A CRITICAL ANALYSIS OF ARTICLE 63(1) OF THE CONSTITUTION OF KENYA: VESTING COMMUNITY LAND RIGHTS ON URBAN COMMUNITIES.

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DEDICATION

This work is dedicated to my parents, Mr and Mrs Barasa and to my siblings, Dr Linda Barasa and Sandra Barasa for their unrelenting love and support.

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I wish to thank my supervisor Ms. Emma Senge Wabuke and my lecturer Mr. Francis Kariuki for their guidance and support throughout this process of writing my dissertation. Their support has been invaluable.

DECLARATION

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

~~Signed~~ Date: 22/03/2018

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

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ABSTRACT

Land is critical to the economic, social and cultural development of Kenya.[1] Land is also an emotive issue and it was at the core of the resistance to British rule during the struggle for independence.[2] Before colonisation, native communities owned land communally through the commons proprietary system.[3] The arrival of the Arab traders and British colonialists led to large scale disruption of this system and the introduction of foreign land tenure systems that were alien to the native inhabitants of Kenya.[4] After independence, the independence government further neglected community land by not providing it with adequate protection which was as a result of not putting in place adequate laws that would grant it legal recognition. [5] Despite all these, the commons proprietary system remained resilient and did not succumb to the onslaught of suppression and subversion.[6]

In 2010 Kenya promulgated a new Constitution and one of its salient features was the recognition of community land.[7] Furthermore, the Constitution provides that community land shall vest in communities identified on the basis of ethnicity, culture or a similar community of interest.[8]

This dissertation seeks to examine the efficiency of vesting community land on urban communities identified on the basis of a similar community of interest as opposed to culture and ethnicity.

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[1] Ministry of Lands, *Sessional Paper No.3 of 2009,* August 2009,1.
[2]Ojienda T, *Conveyancing principles and practice,* LawAfrica Publishing (K), Nairobi,2010,2.
[3] Okoth-Ogendo H, *The tragic African commons: A century of expropriation, suppression and subversion,* Program for Land and Agrarian Studies, South Africa, 2002,2.
[4] Okoth-Ogendo, *The tragic African commons*,5.
[5]Okoth-Ogendo, *The tragic African commons*,9.
[6]Okoth-Ogendo, *The tragic African commons,*9.
[7] Article 61(2), *Constitution of Kenya,* (2010).
[8] Article 63(1), *Constitution of Kenya,* (2010).

LIST OF ABBREVIATIONS

IBEAC	Imperial British East Africa Company

LIST OF CASES

1. *Edward Mwaniki Gaturu & another vs. Hon. Attorney-General & 3 others* [2013] eKLR.
2. *Isaka Wainaina v Murito* [1923] 9 (2) KLR.
3. *Law Society of Kenya Nairobi Branch v Malindi Law Society and 6 others* [2017] eKLR.
4. *Malindi Law Society v Attorney General & 4 others* [2016] eKLR.
5. *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya Ltd)* [1989] KLR.
6. *R v National Land Commission & 4 others Ex Parte Futson Company* Limited [2015] eKLR.
7. *R v National Land Commission Ex Parte Krystalline Salt Limited* [2015] eKLR.

LIST OF LEGAL INSTRUMENTS

1. Community Land Act, (Act No. 27 of 2016).
2. Constitution of Kenya, (2010).
3. East Africa Order in Council, (1901).
4. Environment and Land Court Act (No. 19 of 2011).
5. Judicature Act, (Act No. 16 of 1967).
6. Land Act, (Act No. 6 of 2012).
7. Land Group Representatives Act, (Act 36 of 1968).
8. Land Registration Act, (Act No. 3 of 2012).
9. Magistrates' Courts Act, (Act No. 26 of 2015).
10. National Land Commission Act, No. 5 of 2012.
11. Sessional Paper No.3 of 2009
12. Sectional Properties Act, (Act No. 21 of 1987).
13. Statute Law (Miscellaneous Amendments) (No. 25 of 2015).
14. Trust Land Act (Act 28 of 1938
15. Urban Areas and Cities Act (Act No. 3 of 2012).

CHAPTER 1: INTRODUCTION TO THE STUDY.

1.1. Background

Land tenure is the terms and conditions under which rights to land and land-based resources are acquired, used, retained, disposed of or transmitted.[9] In Kenya, land is currently classified as public, community or private land.[10] Initially, Kenya had a customary land tenure system which was disrupted through the introduction and application of foreign law.[11] This period of disruption can be traced through three eras: the pre-colonial, colonial and post-colonial era.

During the pre-colonial era, land was held under a complex system of customary tenure. Communities owned and held land communally through the commons proprietary system where land and associated resources were availed exclusively to specific communities operating as corporate entities.[12] Customary law derived from the accepted practices of the people and it first played the role of exclusion as access to resources was only on the basis of a socially defined criteria.[13] Land was viewed as a transgenerational asset hence radical title always was in all members of the community past, present and future.[14] Customary law therefore built in sound conservation measures and ensured that radical title always was with the people.[15]

The commons were first disrupted through the invasion of the coastal region by the Arab traders.[16] The Arabs engaged in slave trade which forced indigenous communities to flee the region and the Arabs then occupied the land left vacant.[17]

Upon the arrival of the British, the coastal land was controlled by the Arabs but ownership changed through an agreement signed between the Imperial British East Africa Company and the Sultan of Zanzibar, where all rights to land in the coastal region excluding private land, were ceded to the IBEAC.[18]

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[9]Ministry of Lands, *Sessional Paper No.3 of 2009,* August 2009,13.
[10]Article 61(2), *Constitution of Kenya,* (2010).
[11]Okoth-Ogendo, *The tragic African commons*,5.
[12]Okoth-Ogendo, *The tragic African commons*,2.
[13] Okoth-Ogendo, *The tragic African commons*,3.
[14] Okoth-Ogendo, *The tragic African commons*,3.
[15] Wayumba G, *Aspects of customary land tenure rights in Kenya,* 89.
[16] Truth, Justice and Reconciliation Commission, *Final Report-Volume IIB,* 2013,169.
[17] Truth, Justice and Reconciliation Commission, *Final Report-Volume IIB,* 2013,170.
[18] Truth, Justice and Reconciliation Commission, *Final Report-Volume IIB,* 2013,170.

The IBEAC was to administer Kenya and in 1895 Kenya was declared a protectorate, with effect that the British administration could acquire land from natives through agreement and treaty, sale or conquest.[19] These methods of land acquisition were highly inefficient and the Indian Lands Acquisition Act was therefore extended to the protectorate.[20] This enabled the British to develop rules to guide the acquisition of land in Kenya and also vested all unoccupied land on the commissioner for the protectorate.[21]

The 1901 East African Order in Council gave the Commissioner authority to alienate crown land, through agreement, treaty or convention, and all other lands that the Queen was to acquire.[22] The effect of this was that all such land became crown land under the control of the Queen.[23] Essentially, the British Administrator held land in trust for the queen.[24]

The 1902 Crown Lands Ordinance gave the Administrator power to acquire and also sell land acquired in freeholds and leases of 99 years to any settler so long as the land did not exceed one thousand hectares. [25] Essentially, the state became an entity that could own land and could also grant portions to individual users. [26] It is at this point that the public land holding system was formally introduced.[27]

In 1926, the Kenya Native Areas Ordinance established native settlement schemes and it was backed by the Lands Trust Ordinance 1930 that prohibited the alienation of land set aside in the native reserves, unless it was alienated for a public purpose and in this case, it was to be substituted by land of equal value.[28] The native reserves were situated in highly unproductive areas of limited size and restricted movement.[29] Due to unfavourable living conditions in the reserves, native communities eventually began resisting colonial rule and sought to reclaim alienated land through the Mau Mau movement.[30] The colonialists were therefore forced to reconsider the land policies and in 1954 the Swynnerton Plan was

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[19] Truth, Justice and Reconciliation Commission, *Final Report-Volume IIB,* 2013,177.
[20] Truth, Justice and Reconciliation Commission, *Final Report-Volume IIB,* 2013,177.
[21] Truth, Justice and Reconciliation Commission, *Final Report-Volume IIB,* 2013,177.
[22] Section 1, *East Africa Order in Council,* 1901.
[23] Truth, Justice and Reconciliation Commission, *Final Report-Volume IIB,* 2013,178.
[24] Ojienda, *Conveyancing principles and practice,* 15.
[25] Ojienda, *Conveyancing principles and practice,* 15.
[26] Truth, Justice and Reconciliation Commission, *Final Report-Volume IIB,* 2013,180.
[27] Ojienda, *Conveyancing principles and practice,* 15.
[28] Truth, Justice and Reconciliation Commission, *Final Report-Volume IIB,* 2013,184.
[29] Truth, Justice and Reconciliation Commission, *Final Report-Volume IIB,* 2013,184.
[30] Truth, Justice and Reconciliation Commission, *Final Report-Volume IIB,* 2013,194.

introduced.[31] Through the Swynnerton plan, Africans were allowed to buy and acquire title to land hence the introduction of private land holding tenure for the natives. [32]

Post-independence, the government inherited the colonial land tenure system.[33] Areas that were previously native reserves were converted to government trust lands. Therefore, three tenure systems existed after independence: private, government (public) and government trust lands. The independence government still did not recognise customary tenure and community land ownership was dealt with under trust land and group ranches. However, both systems were largely inefficient leading to further expropriation and individualisation of both trust lands[34] and group ranches[35].It is in line with this problem that the recognition of community land was recommended.[36]

In 2010, Kenya promulgated a new Constitution and one of its new features was the recognition of community land. The Constitution provides the basis for the identification of communities that may be granted community land and states them to be ethnicity, culture or similar community of interest.[37] Community of interest is defined as the possession or enjoyment of common rights, privileges or interests in land, by people living in the same geographical area or having such apparent association.[38]

Despite the recognition of community land, both the homogeneity and diversity of various communities inhabiting various Kenyan urban areas pose a challenge when it comes to vesting community land on the basis of culture and ethnicity.[39]

Diversity poses a challenge in areas where communities from different parts of the country have settled in the same geographical space yet they neither share ethnic affiliation nor culture.[40] These groups of people cannot be granted community land on the basis of ethnicity or culture[41] as they do not meet the set criterion.

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[31] Truth, Justice and Reconciliation Commission, *Final Report-Volume IIB,* 2013,196.
[32] Truth, Justice and Reconciliation Commission, *Final Report-Volume IIB,* 2013,196.
[33] Ojienda, *Conveyancing principles and practice,* 16.
[34] Kameri-Mbote P, Odote C, Musembi C, Kamande M, *Ours by Right Law, Politics and Realities of Community Property in Kenya,* Digital Edition, Strathmore University Press, Nairobi, 2013, 28.
[35] Kameri-Mbote *et al*, *Ours by right,29.*
[36] Ministry of Lands, *Sessional Paper No. 3 of 2009 on National Land Policy,*2009, 13.
[37] Article 63(1), *Constitution of Kenya,* (2010).
[38] Section 2, *Community Land Act,* (Act No. 27 of 2016).
[39] Kameri-Mbote *et al*, *Ours by right,* 32.
[40] Kameri-Mbote *et al*, *Ours by right,* 33.
[41] Article 63(1), *Constitution of Kenya,* (2010).

Homogeneity arises when one particular region is largely occupied by members of the same ethnic community. The Constitution grants every Kenyan citizen the right, either individually or in association with others to acquire and own property of any description in any part of Kenya.[42] This means that legally no part of the country solely belongs to one specific ethnic community[43]. However, this is not the situation in practice. The creation of districts in the old constitutional era was largely ethno-specific and this led to the creation of ethnically homogenous areas that are predominantly inhabited by people from one specific community.[44] These ethno-specific areas have led to the categorisation of people as "insiders" or those perceived to be native to the specific area and "outsiders" who are those that have migrated into the area.[45] The problem has spread to informal urban settlements which are now divided into ethnically homogenous zones.[46]

The vesting of community land on the basis of a community of interest is therefore applicable in areas where people from different communities have been brought together by a shared interest which may be land and land-based resources as opposed to culture or ethnicity.[47] It should also be done in a manner that recognises the dangerous trend of creation of ethnically homogenous zones and should seek to facilitate and foster inter-ethnic interactions among various different communities.[48] Efficient communal land holding in urban areas can therefore be achieved through the vesting of communal land rights on the basis of a similar community of interest as opposed to ethnicity and culture.

1.2. Problem statement

The Constitution has expressly recognised community land and it states that community land shall be held by communities identified on the basis of ethnicity, culture or similar community of interest.[49] However, in Kenyan urban areas, people from communities that neither share ethnic affiliation nor culture have settled and live together in the same area.[50] Also, certain urban areas are largely inhabited by members of one community. Granting community land on the basis of ethnicity and culture would be inefficient in urban areas as

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[42] Article 40(1), *Constitution of Kenya,* (2010).
[43] Commission of Inquiry into the Post-Election Violence, *Final Draft, 2008,* 32.
[44] Commission of Inquiry into the Post-Election Violence, *Final Draft,* 2008, 32.
[45] Commission of Inquiry into the Post-Election Violence, *Final Draft,* 2008, 32.
[46] Commission of Inquiry into the Post-Election Violence, *Final Draft,* 2008, 32.
[47] Kameri-Mbote *et al*, *Ours by right,* 104.
[48] Kameri-Mbote *et al*, *Ours by right, 32.*
[49] Article 63(1), *Constitution of Kenya,* (2010).
[50] Kameri-Mbote *et al*, *Ours by right, 33.*

it would exclude people that do not meet the required criteria or would lead to ethnic balkanisation of certain regions. This is what has prompted this study. This study seeks to examine the efficiency of vesting community land in urban areas on the basis of a similar community of interest as opposed to ethnicity and culture.

1.3. Research objectives

i. To investigate the historical background of Kenya's land tenure systems and their impact on the modern-day land tenure systems.
ii. To investigate the legal framework in Kenya surrounding the vesting of community land on communities on the basis of "similar community of interest"
iii. To investigate the efficiency of vesting community land in urban areas on the basis of a community of interest as opposed to ethnicity or culture.
iv. To investigate the possible urban challenges that may be resolved through the vesting of community land on the basis of a similar community of interest.

1.4. Hypothesis

Vesting of community land rights on the basis of culture and ethnicity would be inefficient and impractical for urban areas due to the diversity and homogeneity of the various communities in urban areas.

1.5. Literature review

a. Historical background of the land tenure system in Kenya

Customary tenure is the system of land holding and land use which derives from the operations of the traditions and customs of the people affected.[51] These customary laws that guide the operations of customary land tenure are derived from the accepted practices of the people and the principles underlying such practices and the laws made by the elders which once accepted become custom.[52]

During the pre-colonial era, land ownership was communal and it was predominantly regulated and governed by customary law.[53] Land was held through the commons proprietary system where the "commons" were ontologically organised land and associated

[51] Wayumba G, *Aspects of customary land tenure rights in Kenya,* 2(7), International Journal of Scientific Research and Engineering Studies, 2015,89.
[52] Wayumba G, *Aspects of customary land tenure rights in Kenya,*89.
[53] Kariuki F, Ouma S and Ng'etich R, *Property Law,* Strathmore University Press, Nairobi, 2016,202.

resources available exclusively to specific communities, lineages or families operating as corporate entities.[54]

The colonialists did not regard the commons as property systems and instead viewed them as open access systems leading to their deterioration and destruction.[55] Foreign land holding systems were then introduced by the colonialists through the introduction of foreign laws.[56]

Through various ordinances, the state became an entity that could own land[57] and all land was vested under the control of the queen.[58] The effects of the ordinances were seen in Isaka Wainaina v Murito where it was stated that, "the effect of the Crown Land Ordinance and the Kenya Order in Council 1920 by which no native private rights were reserved and the Kenya Colony Order in Council 1921 is clearly to vest land reserved for the use of the native tribes in the crown. If that be so, then all native's rights in such reserved land, whatever they were, disappeared and natives in occupation of such Crown lands became tenants at will of the crown."[59]

Private land holding and formal title were introduced through the Swynnerton plan in 1954[60] where it was stated that, "the African man must be provided with such security of tenure through an indefeasible title as will encourage him to invest his labour and profits into the development of his farm."[61]

Upon independence, the government inherited the system of private and public land tenure created by the colonial government and the areas that were previously native reserves were held as government trust lands.[62] Despite the existence of the commons proprietary system in some areas, the government neglected it and did not integrate it into the country's land tenure system.[63]

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[54] Okoth-Ogendo, *The tragic African commons*,2.
[55] Okoth-Ogendo, *The tragic African commons*,2.
[56] Okoth-Ogendo, *The tragic African commons*,5.
[57] Truth, Justice and Reconciliation Commission, *Final Report-Volume IIB,* 2013,180.
[58] Truth, Justice and Reconciliation Commission, *Final Report-Volume IIB,* 2013,178.
[59] *Isaka Wainaina v Murito* [1923] 9 (2) KLR.
[60] Nyamu-Musembi C, *Breathing Life into dead Theories about property rights: de Soto and land relations in rural Africa,* Institute of Development Studies, Sussex, 2006,08.
[61] Swynnerton RJM, *'A plan to intensify the development of African agriculture in Kenya',* Kenya Department of Agriculture, Nairobi, 1954.
[62] Ojienda, *Conveyancing principles and practice,*16.
[63] Okoth-Ogendo, *The tragic African commons,*2.

In 2010, a new Constitution was promulgated and it expressly recognised community land[64] and provides the basis for identification of communities as ethnicity, culture or similar community of interest.[65]

b. Efficiency of vesting community land in urban areas on the basis of a community of interest.

The Community Land Act defines a community as a consciously distinct and organised group of users of community land who are citizens of Kenya and share any of the following attributes - common ancestry, similar culture or other similar common interest, geographical space, ecological space or ethnicity.[66] The Constitution requires community land to vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest[67] whereas community of interest is the possession or enjoyment of common rights, privileges or interests in land, living in the same geographical area or having such apparent association.[68] Odote defines community of interest as the criterion used to identify communities brought together by land based resources such as water, forests and wetlands.[69] He further states that the criterion is critical for the creation of cohesive communities in Kenya and attempts to identify communities on the basis of ethnicity could lead to inter-ethnic tensions which may spark conflict and violence.[70]

Community of interest is highly applicable in cases where the communities are brought together by land primarily and by other land-based resources as opposed to a common ethnicity or culture.[71] Kameri-Mbote and Odote state that community land rights can most easily be aligned to factors such as sectional properties, pastoralism and agriculture and therefore it would be more sensible to start from the community of interest as the primary indicator of community rights as opposed to culture and ethnicity.[72]

An example of a region where the interests of the community overrides ethnicity and culture would be the Yala swamp. The Yala swamp is surrounded by various diverse

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[64] Article 61(2), *Constitution of Kenya,* (2010).
[65] Article 63(1), *Constitution of Kenya,* (2010).
[66] Section 2, *Community Land Act,* (No. 27 of 2016).
[67] Article 63(1), *Constitution of Kenya* (2010).
[68] Section 2, *Community Land Act,* (No. 27 of 2016).
[69] Odote C, *'The legal and policy framework regulating community land in Kenya an appraisal'* Friedrich Ebert Stiftung, Nairobi Kenya,31.
[70] Odote C, *'The legal and policy framework regulating community land in Kenya an appraisal'*, 31.
[71] Kameri-Mbote *et al*, *Ours by right* 106.
[72] Kameri-Mbote *et al*, *Ours by right,*108.

communities and it is a key source of livelihood as it enables the population to engage in various economic activities such as fishing, hunting and agricultural production.[73] Most of these communities do not share any ethnic ties or culture but form a 'community' due to the shared interest which is, they all derive their livelihood from the swamp.[74]

Similarly, in urban areas, many communities that neither share culture nor ethnicity, have converged and live together as a single community. An example would be in sectional properties where the communities share neither culture nor ethnicity but are founded on the basis of a similar community of interest. Each shareholder to the private rights of the management company has designated private rights to the property but still has obligations to the community of residents as well.[75] In this instance it would therefore be more efficient and practical to vest community land rights on the basis of a community of interest as opposed to ethnicity or culture.

1.6. Theoretical framework

This study uses the legal theory of property where it is advanced that property is that which the law considers and recognises as property.[76] One of its main proponents Jeremy Bentham stated that, "property and law are born together and die together; before laws were made there was no property; take away law and property ceases."[77] Property can also be viewed as a creation of law in that a bundle of entitlements are sanctioned by law against all other persons.[78] Honore addressed the issue of the bundle of entitlements and gave the eleven standard incidents that grant ownership.[79]

The legal theory of property informs this study as it was only after legal recognition of community land by various provisions of the law that community land could be vested amongst different communities. It is also through the various provisions of the law that Honore's bundle of entitlements may be granted in community land with effect that the holders of the community land rights acquire enforceable rights against other third parties.

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[73] Kameri-Mbote *et al*, *Ours by right,*67.
[74] Kameri-Mbote *et al*, *Ours by right,*70.
[75] Kameri-Mbote *et al*, *Ours by right,*33.
[76] Kariuki, Ouma and Ng'etich, *Property Law,*36.
[77] Bentham J, *The theory of legislation,* Oceana Publications, New York, 1975,69.
[78] Kameri-Mbote *et al*,, *Ours by right,*19.
[79] http://www.iep.utm.edu/prop-con/ on November 3 2018.

The study also uses the social utility theory where society recognises that the granting of private property rights to individuals not only benefits the individuals but also has wider benefits to the entire society.[80] This theory informs this study as the granting of land rights to communities on the basis of a similar community of interest will lead to greater benefits to society as a whole as it would incorporate various diverse communities. It shall also lead to better inter-ethnic interaction among communities and this in turn will benefit the entire society.

1.7. Justification

This research is important as land is critical to the economic, social and cultural development of Kenya.[81] The Constitution also requires land to be held in a manner that is equitable, efficient. productive and sustainable.[82]

Vesting land rights in urban areas on the basis of a similar community of interest would be more efficient and equitable as it would incorporate diverse communities as opposed to culture and ethnicity which would possibly exclude various groups of people from accessing or being granted rights to community land.

1.8. Research methodology

The main research method for this study shall be through desk research. Through this, various primary and secondary sources of literature shall be reviewed. The primary sources shall consist of the Constitution of Kenya, Acts of Parliament, land policies and case law. The primary sources shall be used during the research to provide first hand and factual evidence on the research topic.

The secondary sources of literature shall consist of journals, textbooks, articles and writings of prominent scholarly authors and research papers. The secondary sources shall be essential to this research as they offer analysis and commentary on the primary sources of literature.[83] They shall therefore be used to locate and also to explain and expound on the primary sources of law.

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[80] Kariuki, Ouma and Ng'etich, *Property Law*,37.
[81] Ministry of Lands, *Sessional Paper No.3 of 2009,* August 2009,1.
[82] Article 60(1), *Constitution of Kenya,* (2010).
[83] https://www.loc.gov/law/help/secondary-rsrcs.php on 16 March 2018.

1.9. Chapter breakdown

The chapter breakdown was done in accordance with the objectives of the study.

1. **Chapter 1 - Introduction to the study.**

   This chapter shall provide an introduction and background to the study. It shall also provide the problem statement, the purpose of the study, the research questions, the assumptions, literature review and the research methods.

2. **Chapter 2 – Historical background of the Kenyan land tenure system.**

   This chapter shall be an in-depth review of the historical background of Kenya's land tenure system starting from customary land tenure and how it was subsequently disrupted. This shall be conducted from the pre-colonial era to the post-colonial era and also in light of the provisions of the Constitution. The effects of colonisation and the post-colonial rule by the independence government on the communal land tenure system will also be analysed with the aim of determining their impact to modern day society.

3. **Chapter 3 – Legal framework surrounding community land**

   This chapter shall investigate the current legal framework surrounding community land in the modern-day era. It shall investigate the provisions of the Constitution and various acts of parliament and their suitability in addressing the community land tenure system.

4. **Chapter 4 - Efficiency of vesting community land rights in urban areas on the basis of a community of interest.**

   This chapter shall investigate why it is inefficient and impractical to vest community land rights in urban areas on the basis of culture and ethnicity. The chapter shall also make a case for the vesting of the land rights on the basis of a community of interest.

5. **Chapter 5- Findings, recommendations and conclusion**

   This chapter shall analyse the findings of the research paper and make suitable and appropriate recommendations. The chapter shall also show how the research paper has addressed the various objectives of the study.

CHAPTER 2: HISTORICAL BACKGROUND OF KENYA'S LAND TENURE SYSTEM.

2.1. Introduction

Kenya's land tenure system has undergone three main stages: the pre-colonial era where land was held under customary law, the colonial era where foreign law was introduced and the post-colonial era after Kenya gained independence. This chapter seeks to investigate the historical background of Kenya's land tenure system from the pre-colonial era to the current modern-day era and its impact on modern day society.

2.2. Land tenure

Land includes the surface of the earth and the subsurface rock, any body of water on or under the surface, marine waters in the territorial sea and exclusive economic zone, natural resources completely contained on or under the surface and the airspace above the surface.[84]

Land tenure is the rules that define how individuals gain access to, and acquire, user rights over land either temporarily or permanently.[85] It is a collection of relationships that exist among members of a society due to their occupation and use of land.[86] The relationship may be defined legally or customarily among people, as groups or individuals with respect to land.[87]

In Kenya, land is currently classified as public, community or private land.[88] Initially, before the colonial period, Kenya had a customary land tenure system but this system was largely disrupted through the introduction and application of foreign law.[89] This period of disruption can be traced historically through the: the pre-colonial, colonial and post-colonial era.

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[84]Article 160, *Constitution of Kenya,* (2010).
[85] Kariuki, Ouma and Ng'etich, *Property Law,*192.
[86]Wayumba G, 'A Historical Review of Land Tenure Reforms in Kenya' Volume 2 Issue 1 *International Journal of scientific Research and Engineering Studies* (2015), 45.
[87]http://www.fao.org/docrep/005/y4307e/y4307e05.htm on 24 February 2017.
[88]Article 61(2), *Constitution of Kenya,* (2010).
[89]Okoth-Ogendo, *The tragic African commons*,5.

a. Pre-colonial era

The pre-colonial era is the period of time that existed before the arrival of the British colonialists.

During the pre-colonial era, land was held by the indigenous African communities under a complex system of customary tenure in which the rights to use and access, were guided by complicated rules and practices often based on communal solidarity such as clan and other lineal heritages.[90] The indigenous African communities owned and held land communally through the commons proprietary system.[91] In these system, land and associated resources were availed exclusively to specific communities operating as corporate entities.[92] The commons were managed and protected by a social hierarchy organised in the form of an inverted pyramid with the family at the tip, clan at the middle and community at the base and access to them was open to individuals and groups but subject to membership whose qualification was based on a socially-defined criterion.[93]

During this era, customary law played a key role as the customary tenure derived from the operations of the traditions and customs of the people.[94] Customary law was derived from the accepted practices of the people and the principles underlying such practices and it first played the role of exclusion, as access to resources was only on the basis of a socially defined criteria.[95] It also ensured there was enough land for and accessible by everybody including women.[96] Also, land in the African commons was a transgenerational asset whose radical title always was in all members of the community past, present and future constituted as corporate entities.[97] Customary law therefore built in conservation measures that ensured maximum environmental protection and ensured that radical title to land always was and still remained with the people.[98]

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[90]Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land, *Final Draft,* 2003,2.
[91] Okoth-Ogendo, *The tragic African commons*,2.
[92]Okoth-Ogendo, *The tragic African commons*,2.
[93]Okoth-Ogendo, *The tragic African commons*,2.
[94]Wayumba G, *Aspects of customary land tenure rights in Kenya,* 2(7), International Journal of Scientific Research and Engineering Studies, 2015,89.
[95] Okoth-Ogendo, *The tragic African commons*,3.
[96] Kariuki, Ouma and Ng'etich, *Property Law,*53.
[97] Okoth-Ogendo, *The tragic African commons*,3.
[98] Wayumba G, *Aspects of customary land tenure rights in Kenya,* 89.

However, even before the arrival of the British colonialists the Portuguese and Arabs from Oman had already ventured into the Kenyan coast.[99] The history of Portuguese in Kenya can be first dated to 1453.[100] However, their interest was strictly confined to the coastal region and therefore, apart from the construction of Fort Jesus and the Vasco da Gama pillar, they had no significant impact on the Kenyan land tenure system.[101] The Portuguese dominated over the coastal region from the 15th to 18th century until they were ousted by the Arabs from Oman, who then took over the coastal region and ventured into trade.[102]

The Arabs from Oman settled in East Africa in 1840 and the then Sultan, Seyyid Said, declared his dominion over the coastal strip which was then ruled by the Sultanate until 1834 when the Imperial British East Africa Company was founded.[103] In 1886 European nations agreed to extend the rule of the Sultanate to cover the Ten-mile coastal strip and Lamu island.[104]

The invasion of the coastal region by the Arab traders under the leadership of the Sultan of Zanzibar marked the beginning of the disruption of the commons.[105] The Arabs engaged in slave trade which then forced the indigenous communities to flee the region for fear of being captured and sold off as slaves. The land they left vacant was then occupied by the Arabs.[106]

b. Colonial era

The origins of the colonial era in Kenya can be traced to the Berlin Conference of 1885.[107] The main agenda of the conference was to coordinate the colonial process in Africa with the primary aim of preventing conflict between the different rival colonial powers.[108] The conference led to the ratification of a General Act by the major colonial powers.[109] The Queen took advantage of that particular General Act and granted a charter to the Imperial

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[99] Rutten M, Ombongi K, *Kenya: Nineteenth century, precolonial,* Fitzroy Dearborn, 2005, 744.
[100] Wayumba G, 'A Historical Review of Land Tenure Reforms in Kenya' Volume 2 Issue 1 *International Journal of scientific Research and Engineering Studies* (2015), 45
[101] Wayumba G, 'A Historical Review of Land Tenure Reforms in Kenya', 45.
[102] Rutten M, Ombongi K, *Kenya: Nineteenth century, precolonial',*744.
[103] Wayumba G, 'A Historical Review of Land Tenure Reforms in Kenya', 45.
[104] Wayumba G, 'A Historical Review of Land Tenure Reforms in Kenya', 45.
[105] Truth, Justice and Reconciliation Commission, *Final Report-Volume IIB,* 2013,169.
[106] Truth, Justice and Reconciliation Commission, *Final Report-Volume IIB,* 2013,170.
[107] Mungeam G, *British Rule in Kenya, 1895-1912*, Clarendon Press, 1966, 7
[108] Craven M, 'Between law and history: The Berlin Conference of 1884-1885 and the logic of free trade' Volume 3 *London Review of International Law,* 2015, 32.
[109]Craven M, 'Between law and history', 32.

British East African Company (IBEAC) to operate and administer the East African territory.[110]

When the British arrived, the coastal land was under the control of the Arabs but ownership changed through an agreement signed between the IBEAC and the Sultan of Zanzibar, where all rights to land in the coastal region excluding private land, were ceded to the IBEAC.[111]

In 1888, the IBEAC was mandated by the British government to administer Kenya and in 1895 Kenya was declared a protectorate, with the effect that the British administration could acquire land from natives through agreement and treaty, sale or conquest.[112] These methods of land acquisition were inefficient and the Indian Lands Acquisition Act was extended to the protectorate hence, enabling the British to develop rules that guided the acquisition of land in Kenya and also, vesting all unoccupied land on the Commissioner for the protectorate.[113]

In 1897, The East African Land Regulations were implemented and the period for leases granted to settlers was extended to 99 years and some areas under African occupation were safeguarded so long as "they were cultivated or regularly used by any native or native tribes."[114] Also, under the East African Land Regulations, the people living in the ten-mile coastal strip were issued with certificates of ownership for a term of 21 years in the form of short-term leases.[115]

The 1901 East African Order in Council gave the Commissioner full authority to alienate crown land, through agreement, treaty or convention and all other lands that the Queen was to acquire.[116] The effect of this was that all such land became crown land under the control of the Queen.[117] Despite this, direct authority was not given to the British Administrator to acquire land but he instead held the land in trust for the queen.[118]

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[110] Wayumba G, 'A Historical Review of Land Tenure Reforms in Kenya', 45.
[111] Truth, Justice and Reconciliation Commission, *Final Report-Volume IIB,* 2013,170.
[112] Truth, Justice and Reconciliation Commission, *Final Report-Volume IIB,* 2013,177.
[113] Truth, Justice and Reconciliation Commission, *Final Report-Volume IIB,* 2013,177.
[114] Truth, Justice and Reconciliation Commission, *Final Report-Volume IIB,* 2013,178.
[115] Wayumba G, 'A Historical Review of Land Tenure Reforms in Kenya', 46.
[116] Section 1, *East Africa Order in Council,* 1901.
[117] Truth, Justice and Reconciliation Commission, *Final Report-Volume IIB,* 2013,178.
[118] Ojienda, *Conveyancing principles and practice,* 15.

Power of acquisition of land by the Administrator was granted by the 1902 Crown Lands Ordinance which also gave him power to sell land acquired in freeholds and leases of 99 years to any settler but contingent on the land not exceeding 1000 hectares. [119] Essentially, the state became an entity that could own land and could also grant portions to individual users. [120] The 1902 Crown Lands Ordinance also affected the ten – mile coastal strip as it also fell under the purview of government land and therefore could be alienated.[121] However this was an arduous task as the colonial government was unable to distinguish between the land available for alienation and private land that had already been claimed by subjects of the Sultan.[122] However, the main effect of the 1902 Crown Lands Ordinance was that the public land holding system was formally introduced into Kenya and the stage was set for individual ownership.[123]

In 1908, the Land Titles Ordinance was enacted with the specific purpose of adjudicating land claims within the ten-mile coastal strip.[124] Through it a Land Registration Court was set up and the court's main purpose was to separate private land from crown land and any land that was not successfully claimed was declared government land.[125] It required all private claimants who had valid certificates of ownership issued by the Sultan of Zanzibar to register their interests within six calendar months.[126] Once their claims were registered, they were issued with either a certificate of mortgage, certificate of leasehold or certificate of ownership depending on the interest established.[127]

The Crown Lands Ordinance of 1915 repealed the Crown Land Ordinance of 1902[128] and conferred powers on the colonial government to the extent that the Governor was empowered to make grants of freehold and leasehold (up to 999 years) in favour of individuals and corporate bodies on behalf of the crown.[129] The effects of the ordinances were seen in Isaka Wainaina v Murito where it was stated that, "the effect of the Crown

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[119] Ojienda, *Conveyancing principles and practice,* 15.
[120] Truth, Justice and Reconciliation Commission, *Final Report-Volume IIB,* 2013,180.
[121] Wayumba G, 'A Historical Review of Land Tenure Reforms in Kenya',46.
[122] Wayumba G, 'A Historical Review of Land Tenure Reforms in Kenya',46.
[123] Ojienda, *Conveyancing principles and practice,* 15.
[124] Wayumba G, 'A Historical Review of Land Tenure Reforms in Kenya',46.
[125] Wayumba G, 'A Historical Review of Land Tenure Reforms in Kenya',46.
[126] Chelimo S, 'Registration of title to land: A critique of the Land Registration Act No.3 of 2012, LLM Thesis, University of Nairobi, November 2014,33.
[127] Chelimo S, 'Registration of title to land: A critique of the Land Registration Act No.3 of 2012, LLM Thesis, University of Nairobi, November 2014,33.
[128] Chelimo S, 'Registration of title to land: A critique of the Land Registration Act No.3 of 2012, LLM Thesis, University of Nairobi, November 2014,33.
[129] Ojienda, *Conveyancing principles and practice,* 15.

Land Ordinance and the Kenya Order in Council 1920 by which no native private rights were reserved and the Kenya Colony Order in Council 1921 is clearly to vest land reserved for the use of the native tribes in the crown. If that be so, then all native's rights in such reserved land, whatever they were, disappeared and natives in occupation of such Crown lands became tenants at will of the crown."[130]

In 1926, the Kenya Native Areas Ordinance established native settlement schemes and it was backed by the Lands Trust Ordinance 1930 that prohibited the alienation of land set aside in the native reserves, unless it was alienated for a public purpose and in this case, it was to be substituted by land of equal value.[131] The native reserves were situated in highly unproductive areas that were of limited size and native movement from one reserve to another was restricted.[132]

Living conditions in the reserves were harsh and various native communities eventually formed the Mau Mau movement, which began to resist the colonial rule and sought to reclaim alienated land through the use of violent tactics.[133] This was also coupled by the inability of the colonial government to meet its domestic food demands which was an after-effect of the second world war[134] that had led to heightened levels of poverty among households.[135] These two factors coupled with the view that customary land tenure system was an obstacle to agricultural development[136] eventually forced the British administration to reconsider the land policies that were in place at the time. Their view was that the customary land tenure system had to be replaced by a system based on the registration of individual title.[137] This led to the development of the East Africa Royal Commission Report[138] and the Swynnerton Plan.[139]

The East Africa Royal Commission Report was published by an appointed Royal Commission and served as a blueprint for subsequent land reform policy.[140] The

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[130] *Isaka Wainaina v Murito* [1923] 9 (2) KLR.
[131] Truth, Justice and Reconciliation Commission, *Final Report-Volume IIB,* 2013,184.
[132] Truth, Justice and Reconciliation Commission, *Final Report-Volume IIB,* 2013,184.
[133] Truth, Justice and Reconciliation Commission, *Final Report-Volume IIB,* 2013,194.
[134] Joseph K, Patricia M, *Securing property rights in Kenya Formal versus informal,* Oxford University Press, Oxford, 2010, 313.
[135] Thurston A, *Smallholder agriculture in colonial Kenya,* 1.
[136] Coldham S, 'Land Control in Kenya' 22, *Journal of African Law,* (1978), 63.
[137] Coldham S, 'Land Control in Kenya', 63.
[138] Joseph and Patricia, *Securing property rights in Kenya,* 313.
[139] Truth, Justice and Reconciliation Commission, *Final Report-Volume IIB,* 2013,196.
[140] Joseph and Patricia, *Securing property rights in Kenya,* 313.

Swynnerton Plan was a comprehensive development scheme which aimed to increase the production of goods and raw materials[141] through the introduction of native land ownership that was centred on the individual.[142] Thus, the indefeasible title was introduced with the general expectation that natives would yield maximum benefit from their farms and in the process abandon the agitation for the return of their land.[143] The two reports had a similar recommendation which was to increase agricultural production through the replacement of customary land tenure systems with a private land holding tenure[144] and therefore Africans were allowed to buy and acquire title to land and thus the introduction of the private land holding system. [145]

Upon independence, the government inherited the system of land tenure that was created by the colonial government.[146] Areas that were previously native reserves were converted to government trust lands and managed by the local authorities.

c. Post-colonial era

After independence there were three land tenure systems: private, government (public) and government trust lands. The post-independence governments still failed to recognise customary tenure and community ownership was dealt with under trust land and group ranches. Trust lands had developed as a result of the hopeless squatter situation and high levels of landlessness which were a consequence of the Crown Land Ordinance and the Government Land Act.[147] Trust lands were to be governed by the Trust Lands Act[148] and the applicable tenure regime was to be the African Customary law of the local communities.[149]

However, the local authorities designated as county councils were to manage the land as trustees, and the procedure to be followed by the government or county council during the disposition of trust lands was laid down. The act was highly disregarded and the resident's

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[141] Thurston A, *Smallholder agriculture in colonial Kenya: The official mind and the Swynnerton plan,* African Studies Centre, Cambridge, 1987, 1.
[142] Ojienda, *Conveyancing principles and practice,* 18.
[143] Ojienda, *Conveyancing principles and practice,* 18.
[144] Joseph and Patricia, *Securing property rights in Kenya,* 313.
[145] Truth, Justice and Reconciliation Commission, *Final Report-Volume IIB,* 2013,196.
[146] Ojienda, *Conveyancing principles and practice,* 16.
[147] Chelimo S, 'Registration of title to land: A critique of the Land Registration Act No.3 of 2012, LLM Thesis, University of Nairobi, November 2014,39.
[148] *Trust Land Act* (Act 28 of 1938).
[149] Chelimo S, 'Registration of title to land: A critique of the Land Registration Act No.3 of 2012, LLM Thesis, University of Nairobi, November 2014,39.

rights in trust lands were expropriated leading to the ownership of trust lands changing to individuals and the state hence the loss of control by the councils and the elimination of the application of customary law.[150]

Group ranches were governed by the Land Group Representatives Act.[151]. Through the act, people holding shared interests in a common grazing area would be registered hence forming a group ranch.[152] A constitution would then be adopted and three to ten people would be appointed to serve as the group representatives, who would then apply for incorporation to the registrar of group representatives.[153] Group ranches did not work well as the group representatives lacked the authority of the traditional leaders and government policy emphasized on individual rights with the aim that the group rights would eventually mature into individual rights.[154] This led to subdivision and individualisation of group ranches.[155]

However, despite the neglect, disregard and failure to recognise customary law, it still continued to exist. Okoth-Ogendo described it as "a dangerous weed that simply went underground and continued to grow despite the overlay of statutory law."[156] It is in line with this and the problems associated with group ranches and trust lands that the recognition of community land was recommended.[157]

In 2010, Kenya promulgated a new Constitution and the Constitution recognised three land tenure systems. The Constitution states that all land in Kenya belongs to the people of Kenya collectively as a nation as communities and as individuals[158] then classifies land as public, community or private.[159]

The recognition of community land was one of the salient features of the 2010 Constitution and a significant step as both the colonial and the post-independence government had failed

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[150] Kameri-Mbote *et al*, *Ours by Right Law, Politics and Realities of Community Property in Kenya,* Strathmore University Press, Nairobi, 2013, 28.
[151] *Land Group Representatives Act,* (Act 36 of 1968).
[152] Chelimo S, 'Registration of title to land: A critique of the Land Registration Act No.3 of 2012, LLM Thesis, University of Nairobi, November 2014,39.
[153] Chelimo S, 'Registration of title to land: A critique of the Land Registration Act No.3 of 2012, LLM Thesis, University of Nairobi, November 2014,39.
[154] Kameri-Mbote *et al*, *Ours by right,29.*
[155] Kameri-Mbote *et al*, *Ours by right,29.*
[156] Okoth-Ogendo, *The tragic African commons*,3.
[157] Ministry of Lands, *Sessional Paper No. 3 of 2009 on National Land Policy,*2009, 13.
[158] Article 61(1), *Constitution of Kenya,* (2010).
[159] Article 61(2), *Constitution of Kenya,* (2010).

to recognise community land leading to its intensified expropriation.[160] The Constitution provides the basis for the identification of communities that may be granted land rights and states them as ethnicity, culture or a similar community of interest.[161] Community of interest is defined as the possession or enjoyment of common rights, privileges or interests in land, by people living in the same geographical area or having such apparent association.[162]

2.3. Conclusion

The above chapter has demonstrated how the land tenure system historically evolved in Kenya through the different eras. The chapter has also shown how customary law was disrupted and expropriated during the pre-colonial, colonial and post-colonial era by the Arabs, colonialists and post-independence governments respectively. However, despite the failure of recognition and introduction of public and private land holding systems through application of foreign law, customary law still remained resilient.

By the time Kenya gained independence, three formal tenure systems existed: private, trust lands and government land. The three colonial tenure systems were maintained by the post-independence governments until 2010 when a new Constitution was promulgated. The 2010 Constitution recognised three land tenure systems: private, public and for the first time, community land.

[160] Okoth-Ogendo, *The tragic African commons*,3.
[161] Article 63(1), *Constitution of Kenya,* (2010).
[162] Section 2, *Community Land Act,* (Act No. 27 of 2016).

CHAPTER 3: LEGAL AND INSTITUTIONAL FRAMEWORK.

3.1. Introduction

As shown in the previous chapter, after independence but before the promulgation of the 2010 Constitution, there were three land tenure systems which were private, government public and government trust lands. These three tenure systems were regulated by a multiple and complex system of laws which did not recognise community land. However, with the promulgation of the Constitution, new systems of land tenure were put in place and they are: private, public and community land.[163]

Since the promulgation of the Constitution, various laws have been enacted and institutions established to give effect to various articles of the Constitution that address community land. These laws and institutions are of utmost importance as they lay the foundation for the legal recognition of community land tenure and also vesting of community land on the basis of a community of interest.

This chapter therefore seeks to analyse the legal and institutional frameworks that have been put in place and how they address the vesting of community land on the basis of a community of interest.

3.2. Legal and policy framework

a. Sources of law in Kenya

The sources of law in Kenya are the Constitution, all other written laws, the substance of the common law, doctrines of equity and the statutes of general application in force in England on the 12th of August 1897.[164] With regard to civil cases African customary law is applicable in instances where one or more parties is subject to or affected by it, so far as it is applicable and not repugnant to justice and morality or inconsistent with any written law.[165]

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[163] Article 61(2), *Constitution of Kenya,* (2010).
[164] Section 3, *Judicature Act,* (Act No. 16 of 1967).
[165] Section 3, *Judicature Act,* (Act No. 16 of 1967).

b. National Land Policy

Kenya had not had any land policy since gaining independence.[166] In February 2004, the process of formulation of Kenya's first National Land Policy began[167] and the main aim of the policy was to guide the country towards, sustainable, efficient and equitable use of land for prosperity and posterity.[168] The policy dealt with various issues such as land use planning, land conflicts, security of tenure, environmental degradation and issues of land degradation.[169] The Draft National Land policy was adopted in 2007 and finally approved in 2009.[170]

The National Land Policy played a key role in Kenya's community land law as some of its most significant recommendations were later on entrenched into the Constitution of Kenya. It recognised the expropriation of both trust lands and group ranches and recommended that the government should take steps to protect and secure community land.[171] The National Land Policy also recommended that land in Kenya should be designated as private, public and community[172] where community land is land lawfully held and used by a specific community[173]

c. The Constitution of Kenya

The Constitution of Kenya was promulgated on the 27th of August 2010. It is the supreme law of the Republic of Kenya and therefore it binds all persons and state organs at both levels of government.[174]

The Constitution, through article 40, protects the right to property where every person has the right, either individually or in association with others, to acquire and own property of any description[175] and in any part of Kenya.[176] The Constitution addresses most of the land

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[166] Ministry of Lands, *Sessional Paper No. 3 of 2009 on National Land Policy,*2009, ix.
[167] Ministry of Lands, *Sessional Paper No. 3 of 2009 on National Land Policy,*2009, vii.
[168] Ministry of Lands, *Sessional Paper No. 3 of 2009 on National Land Policy,*2009, ix.
[169] Ministry of Lands, *Sessional Paper No. 3 of 2009 on National Land Policy,*2009, ix.
[170] Ministry of Lands, *Sessional Paper No. 3 of 2009 on National Land Policy,*2009, vii.
[171] Ministry of Lands, *Sessional Paper No. 3 of 2009 on National Land Policy,*2009, 15.
[172] Ministry of Lands, *Sessional Paper No. 3 of 2009 on National Land Policy,*2009, 13.
[173] Ministry of Lands, *Sessional Paper No. 3 of 2009 on National Land Policy,*2009, 14.
[174] Article 2, *Constitution of Kenya* (2010).
[175] Article 40(1)(a), *Constitution of Kenya* (2010).
[176] Article 40(1)(b), *Constitution of Kenya* (2010).

issues in chapter 5 under the heading land and environment and essentially Kenya's land laws should give effect to the various provisions of the Constitution.[177]

In Article 60(1), the Constitution gives the principles of land policy in Kenya where all land should be held, used and managed in a manner that is equitable, efficient, productive and sustainable.[178] This should be done in accordance with various other principles such as elimination of discrimination, sound conservation and protection of ecologically sensitive areas, security of land rights, transparent and cost effective administration and the settlement of disputes by communities through recognised local community initiatives that are consistent with the Constitution.[179]

The Constitution establishes the basis for community land holding in Kenya. It states that land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals[180] then goes ahead to classify land as public, community and private[181]. This is a significant provision as previously, community land was not recognised and the three forms of tenure were private, public and government trust lands.

In article 63, the Constitution addresses community land where it states that community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest.[182] The Constitution also required parliament to enact legislation that would give effect to Article 63.[183] It is pursuant to this article that the Community Land Act was established.

The Constitution also establishes various institutions that are essential to land. Examples of such institutions are the National Land Commission[184] and the Environment and Land Court.[185]

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[177] IK&M Advocates, *New land laws in Kenya, 2012- What you need to know,* 28th May 2012, 1.
[178] Article 60(1), *Constitution of Kenya* (2010).
[179] Article 60(1), *Constitution of Kenya* (2010).
[180] Article 61(1), *Constitution of Kenya* (2010).
[181] Article 61(2), *Constitution of Kenya* (2010).
[182] Article 63(1), *Constitution of Kenya* (2010).
[183] Article 63(5), *Constitution of Kenya* (2010).
[184] Article 67(1), *Constitution of Kenya* (2010).
[185] Article 162(2), *Constitution of Kenya* (2010).

3.3. Statute

a. Land Act

After independence, Kenya's land tenure systems were operated under two systems: the customary and statutory system. The customary system operated informally as the law did not expressly recognise it. Under the statutory system, there were five land registration regimes and three substantive regimes which were supported by various administrative institutions.[186] This led to the existence of multiple systems of land law and the Land Act, through a constitutional requirement,[187] sought to address this issue of multiplicity of laws.

The preamble of the Land Act describes it as an act of parliament to give effect to article 68 of the Constitution to revise, consolidate and rationalise land laws and to provide for sustainable administration and management of land and land-based resources and for connected purposes.[188]

The Land Act does not address community land but instead states that it shall be managed by the law that was enacted pursuant to article 63 of the Constitution[189] which is the Community Land Act.

b. Community Land Act

The Community Land Act was enacted to give effect to article 63(5) of the Constitution which required Parliament to enact legislation that would address community land.[190] The act seeks to provide for the recognition of community land rights, management and administration of community land and to provide for the role of county governments in relation to unregistered community land.[191]

The Community Land Act defines a community as a consciously distinct and organized group of users of community land who are citizens of Kenya and share any of the following attributes: common ancestry, ethnicity, similar culture or unique mode of livelihood, socio-economic or other similar common interest, geographical space or ecological space.[192]

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[186]Joseph and Patricia, *Securing property rights in Kenya,* 315.
[187] Article 68(a), *Constitution of Kenya* (2010).
[188] Preamble, *Land Act,* (Act No. 6 of 2012).
[189]Section 37, *Land Act,* (Act No. 6 of 2012).
[190] Article 63(5), *Constitution of Kenya* (2010).
[191] Preamble, *Community Land Act,* (Act No. 27 of 2016).
[192]Section 2, *Community Land Act,* (Act No. 27 of 2016).

The act also defines community of interest as the possession or enjoyment of common rights, privileges or interests in land, living in the same geographical area or having such apparent association.[193] It also deals with various aspects that relate to community land and it requires these aspects to be guided by the constitutional principles of land policy and the national values and principles of governance.[194]Some of the key aspects of the act are, the protection of community land rights[195], the procedure for registration of communities[196], that of recognition and adjudication of community land[197] and how community land is registered.[198] The act also requires the formation of a properly constituted community assembly which shall have the duty of managing and administering the community land.[199]

The act describes the nature of the community land title which may either be an absolute[200] interest or a leasehold interest in land.[201] Absolute interest may be defined as the most comprehensive interest in land and it is the standard by which all other interests in land are defined while leasehold interest is interest in the land of another for a certain duration of time.[202]

c. Land Registration Act

The Land Registration Act sought to revise, consolidate and rationalise the registration of titles to land and to give effect to the principles and objects of devolved government in land registration.[203]

With regard to community land, the act establishes a community land register.[204] The register should contain a cadastral map that shows the extent of community land and the areas of common interest that have been identified.[205] It should also contain the name of the community, the names and identities of the members, the user of the land and also the identity of the group representatives.[206]

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[193] Section 2, *Community Land Act,* (Act No. 27 of 2016).
[194] Section 3, *Community Land Act,* (Act No. 27 of 2016).
[195] Section 5, *Community Land Act,* (Act No. 27 of 2016).
[196] Section 7, *Community Land Act,* (Act No. 27 of 2016).
[197] Section 8, *Community Land Act,* (Act No. 27 of 2016).
[198] Section 11, *Community Land Act,* (Act No. 27 of 2016).
[199] Section 15, *Community Land Act,* (Act No. 27 of 2016).
[200] Section 16(a), *Community Land Act,* (Act No. 27 of 2016).
[201] Section 16(b), *Community Land Act,* (Act No. 27 of 2016).
[202] Kariuki, Ouma and Ng'etich, *Property Law,*195.
[203] Preamble, *Land Registration Act,* (Act No. 3 of 2012).
[204] Section 8, *Land Registration Act,* (Act No. 3 of 2012).
[205] Section 8(a), *Land Registration Act,* (Act No. 3 of 2012).
[206] Section 8, *Land Registration Act,* (Act No. 3 of 2012).

The act requires the registrar to issue a certificate of title or lease in the prescribed form[207] and it bars any instrument that purports to dispose of any rights or interests in community land except in accordance with the law that relates to community land.[208]

d. Sectional Properties Act

Sectional property deals with various forms of common interest communities[209] and this includes townhouses, apartment buildings, retirement villages[210] condominiums, planned unit developments and cooperatives.[211] The Sectional Properties Act was enacted before the promulgation of the Constitution. However, its key aim is to provide for the division of buildings into units that are owned by individual proprietors. It also provides for common property that is to be owned by the proprietors of the units as tenants in common and provides for the management and use of the units and the common property.[212]

The main benefit conferred by these common interest communities is the affordable cost of home ownership as they require less land per unit than traditional housing developments.[213] An owner of sectional property, is granted a sectional title.[214] This differs from an absolute or leasehold title as while the previous two transfer full ownership rights of the land and all buildings in it, a sectional title only gives a specific section or unit of an undivided share of common property.[215] However, sectional property can only be developed on land held on freehold title or on a leasehold title that has an unexpired residue of term which is not less than forty five years.[216]

3.4. Institutional framework

a. National Land Commission

The Constitution establishes the National Land Commission[217] and gives its functions[218] some of which include the management of public lands on behalf of national and county

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[207] Section 8(2), *Land Registration Act,* (Act No. 3 of 2012).
[208] Section 8(3), *Land Registration Act,* (Act No. 3 of 2012).
[209] Kariuki, Ouma and Ng'etich, *Property Law*,251.
[210] http://www.appraise.co.za/sectionaltitle_ownership.html on 22 December 2018.
[211] Kariuki, Ouma and Ng'etich, *Property Law*,251.
[212] Preamble, *Sectional Properties Act,* (Act No. 21 of 1987).
[213] Kariuki, Ouma and Ng'etich, *Property Law*,251.
[214]https://www.nation.co.ke/lifestyle/dn2/sectional-property-ownership-mortgage-housing/957860-4258078-wqd4hmz/index.html on 22 December 2018.
[215]https://www.nation.co.ke/lifestyle/dn2/sectional-property-ownership-mortgage-housing/957860-4258078-wqd4hmz/index.html on 22 December 2018.
[216] Section 2, *Sectional Properties Act,* (Act No. 21 of 1987).
[217] Article 67(1), *Constitution of Kenya* (2010).
[218]Article 67(2), *Constitution of Kenya* (2010).

governments[219], to recommend a national land policy to the national government[220], advising the national government on comprehensive programme for the registration of title in land throughout Kenya[221], to conduct research related to land and the use of natural resources, and make recommendations to appropriate authorities[222], to initiate investigations into present or historical land injustices and recommend appropriate redress[223] and also to monitor and have responsibilities over land use planning throughout the country[224].

The National Land Commission is also governed by the National Land Commission Act. The act makes further provision as to the functions and powers of the commission, qualifications and procedures for appointments and gives effect to the objects and principles of devolved government in land management and administration[225]. The act gives the commission more functions which include alienating public land on behalf of the national and county governments[226], monitoring the registration of rights and interests in land[227], ensuring the sustainable management of public land[228] and the development and maintenance of an effective land information system for the management of public land[229].

The jurisdiction of the National Land Commission under both the act and Constitution is limited to public land. This was reiterated in the case of R v National Land Commission and 4 others Ex Parte Futson Company Limited whereby it was stated that the commission's mandate was limited to public land and it ceased once public land was converted to private land.[230] However, the commission can still exercise its mandate when ascertaining whether public land was converted to private land in accordance with the law.[231] However, despite this, the National Land Commission still plays a role in the conversion of community land to public land and vice versa.

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[219] Article 67(2)(a), *Constitution of Kenya* (2010).
[220] Article 67(2)(b), *Constitution of Kenya* (2010).
[221] Article 67(2)(c), *Constitution of Kenya* (2010).
[222] Article 67(2)(d), *Constitution of Kenya* (2010).
[223] Article 67(2)(e), *Constitution of Kenya* (2010).
[224] Article 67(2)(h), *Constitution of Kenya* (2010).
[225] Preamble, *National Land Commission Act,* No. 5 of 2012.
[226] Section 5(2)(a), *National Land Commission Act,* No. 5 of 2012.
[227] Section 5(2)(b), *National Land Commission Act,* No. 5 of 2012.
[228] Section 5(2)(c), *National Land Commission Act,* No. 5 of 2012.
[229] Section 5(2)(d), *National Land Commission Act,* No. 5 of 2012.
[230] *R v National Land Commission & 4 others Ex P Futson Company* Limited [2015] eKLR.
[231] *R v National Land Commission Ex Parte Krystalline Salt Limited* [2015] eKLR.

The National Land Commission is also the body that is legally mandated to acquire land through eminent domain on behalf of the national and county government.[232] Eminent domain or compulsory acquisition is the power of the state to extinguish or acquire any title or other interest in land.[233] However, it must be for a public purpose or in the public interest, subject to prompt payment in full and any person who has an interest in, or right over that property has a right of access to court.[234] Subject to this requirements, community land may be compulsorily acquired and converted to public land.[235]

The Community Land Act also grants the National Land Commission the power to convert public land to community land through allocation[236] and this may be done on a case by case basis.[237] If, a community decides to set aside registered community land for public purposes,[238] the Commission is required to gazette the land as public.[239]

b. County Governments

The Constitution establishes county governments for each of the 47[240] counties. The counties have been given the mandate to exercise sovereign power at county level which is delegated to its two organs which are the legislative assembly[241] and the executive structure.[242]

The County governments play a significant role in community land. Land that a county government holds as trust land consists of community land.[243]Also the county government has the mandate to hold in trust any unregistered community land on behalf of the communities.[244] In the instance of compulsory acquisition of any unregistered community land, the county government holds the money payable in trust for the community.[245]

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[232] Section 107(1), *Land Act,* (Act No. 6 of 2012).
[233] Ministry of Lands, *Sessional Paper No.3 of 2009,* August 2009,1.
[234] Article 40(3)(b), *Constitution of Kenya* (2010).
[235] Section 22(1)(a), *Community Land Act,* (Act No. 27 of 2016).
[236] Section 24(1), *Community Land Act,* (Act No. 27 of 2016).
[237] Section 24(2), *Community Land Act,* (Act No. 27 of 2016).
[238] Section 26(1), *Community Land Act,* (Act No. 27 of 2016).
[239] Section 26(2), *Community Land Act,* (Act No. 27 of 2016).
[240] First Schedule, *Constitution of Kenya (2010.)*
[241] Article 1(3)(a), *Constitution of Kenya* (2010).
[242] Article 1(3)(b), *Constitution of Kenya* (2010).
[243] Article 63(2)(d)(iii), *Constitution of Kenya* (2010).
[244] Article 63(3), *Constitution of Kenya* (2010).
[245] Section 6(2), *Community Land Act,* (Act No. 27 of 2016).

The county government plays a role in county planning and development. Registered communities may decide to use the land for development. However, before commencing the community must submit to the county government a plan outlining the development, management and use of the land for approval.[246] Before approving the plans, the county government has to take into account factors such as conservation, environmental and heritage issues, the impact on the environment and compliance with constitutional values and principles.[247]

c. Environment and Land Court

Land in Kenya is an emotive issue and ownership has been one of the main causes of past ethnic conflicts in the country.[248] This then necessitates a land dispute resolution institution that can deal with such land related conflicts when they arise.

The Constitution in Article 162(2) required parliament to establish a court with the status of the High Court[249] which would hear and determine disputes that related to the use and occupation of, and title to land.[250] By 'establish a court of equal status the article essentially meant that the court must be of the same standing as the High Court hence, the persons or judges appointed to those courts must be persons of the same social or professional standing as persons appointed to the High Court.[251] Pursuant to this, the Environment and Land Court Act was enacted to give effect to this provision[252] and it established the Environment and Land Court.[253] However despite the two courts having the same status, the High Court does not have jurisdiction in respect of matters that are falling within the Environment and Land Court's jurisdiction.[254]

The Constitution further required parliament to determine the jurisdiction and functions of the court[255] so as to enable the court to function effectively. In Owners of the motor vessel 'Lillian S' v Caltex Oil the term jurisdiction was said to be the authority which a court has

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[246]Section 19(1) *Community Land Act,* (Act No. 27 of 2016).
[247] Section 19(2), *Community Land Act,* (Act No. 27 of 2016).
[248] Odote C, *'Breaking the mould'*, 3.
[249] Article 162(2), *Constitution of Kenya* (2010).
[250] Article 162(2)(b), *Constitution of Kenya* (2010).
[251] *Malindi Law Society v Attorney General & 4 others* [2016] eKLR.
[252] Preamble, *Environment and Land Court Act* (No. 19 of 2011).
[253] Section 4, *Environment and Land Court Act* (No. 19 of 2011).
[254] Article 165(5)(b), *Constitution of Kenya* (2010).
[255] Article 162(3), *Constitution of Kenya* (2010).

to decide matters that are litigated before it and to take cognizance of matters that are presented in a formal way before its decision.[256]

The jurisdiction of the court is found in the Environment and Land Court Act where the court has original and appellate jurisdiction to determine all disputes that relate to the environment and land.[257] This gives it the power to hear and determine disputes relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rent, valuations, mining minerals and other natural resources,[258] compulsory acquisition,[259] land administration and management,[260] public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land[261] and any other dispute relating to land and the environment.[262]

On 15th December 2015 The Statute Law (Miscellaneous Amendments) Act No. 25 of 2015 received presidential assent.[263] The act sought to amend the Environment and Land Court Act and through the insertion of a new subsection to section 26, the Chief Justice was given the power, to appoint magistrates to preside over cases involving the environment and land in respect of any area of the county.[264] The magistrate was to have jurisdiction over matters of civil nature that involved the occupation of and title to land provided that the matter did not exceed the pecuniary jurisdiction that was set out in the Magistrates Court Act.[265] Pursuant to this the Malindi Law Society filed a petition challenging the constitutionality of the newly amended sections of the Environment and Land Court Act.[266] The court ruled in favour of the petitioner and declared that in relation to the jurisdiction of the subordinate courts and in respect of matters relating to the environment and the use, occupation of and title to land is inconsistent with article 162(2) of the constitution and therefore null and void.[267] The Attorney General, and Law Society of Kenya Nairobi Branch appealed.

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[256] *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya Ltd)* [1989] KLR.
[257] Section 13(1) *Environment and Land Court Act* (Act No.19 of 2011).
[258] Section 13(2)(a) *Environment and Land Court Act* (Act No.19 of 2011).
[259] Section 13(2)(b) *Environment and Land Court Act* (Act No.19 of 2011).
[260] Section 13(2)(c) *Environment and Land Court Act* (Act No.19 of 2011).
[261] Section 13(2)(d) *Environment and Land Court Act* (Act No.19 of 2011).
[262] Section 13(2)(e) *Environment and Land Court Act* (Act No.19 of 2011).
[263] Commencement clause, Statute Law (Miscellaneous Amendments) (No. 25 of 2015).
[264] *Section 2,* Statute Law (Miscellaneous Amendments) (No. 25 of 2015).
[265] *Section 2,* Statute Law (Miscellaneous Amendments) (No. 25 of 2015).
[266] *Malindi Law Society v Attorney General & 4 others* [2016] eKLR.
[267] *Malindi Law Society v Attorney General & 4 others* [2016] eKLR.

In rejecting the High Court's decision, the Court of Appeal judges relied on the case of Edward Mwaniki Gaturu & another v the Attorney General & 3 Others where it was held that the Environment and Land Court does not have exclusive jurisdiction to hear and determine such land related matters.[268] However, the judges noted that the Malindi Society's argument had gone an extra step as it argued that parliament did not and does not have the constitutional mandate to confer jurisdiction regarding such matters to an inferior court.[269] The judges then noted that parliaments power to establish specialised courts is restricted but their power to confer jurisdiction on as per the Magistrates' Courts Act is not hence it did not act ultra vires.[270]

The court stated that conferring jurisdiction on magistrates' courts to hear and determine land issues does not diminish the specialisation of specialised courts as appeals from Magistrates' Courts lie in the specialised courts. Therefore, under the doctrine of stare decisis the decisions of the Environment and Land Court are still binding on those of the Magistrates' Court.[271]

Essentially, from the above judgement, subordinate courts were also conferred with jurisdiction to hear and determine matters that relate to land.

3.5. Conclusion

The Constitution of Kenya implemented the recommendations of the National Land Policy and expressly recognised community land in a bid to secure and protect it. Also, various laws have been enacted to give effect and supplement the constitutional requirements on community land. These laws have addressed various issues such as title and registration, administration, management and use of community land.

Institutions such as the National Land Commission which addresses the methods of acquisition of community land from public land have also been established. The specialised Environment and Land Court which is a dispute resolution mechanism has also been established and granted jurisdiction over land related disputes. This jurisdiction was recently extended to the subordinate courts through statutory amendment.

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[268] *Edward Mwaniki Gaturu & another vs. Hon. Attorney-General & 3 others* [2013] eKLR.
[269] *Law Society of Kenya Nairobi Branch v Malindi Law Society and 6 others* [2017] eKLR.
[270] Preamble, Magistrates' Courts Act, (Act No. 26 of 2015)
[271] *Law Society of Kenya Nairobi Branch v Malindi Law Society and 6 others* [2017] eKLR.

There is therefore proper legal and institutional framework surrounding community land. A proper foundation has therefore been laid for the vesting of community land on the basis of a community of interests.

CHAPTER 4: EFFICIENCY OF VESTING COMMUNITY LAND RIGHTS IN URBAN AREAS ON THE BASIS OF A COMMUNITY OF INTEREST.

4.1. Introduction

This chapter seeks to investigate and demonstrate why it is inefficient and impractical to vest community land rights in urban areas on the basis of culture and ethnicity. It also seeks to show that the vesting of community land rights on the basis of a community of interest is more practical and efficient when it comes to community land rights in urban areas especially with regard to the informal settlements located in these areas.

An urban area may be defined as a developed region surrounding a city. In this case developed means that there is a high density of human structures such as houses, roads, bridges and railways.[272] Most of the inhabitants of urban areas are employed in various non-agricultural sectors.[273] The Urban Areas and Cities Act vaguely defines urban areas as a municipality or a town[274] Urbanisation may be defined as the process by which large numbers of people become permanently concentrated in relatively small areas forming villages, towns, municipalities and cities.[275]

As of 2016, the population of Kenya was 48.46 million people with an estimated growth rate of 2.7% per annum.[276] As per the 2009 census out of every three Kenyans one lives in an urban area implying that 32.3% of Kenyans live in the 108 designated urban areas each having a population ranging from between 20,000 and 3 million people.[277] According to Vision 2030, Kenya's long-term development blueprint,[278] the level of urbanisation is expected to reach 54% by 2030 with an estimated 30 million people living in urban areas.[279]

Despite the rapid growth and development of urban areas, all is not rosy. Urban development in Kenya is characterised by spontaneous growth and haphazard unplanned

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[272] https://www.nationalgeographic.org/encyclopedia/urban-area/ on 20 January 2019.
[273] https://www.nationalgeographic.org/encyclopedia/urban-area/ on 20 January 2019.
[274] Section 2, *Urban Areas and Cities Act* (Act No. 3 of 2012).
[275] Ministry of Transport, Infrastructure, Housing and Urban Development, *The New Urban Agenda: Towards Inclusive, Safe, Resilient and Sustainable Cities and Human Settlement,* Popular version, ix.
[276] http://invest.go.ke/kenya-demographics/ on 20 January 2019.
[277]Ministry of Transport, Infrastructure, Housing and Urban Development, *The New Urban Agenda: Towards Inclusive, Safe, Resilient and Sustainable Cities and Human Settlement,* Popular version, ix.
[278] https://vision2030.go.ke/about-vision-2030/ on 20 January 2019.
[279] Ministry of Transport, Infrastructure, Housing and Urban Development, *The New Urban Agenda: Towards Inclusive, Safe, Resilient and Sustainable Cities and Human Settlement,* Popular version, ix.

development.[280] This, fuelled by high unemployment levels, the ever-escalating cost of living, irregular land allocation systems and land grabbing has led to the emergence and proliferation of informal settlements and slum dwellings which are homes to most of the urban population.[281] A distinction may be drawn between informal settlements and slums. A slum is a housing area which was once a sustainable neighbourhood but due to various factors such as negligence, decadence and illegal extensions has deteriorated over time.[282] On the other hand an informal settlement is a residential area where a group of housing units have been constructed on land which the occupants often have no legal claim to.[283] These areas are unplanned and housing development is not in compliance with planning and building regulations.[284]

So prevalent are informal settlements in Kenya that despite not being recognised by law per se, they have existed as a fourth form of land tenure.[285] The inhabitants of this settlements are plagued by high poverty levels which makes them unable to meet costs that associated with land ownership. They therefore devise various mechanisms which grant them access to land and basic services such as shelter, water, electricity and education.[286]

Despite this 'informal-tenure arrangement' meeting the immediate needs of the inhabitants, they still lack security of tenure which is the right of all individuals and groups to effective protection by the state against forced evictions.[287] Forced evictions are the permanent or temporary removal, against their will, of individuals, families or communities from the homes or land which they occupy without access to any appropriate form of legal recourse.[288] These informal arrangements lack security of tenure largely because land rights in Kenya are pegged on legality.[289] Essentially, the law only protects land rights in legally registered property which is not the case in informal settlements. This lack of legal

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[280] Civil Society development Programme, *Kenya Urban Areas. A brief,2.*
[281] Civil Society development Programme, *Kenya Urban Areas. A brief,2.*
[282] Ministry of Transport, Infrastructure, Housing and Urban Development, *The New Urban Agenda: Towards Inclusive, Safe, Resilient and Sustainable Cities and Human Settlement,* Popular version, ix.
[283] Ministry of Transport, Infrastructure, Housing and Urban Development, *The New Urban Agenda: Towards Inclusive, Safe, Resilient and Sustainable Cities and Human Settlement,* Popular version, viii
[284] Ministry of Transport, Infrastructure, Housing and Urban Development, *The New Urban Agenda: Towards Inclusive, Safe, Resilient and Sustainable Cities and Human Settlement,* Popular version, viii
[285] Kariuki, Ouma and Ng'etich, *Property Law,*201.
[286] Kariuki, Ouma and Ng'etich, *Property Law,*201.
[287] Ministry of Transport, Infrastructure, Housing and Urban Development, *The New Urban Agenda: Towards Inclusive, Safe, Resilient and Sustainable Cities and Human Settlement,* Popular version, ix.
[288] Ministry of Transport, Infrastructure, Housing and Urban Development, *The New Urban Agenda: Towards Inclusive, Safe, Resilient and Sustainable Cities and Human Settlement,* Popular version, ix.
[289] Kariuki, Ouma and Ng'etich, *Property Law,*201.

protection has then led to instances of forceful eviction and lack of access to constitutionally guaranteed basic services.[290]

4.2. Analysis: efficiency of vesting community land rights on the basis of a community of interest.

a. Ethnicity, culture and similar community of interest

As previously stated, community land vests in and is held by communities which may be identified on the basis of ethnicity, culture or similar community of interest.[291] The first challenge that then has to be addressed is whether the community is derived from a mandatory combination of all the three factors, or can the three factors be mutually exclusive?[292] To answer the question one has to turn to the National Land Policy which first addressed the issue of community land and the Community Land Act.

The glossary section of the National Land Policy refers to a community as a clearly defined group of users of land, which may but need not be a clan or ethnic community and these groups of users hold a set of clearly defined rights and obligations over land and land-based resources.[293] On the other hand the Community Land Act states that the community is a consciously distinct and organised group of users of community land who are citizens of Kenya and share any of the following attributes: similar culture, geographical space, ecological space, ethnicity, common ancestry and socio-economic or other similar common interest.[294]

Clearly, it was not the intention of the drafters of the National Land Policy and the Community Land Act for there to be a mandatory combination of the three factors. From the glossary section of the National Land Policy, ethnic ties are not a requirement for one to be a member of a community. Therefore, one can qualify for membership without being identified on the basis of ethnicity. As for the Community Land Act to qualify for community membership, all that one requires is to share *any* of the listed attributes.

The three factors as stated in the Constitution may then be applied as a combination of two or all or they may be deemed mutually exclusive and applied individually. This is because

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[290] Kariuki, Ouma and Ng'etich, *Property Law*,201.
[291] Article 63(1), *Constitution of Kenya* (2010)
[292] Kameri-Mbote *et al*, *Ours by Right*, 30.
[293] Ministry of Lands, *Sessional Paper No. 3 of 2009 on National Land Policy*,2009, 63.
[294] Section 2, *Community Land Act,* (No. 27 of 2016).

the National Land Policy largely informed the drafters of the Constitution on the issue of community land, while the Community Land Act was enacted to give effect to article 63(5) of the Constitution and to provide for community land,[295] and both of them advocate for the separate application of the three factors. Therefore, community land can be vested on a community purely on the basis of a similar community of interest

b. Homogeneity and diversity of ethnic communities

Kenya is a country comprised of 42 ethnic tribes which contribute to its rich and diverse cultural heritage.[296] The different ethnic tribes each have unique histories, cultures, languages, values, lifestyles and in some instance's religions.[297] In relation to vesting community land on communities identified on the basis of culture and ethnicity, Kenyan urban areas are plagued by two problems in relation to land: diversity and homogeneity of ethnic communities.[298]

Homogeneity of ethnic communities in urban areas arises when one particular region is largely occupied by members of the same ethnic community. The Constitution permits Kenyans to acquire and own property either individually or in association with others of any description in any part of Kenya.[299] Essentially no part of Kenya belongs to one specific ethnic group.[300] However, the districts in the old constitutional era were created using a method which largely focused on ethnic tribes hence leading to the creation of various ethnically homogenous areas.[301] This areas then developed the notion of "insiders", who are individuals native to that particular area and "outsiders" who are individuals that have migrated into the area from other regions.[302]

This problem has spread to informal urban settlements such as Mathare, Korogocho and Kibera that have now been divided into ethnically homogenous zones where certain sections of the slum are associated with specific ethnic communities.[303] For example, in Korogocho, the informal settlement is divided into nine zones and the zones are predominantly occupied by individuals from different ethnic communities. The Luo and

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[295] Preamble, *Community Land Act,* (No. 27 of 2016).
[296] http://www.kenya-information-guide.com/kenya-tribes.html on 20 January 2019.
[297] http://www.kenya-information-guide.com/kenya-tribes.html on 20 January 2019.
[298] Kameri-Mbote *et al*, *Ours by right,* 32.
[299] Article 40(1)(b), *Constitution of Kenya* (2010).
[300] Commission of Inquiry into the Post-Election Violence, *Final Draft,* 2008, 31.
[301] Commission of Inquiry into the Post-Election Violence, *Final Draft,* 2008, 32.
[302] Commission of Inquiry into the Post-Election Violence, *Final Draft,* 2008, 32.
[303] Commission of Inquiry into the Post-Election Violence, *Final Draft,* 2008, 32.

Luhya occupy three zones, the Kikuyu four zones and the remaining two zones are occupied by Cushitic communities[304] Kibera also experiences the same problem. There are homogenous areas such as 'Kisumu Ndogo' which is predominantly occupied by the Luo community and 'Makina' which is closely associated with the Nubian community.[305] So serious is the problem of homogeneity in urban areas that the Waki report describes it as form of 'quasi-residential apartheid' that has developed within urban areas.[306]

Granting community land to ethnically homogenous areas on the basis of ethnicity or culture would therefore be impractical as it would first lead to the exclusion of persons deemed to be 'outsiders' from accessing land rights. Secondly, land in Kenya is a highly emotive issue which has led to instances of ethnic clashes in the past.[307] The criteria applied in defining communities in urban areas should therefore be geared towards national unity as opposed to the possible formation of ethnic enclaves within the country.[308] Also, the criteria used should recognise the right of every Kenyan citizen to own land in any part of the country.[309]

The second challenge that arises in urban areas is the diversity of ethnic communities. Diversity in urban areas essentially entails Kenyans, from different communities, that neither share ethnic affiliation nor culture converging and living together in the same urban area.[310] A good example would be in sectional properties where ethnic communities that have no culture or ethnicity live together as one.[311] In the instance of diversity, it would be inefficient to vest community land on communities on the basis of their ethnicity or culture as despite living in a common urban area, the inhabitants neither share any ethnic affiliation nor culture, and would therefore not meet the set criteria.

Homogeneity and diversity of ethnic communities therefore makes the vesting of community land rights largely inefficient with regard to urban areas. This therefore

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[304] https://www.nation.co.ke/lifestyle/dn2/Nairobi-Ethnicity-Low-Income-Areas/957860-2407204-9b52khz/index.html on 20 January 2019.
[305] Wanjiru M, Matsubura K, 'Slum toponymy in Nairobi, Kenya: A case study analysis of Kibera, Mathare, and Mukuru',4, *Urban and Reginal Planning Review*, 2017, 31.
[306] Commission of Inquiry into the Post-Election Violence, *Final Draft,* 2008, 32.
[307] Odote C, *'Breaking the mould'*, 3.
[308] Odote C, *'Breaking the mould'*, 3.
[309] Article 40, *Constitution of Kenya* (2010).
[310] Kameri-Mbote *et al*, *Ours by right,* 32.
[311] Kameri-Mbote *et al*, *Ours by right,* 32.

necessitates an analysis of the efficiency of vesting community land rights on the basis of a community of interest.

c. Community of interest

The Community Land Act while defining the term community does not limit the shared attributes to only ethnicity, common ancestry or common culture but states that a community may also be composed of people who share a common geographical space, ecological space or socio-economic interests.[312] Also it defines community of interests as the possession or enjoyment of common rights, privileges or interests in land, living in the same geographical area or having such apparent association.[313]

Odote defines community of interest as the criterion used to identify communities brought together by land-based resources examples of which may be water, forests and wetlands.[314] Kameri-Mbote also states that community land rights can be most easily aligned to factors such as sectional properties, pastoralism and even agriculture, which would entail starting from community of interest as the primary indicator before then proceeding to ethnicity and culture.[315] In both instances as explained by Kameri-Mbote and Odote, the community is primarily brought together not by the culture or ethnicity of the various people, but by the shared land-based resources and geographical space.

In Kenyan urban areas, the inhabitants may be from various different ethnic communities but they live together in a common geographical space. As previously stated, in most informal settlements the inhabitants are plagued by poverty and the inhabitants are unable to meet the costs of land ownership hence, forcing them to devise mechanisms that will grant them access to land and other basic services.[316] They therefore share the same socio-economic interests which is access to basic services. The inhabitants of informal settlements in urban areas are therefore entitled to register as a community[317], as per the provisions of the community land act, on the basis of community of interest.

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[312] Section 2, *Community Land Act,* (No. 27 of 2016).
[313] Section 2, *Community Land Act,* (No. 27 of 2016).
[314] Odote C, *'The legal and policy framework regulating community land in Kenya an appraisal'* Friedrich Ebert Stiftung, Nairobi Kenya,31.
[315] Kameri-Mbote *et al*, *Ours by right,*108.
[316] Kariuki, Ouma and Ng'etich, *Property Law,*201.
[317] Section 7, *Community Land Act,* (No. 27 of 2016).

4.3. Using community land vested on community of interest to resolve various challenges

a. Security of tenure.

The informal – tenure arrangement has led to lack of security of tenure as the law only protects land rights in legally registered property.[318] Inhabitants of informal settlements after coming together and registering as a community on the basis of a community of interest, can acquire proper title to community land and hence security of tenure. The community members may acquire community land through allocation[319] if the initial land is acquired from public land or through transfer in the case of private land.[320] The land may be held under leasehold or freehold tenure.[321] When registered under freehold tenure, the interest conferred on the community is the absolute ownership of the land together with all rights and all privileges appurtenant to the land.[322] As for leasehold tenure, the interest conferred on the community is the leasehold interest described in the lease, together with all implied and express rights and privileges subject to all implied or express agreements, liabilities or incidents of the lease.[323]

Once the members of the community have acquired proper title to community land, they shall have legally enforceable land rights and shall be protected from forceful evictions as was the case in informal settlements. Essentially, they shall have acquired security of tenure.

b. Low-cost housing

The high levels of poverty have forced the inhabitants of these informal urban settlements to devise mechanisms that give them access to basic services such as shelter, electricity and water.[324] These mechanisms are what has significantly contributed to the emergence and increased growth of the informal settlements and slums.[325] However through the use of the Community Land Act and the Sectional Properties Act, this problem may be resolved through development of low-cost sectional property.

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[318] Kariuki, Ouma and Ng'etich, *Property Law*,201.
[319] Section 24(1), *Community Land Act,* (No. 27 of 2016).
[320] Section 25(a), *Community Land Act,* (No. 27 of 2016).
[321] Section 3, *Community Land Act,* (No. 27 of 2016).
[322] Section 16(a), *Community Land Act,* (No. 27 of 2016).
[323] Section 16(b), *Community Land Act,* (No. 27 of 2016).
[324] Kariuki, Ouma and Ng'etich, *Property Law*,201.
[325] Civil Society development Programme, *Kenya Urban Areas. A brief,2.*

Sectional property deals with various forms of common interest communities such as high-rise apartments[326] and one of the main benefits conferred is the generally low and affordable cost of home ownership. This can be attributed to the fact that sectional properties need less land per unit than that required by traditional developments.[327]

Once the members of the community have acquired good title to community land, they are permitted to reserve special purpose areas for settlement or urban development.[328] However, the areas reserved can only be used exclusively for the intended purpose.[329] The community can therefore reserve the land for development of sectional property.

For sectional property to be developed on any parcel of land, the land must either be held on freehold title or leasehold title. With regard to leasehold title, the unexpired residue of the term must not be less than a period of 45 years.[330]Community land can be held under either freehold or leasehold title[331] and therefore the sectional property act can be applied to community land.

For the building to be subdivided into units, a sectional plan that describes two or more units must be registered.[332] Once the plan is registered, the register for the old title is closed and new separate registers for each unit described in the plan are opened. Each unit then acquires its own sectional title deed.[333]

Through sectional property, the members of a community can therefore gain access to low cost housing and also in the process access certain basic services such as water and electricity. Also, sectional properties require the establishment of a corporation composed of either the owners of the sectional units[334] or persons that are entitled to the parcel of land on termination of the sectional agreement.[335] This corporation is required to make by-laws that provide for the control, management and administration of the units[336] and are binding to all the owners of the units.[337] Kameri-Mbote argues that since the members of the

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[326] http://www.appraise.co.za/sectionaltitle_ownership.html on 29 January 2019.
[327] Kariuki, Ouma and Ng'etich, *Property Law*,251.
[328] Section 13(3), *Community Land Act,* (No. 27 of 2016).
[329] Section 13(4), *Community Land Act,* (No. 27 of 2016).
[330] Section 2, *Sectional Properties Act,* (Act No. 21 of 1987).
[331] Section 3, *Community Land Act,* (No. 27 of 2016).
[332] Section 4, *Sectional Properties Act,* (Act No. 21 of 1987).
[333] Section 5, *Sectional Properties Act,* (Act No. 21 of 1987).
[334] Section 17(2)(a), *Sectional Properties Act,* (Act No. 21 of 1987).
[335] Section 17(2)(b), *Sectional Properties Act,* (Act No. 21 of 1987).
[336] Section 30(1), *Sectional Properties Act,* (Act No. 21 of 1987).
[337] Section 30(5), *Sectional Properties Act,* (Act No. 21 of 1987).

corporation design their own rules under which they live and manage their land and resources, a new culture may then emerge notwithstanding the fact that the members shared no previous cultural ties.[338]

c. Planned urban development

In urban areas rapid urbanisation has led to haphazard and unplanned development which in turn has led to the emergence and high growth rates of slums and informal settlements.[339] These areas have several problems that pose a risk to public health and safety. Some of them include: overcrowding, poor sanitation facilities, uninsulated low-hanging electric cables and lack of infrastructure.[340].

On the other hand, the state has the power to regulate the manner in which individuals use land. This is exercised through development control or police power.[341] The state derives police power from article 66 of the Constitution which provides that, the state may regulate the use of any land, or any interest in or right over any land, in the interest of defence, public order, public morality, public health or land use planning.[342] This constitutional provision is supplemented by various laws such as the Urban Areas and Cities Act and the Physical Planning Act.

Through the use of community land in urban areas, proper well-planned development can be achieved as the Community Land Act gives the state express powers to regulate the use of community land in accordance with article 66 of the constitution.[343]

Also, county governments play a role in urban planning. Before the community develops the land, they are required to submit a plan for the development, management and use of land to the county government.[344] In this plan the community is expected to consider various factors, some of which include: conservation, heritage and environmental issues that relate to the development, management or use of land[345] and also any environmental impact plan subject to existing environmental land laws.[346] The county government also has to consider

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[338] Kameri-Mbote, Odote, Musembi and Kamande, *Ours by right,*33.
[339] Civil Society development Programme, *Kenya Urban Areas. A brief,2.*
[340] https://reliefweb.int/report/kenya/hidden-crisis-urban-slums on 29 January 2019.
[341] Kariuki, Ouma and Ng'etich, *Property Law*,251.
[342] Article 66(1), *Constitution of Kenya* (2010).
[343] Section 4(2), *Community Land Act,* (No. 27 of 2016), and Section 38(1) *Community Land Act,* (No. 27 of 2016).
[344] Section 19, *Community Land Act,* (No. 27 of 2016).
[345] Section 19(1)(a), *Community Land Act,* (No. 27 of 2016).
[346] Section 19(1)(c), *Community Land Act,* (No. 27 of 2016).

whether the submitted plan complies with all relevant development planning laws.[347] After ensuring that these factors have been complied with, the county government approves the plan and notifies the registered community which may then proceed with the plans regarding the development, management and use of the land.[348]

d. Increased inter-ethnic interactions

Through vesting of community land on the basis of a similar community of interest, there can be increased interaction of various communities from various different backgrounds. As previously highlighted, most urban settlements have been split into ethnically homogenous zones which is a threat to national unity.[349] Through the vesting of community land on the basis of community of interest, people from different ethnic and cultural backgrounds can register as a community so as to access community land rights. This will lead to greater inter-ethnic interactions and hence resolve the issue of ethnically homogenous areas.

4.4. Conclusion

From the above chapter it is clear that the diversity and homogeneity of communities living in various urban areas makes it inefficient to vest community land rights on communities on the basis of a culture or ethnicity. Homogeneity poses a challenge as vesting community land on communities on the basis of culture and ethnicity will lead to the exclusion of various individuals that are deemed to be outsiders to the community. Also, granting community land rights to ethnically homogeneous areas on the basis of ethnicity or culture will be a threat to national unity and cohesion.

The diversity of communities in urban areas also poses a challenge. Various communities from different backgrounds that neither share ethnicity nor culture have converged and live together in various urban areas and hence they would not fit the set criteria.

This therefore necessitated an analysis of vesting community land rights on the basis of a community of interest. During the analysis it was shown that various communities living in the informal settlements of the urban areas share a common geographical space and

[347] Section 19(4), *Community Land Act,* (No. 27 of 2016).
[348] Section 19(1), *Community Land Act,* (No. 27 of 2016).
[349] Commission of Inquiry into the Post-Election Violence, *Final Draft,* 2008, 32.

socio-economic interests such as access to basic needs such as shelter, water, electricity and education

These communities therefore qualify to be granted community land rights on the basis of a community of interest. It was also demonstrated that the granting of land rights on the basis of a community of interest is largely efficient as it can be used to solve some of the challenges faced in the informal settlements. Through community land the residents can acquire proper title to land and hence security of tenure, sectional properties can be developed so as to grant access to low cost housing and basic services such as shelter, water and electricity. Also, through proper planned development, challenges such as overcrowding, public health and lack of infrastructure in the informal settlements of urban areas can be solved.

CHAPTER 5: FINDINGS, RECOMMENDATIONS AND CONCLUSION.

This chapter seeks to analyse the findings of the research paper and make suitable and appropriate recommendations. The chapter shall also demonstrate how the research paper has addressed the various objectives of the study.

5.1. Findings

a. **Adequacy of legal and institutional framework surrounding community land.**

   The study has found that there are adequate laws surrounding community land. The Constitution expressly recognises community land and states that it shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest. The constitution has also established various institutions such as the National Land Commission, county governments and the Environment and Land Court.

   Various laws have also been enacted by parliament to give effect and to supplement various constitutional provisions on community land. Examples of such laws are: The Community Land Act, the County Governments Act, the Land Registration Act and the Sectional Properties Act

b. **Inefficiency of culture and ethnicity as the basis of vesting community land rights in urban areas**

   The research paper has shown that despite the Constitution allowing community land rights to be vested on communities on the basis of culture and ethnicity, the two criteria are largely inefficient in urban areas. This is due to the homogeneity and diversity of various communities that inhabit the various urban settlements in Kenya. Granting community land rights on the basis of culture and ethnicity would exclude individuals that do not meet the set criteria from accessing land rights and would also pose a threat to national unity due to the balkanisation of ethnic communities in various areas. On the other hand, the diversity of communities makes it largely impractical to vest community land rights on the basis of culture and ethnicity as various people from different communities neither share culture nor ethnicity but live within the same geographical space and share the same socio-economic interests.

c. **Efficiency of vesting community land rights in urban areas on the basis of a community of interest**

The research paper has shown that with regard to urban areas, community of interest is an efficient criterion to vest community land on communities in urban areas. This can be attributed to the fact that most of these individuals may not have a common ethnicity or culture but they share common geographical spaces and have shared socio-economic interests such as access to various basic services. They are therefore entitled to register as communities on the basis of a community of interest.

Also vesting community land on the basis of a community of interest will lead to increased inter-ethnic interactions which is necessary for national unity and cohesion.

d. **Resolving various urban challenges on the basis of a community of interest**

The study has shown that, through the use of community land vested on the community of interest various challenges associated with informal settlements in urban areas can be resolved. Through the vesting of community land rights, individuals inhabiting these areas can acquire security of tenure which will then grant them legal protection from forceful evictions. They can also gain access to low cost housing and basic services through the development of sectional property on community land. Also, through the use of community land in informal urban settlements, the state through the national and county government can ensure that there is proper and planned development by exercising police power. Through this the high growth rate of poorly planned informal settlements can be regulated.

5.2. Recommendation

a. **Giving priority to the vesting of community land on the basis of a community of interest.**

It is recommended that community of interest should be given priority before considering ethnicity and culture. When a community is granted community land on the basis of community of interest, through land use, they end up developing a new culture which is not based on their initial ethnic or cultural backgrounds.

Community of interest should also be given priority before ethnicity as the vesting of community land rights on the basis of ethnicity may lead to the ethnic balkanisation of various areas. Also, community land rights on the basis of ethnicity may lead to the exclusion of various communities from access to land rights.

5.3. Conclusion

The objectives of this study were:

1. To investigate the historical background of Kenya's land tenure systems and their impact on the modern-day land tenure systems.
2. To investigate the legal framework in Kenya surrounding the vesting of community land to communities on the basis of "similar community of interest"
3. To investigate the efficiency of vesting community land rights in urban areas on the basis of a community of interest as opposed to ethnicity or culture.
4. To investigate the possible urban challenges that may be resolved through the vesting of community land rights on the basis of a similar community of interest.

Objective 1

The historical background of Kenya's land tenure system was investigated from the pre-colonial era to the 2010 Constitutional era. The study has demonstrated how before colonisation land in Kenya was held under customary tenure. During colonisation the customary tenure was disrupted first by the Arab traders at the coastal region and subsequently by the British colonialists who failed to recognise the customary tenure system and instead introduced a foreign tenure system. After independence, the governments further failed to recognise the customary tenure system leading to further neglect and expropriation.

Despite the disregard for community land tenure, it continued to exist. In 2010, the new Constitution was promulgated and for the first-time community land was recognised.

Objective 2

The legal framework surrounding community land was investigated. It was shown that the constitution expressly recognises community land and various statutes have been established to give effect to various constitutional provisions that relate to community land. Also, institutions such as the National Land Commission, Environment and Lands court and the County Governments have been established. The legal framework surrounding the vesting of community land can therefore be said to be adequate.

Objective 3

The study has demonstrated that the vesting of community land rights in urban areas on the basis of culture and ethnicity is largely impractical and inefficient due to the diversity and homogeneity of the various communities inhabiting such areas. Community land rights can however be vested on the basis of a community of interest as the communities share similar geographical spaces and socio-economic interests

Objective 4

The study has shown that through community land vested on the basis of a community of interest, various urban challenges such as lack of security of tenure, lack of access to basic services and poor urban planning and development can be resolved.

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