudence*, London: Sweet & Maxwell, 2001, 98.

²⁰⁶ Michael Freeman, *Lloyd' introduction to jurisprudence*, 99.

²⁰⁷ Michael Freeman, *Lloyd' introduction to jurisprudence*, 100.

²⁰⁸ *Isaka Wainaina & Another v. Murito wa Indagara & Ors*, [1923] Eklr.

²⁰⁹ Patricia Kameri Mbote, *Writing Wrongs*, 1.

reason such a claim could potentially have far reaching implications.²¹⁰In both instances we see natives and the general population revolting against such decisions reason being that the laws in place then were not in the best interest of the populace. In conformity to Locke's theory **ideally** citizens should not be bound by such laws. The effects of making such a statement however, would be that laws protecting property would be dimmed illegitimate and have no force of law.²¹¹ Citizens would revolt and the brutish state of nature could potentially lead to a state of war;²¹²this in Kenya can be compared to the 2008-2009 elections whereby historical land grievances were considered to be the main driver of conflicts and ethnic tension.²¹³ The principle of sanctity of title also showcases that the registration of a person as proprietor vests the individual with absolute ownership of the land,²¹⁴ and that the title of a proprietor is not subject to challenge except on the following grounds: fraud or misrepresentation to which the person is proved to be a party; or where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme.²¹⁵ However, in the case of historical land injustices the claimants are not necessarily arguing that the issuance of the title was based on an illegality; rather their claim is that the laws that granted these titles were not in the interests of the people. Thus, to prevent a situation of anarchy and to ensure that adequate redress the rights and interests of individuals whose rights were subjugated need to be recognized and restored. This is the basis through which the NLC carries out investigations and makes its recommendations. Through the mandate of the NLC and using ADR parties have an opportunity to draft the means through which they hope to address the issue. That is both parties to the dispute will have an opportunity to convene and

²¹⁰ *Ledidi Ole Tauta & Others v Attorney General & 2 others* [2015] eKLR.

²¹¹ Michael Freeman, *Lloyd' introduction to jurisprudence*, 100.

²¹² <http://www.iep.utm.edu/soc-cont/> accessed on 20 January 2018.

²¹³ *Truth Justice and Reconciliation Commission*, 245.

²¹⁴ Section 24 (a), *Land Registration Act* (2012).

²¹⁵ Section 26 (1), *Land Registration Act* (2012).

come up with a mutually agreeable decision.

Rawls' theory on justice looks at things from an abstract Original position which he argues would result in a just outcome. Legislatures and decision makers, in such a position are unaware of circumstances that could make them prejudiced and as such the decisions made would and would be to the benefit of the least advantaged within society.²¹⁶ However, as a matter of practice Kenya's decision makers did not envision themselves in the original position and because of this injustices occurred because decisions made were to the benefit of a select group of individuals as opposed to the least advantaged which is what Rawls advocated for. This forms the basis through which the NLC was given the power and mandate to carry out investigations and make subsequent recommendations on historical land injustices, to which authorities are required to act upon.²¹⁷ Furthermore, the Historical Land Injustice Rules provide for the procedure that ought to be followed by the committee carrying out the investigations to ensure that the due process is followed and as such to ensure fairness.

After making recommendations, and furnishing them to the appropriate authorities the NLC as a commission has the mandate to encourage parties to use the various ADR mechanisms that are at their disposal.²¹⁸ These are: mediation, conciliation and negotiation,²¹⁹ in addition to traditional dispute resolution processes. Statistics on the efficacy of the operations of the Njuri-Ncheke showcase that a decentralized system increased cooperation and this led to the Njuri-Ncheke successfully resolving various issues brought before it.²²⁰

²¹⁶ <http://www.iep.utm.edu/soc-cont/> accessed on 20 January 2018.

²¹⁷ Article 67 (2) (e), *Constitution of Kenya* (2010).

²¹⁸ Article 67 (2) (f), *Constitution of Kenya* (2010).

²¹⁹ Article 67 (2) (f), *Constitution of Kenya* (2010).

²²⁰ Findings, Dr Kirema Mbuguru and Prof David Macharia, *Resolving Conflicts Using Indigenous Institutions*

Kenya's history through the various commissions established and the recommendations issued, showcase that reliance should not be left solely at the discretion of the party; reason being it might not be in their best interest to implement the recommendations made. As such, the NLC ought to have its own enforcement mechanism which would work under the supervision of the High Court.

5.2: RECOMMENDATIONS

1. That Traditional Dispute Resolution Mechanisms, be utilized to resolve historical land injustices where the subject matter of the dispute is community land.
2. That Conciliation, Mediation and negotiation are utilized as first steps before the judiciary allows a party to institute a suit pertaining to historical land injustices.
3. That the powers of the NLC are expanded to operate as a quasi-judicial body, with the High Court exercising supervisory jurisdiction.

:A case study of the Njuri-Ncheke of Ameru, Kenya, 4th June 2016.

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