

**ENVIRONMENTAL JUSTICE FOR THE MAASAI COMMUNITY; RECLAIMING
LAND AND NATURAL RESOURCES**

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Declaration

This is to certify that this research dissertation is my original work and has not been presented for a degree award in any university or institution of higher learning. Information from other sources has been duly acknowledged.

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ABSTRACT

Land is man's most valuable resource supporting most basic needs and critical needs of shelter, food and business. Before the advent of colonialism, pastoral communities in Kenya governed their land through the communal land tenure system. The colonial government introduced the English property system replacing it with the communal land tenure system. The Maasai was one of the affected communities. They lost their land to the colonial government through the Anglo Maasai Agreement of 1904 and 1911. This study examines the Anglo Maasai Agreements of 1904 and 1911 during the colonial era and the manner in which it has disadvantaged the Maasai community as a result of land dispossession. It explores the Constitution of Kenya and other key legislations on past historical injustices. The methodology that was adopted was a review of the literature on land policies in Kenya in context of the historical injustices experienced by the Maasai community. The study makes proposals on how best to redress historical injustices by focusing on the National Land Commission that has been given the mandate to initiate investigations on historical injustices and recommend appropriate redress under Article 67(2) (e) of the Constitution of Kenya. Despite there been legislation relating to the redress of historical land injustice, it is inadequate. This research seeks to give proposals and recommendations on how to improve the laws to cater for the protection of the Maasai land rights. The qualitative data was gathered in context of the research objectives; the extent to which the Anglo Maasai agreements were cause of dispossession of land and the extent to which the dispossession in relation to land is a basis for claim for land in redress for the historical injustice under the Constitution of Kenya.

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CHAPTER 1: INTRODUCTION

1.1 Background

The Maasai community is a semi-nomadic group of subsistence pastoralists located in the Rift Valley of Kenya and Tanzania. They originated from Southern Sudan during the first millennium AD.¹ The Maasai were originally agro pastoralists. They grew millet, sorghum and kept livestock. Over a period of time they adopted pastoralism and left agriculture to communities that occupied the fertile highlands.²

The British forcefully moved certain sections of the Maasai in 1904 out of their grazing grounds in Rift Valley (Naivasha-Nakuru) into reserves to make way for the settlers. One reserve was on the North of Laikipia while the other at the South, the border of Kenya and Tanzania referred to as German East Africa at the time.³

The British promised the Maasai under the 1904 Agreement that they would reserve the territory as long as the Maasai would exist as a race. In 1911 the British failed to honour the terms of the agreement by pushing the Maasai to the Southern reserve. The Maasai leaders were made to sign the agreement under duress and the Maasai community driven out of Laikipia at gun point which effectively rendered the first agreement void.⁴

During the pre-colonial period, land ownership was collective and communal. The living owners of the land were deemed as trustees of the dead, or holding tenancies based on religious beliefs and customs. Land occupied by a family was well known by the community because demarcations had been set aside. The security of tenure was well respected and hardly would

¹ Hodgson D, *Once Intrepid Warriors: Gender, Ethnicity and the Cultural Politics of Maasai Development*, Indian University Press, 2001, 23

² Spear T and Waller R, *Being Maasai: Ethnicity and Identity in East Africa*, Ohio University Press, Athens, 1993, 1-2

³ Hughes L, *Moving the Maasai: A Colonial Misadventure*, Palgrave Macmillan, Basingstoke, 2006, 8

⁴ Hughes L, *Moving the Maasai: A Colonial Misadventure*, 9

there be any disturbance.⁵Laws such as the Crown Lands Ordinance of 1905 were introduced in Kenya to take control of land and natural resources vesting the public land in the hands of the colony while leaving the local communities as mere tenants of the crown.⁶

The historical injustice in relation to land has caused the Maasai community numerous problems. The two agreements are responsible for the ongoing economic, cultural and social destitution of the Maasai community and have indeed been responsible for the erosion of their sovereignty as a people.⁷

This research is geared towards analysing the manner in which the colonial policies have affected the Maasai community. It is guided by the tragic African commons theory which examines the African commons as a property system. The British disregarded the African commons as form of property system, they were referred to as *terra nullius* meaning it was an open access. They failed to understand that property which includes land and natural resources could be derived from a person as opposed to a sovereign.⁸

The National Land Commission has the mandate to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress.⁹ The National land policy set out a framework which would address historical injustices dating from 1885 when Kenya was declared a protectorate. It established a suitable legal and administrative framework to investigate, document and determine historical land injustices and recommend mechanisms for their resolution; review all laws and policies adopted by post

⁵Ainsley J, 'Land Tenure Ethics and Land Value Taxation' in Gachenga E and Franceschi L, *Governance, Institutions and the Human condition*, Law Africa, 2009,270

⁶Okoth-Ogendo HWO, *Tenants of the crown: Evolution of Agrarian Law and institutions in Kenya*, African Centre for Technology Studies, Nairobi, 1991, 54

⁷Olol-Dapash M, '*Maasai Autonomy and Sovereignty in Kenya and Tanzania*', Mining Indigenous Lands, Cultural Survival Inc, 2001

⁸ Okoth- Ogendo HWO, *The Tragic African Commons: A century of Expropriation, Suppression and Subversion*, Programme for Land Agrarian Studies, University of Western Cape, Cape Town, 2002, 5

⁹Article 67 (2)(e), Constitution of Kenya (2010); Section 5,15, National Land Commission Act (Act No. 5 of 2012)

independence Governments that exacerbate the historical land injustices; establish suitable mechanisms for restitution of historical land injustices and claims; and specify a period time in which land claims should be made.¹⁰ The set framework has however not been addressed since the inception of the National Land Commission.

This research aims to look at the extent to which the 1904 and 1911 Anglo Maasai agreements constitute dispossession of land. Soon after independence the group ranches were introduced in an attempt to solve the land problem of the Maasai. The group ranches aimed at individualizing property as opposed to the communal land tenure system. They however proved unsuccessful owing to the fact that the government encouraged subdivision of the ranches for individual owners. The government failed to appreciate the communal land tenure system that was previously held by the Maasai community prior to the colonial era. It led to individual titles, widespread fraud and theft.¹¹ The issue of land dispossession remains unsolved till to date.

1.2 Statement of the Problem

The Maasai community has been faced with numerous challenges following the Anglo Maasai Agreements of 1904 and 1911 which as a result led them to be dispossessed of their land. The Constitution of Kenya gives the National Land Commission the mandate to initiate investigations on its own initiative or a complaint into present or historical land injustices and recommend appropriate redress.¹² Every person is entitled to the right to protection of property. This is essentially the right to acquire and own property either individually or in association with others of any description and in any part of Kenya.¹³ This research looks at the extent to which the Anglo- Maasai agreements of 1904 and 1911 constitute a basis for making a land claim based on historical redress under the Constitution of Kenya 2010.

¹⁰Sessional paper No. 3 of 2009; Section 178,179, National land policy,

¹¹The Final Report of the Constitution of Kenya Review Commission,2005,

¹²Article 67 (2)(e), Constitution of Kenya(2010), Section 5,15, National Land Commission Act (Act No.5 of 2012)

¹³Article 40(1), Constitution of Kenya,2010

1.3 Statement of Objectives

This study seeks to achieve the following objectives:

- a) To analyse the extent to which the 1904 and 1911 Anglo-Maasai agreements were a cause for dispossession of land.
- b) To determine the extent to which the dispossession in relation to land is a basis for claim for land in redress for the historical injustice under the Constitution of Kenya.

1.4 Research Question

- a) To what extent were the 1904 and 1911 Anglo-Maasai agreements a cause for dispossession of land?
- b) To what extent was the dispossession in relation to land a basis for claim for land in redress for the historical injustice under the Constitution of Kenya?

1.5 Justification of the Study

The study is significant in order to understand the historical injustice experienced by the Maasai community and the manner in which it relates to their current situation. It is also significant in laying down appropriate steps that the National Land Commission should take in providing redress for historical injustices experienced by the Maasai community as envisaged under the Constitution of Kenya.

1.6 Chapter Breakdown

Chapter One: Introduction

This chapter gives and an overview of the topic in relation to reclaiming land and natural resources for the Maasai community.

Chapter Two: Literature review and Theoretical framework

This chapter discusses the literature on historical injustices experienced by the Maasai in relation to land and the gaps presented within this topic. This chapter shall also constitute theories on this topic which include the tragic African commons, transitional justice and thereafter a conceptual framework to contextualize the ideas.

Chapter Three: Anglo-Maasai agreements of 1904 and 1911

This chapter gives a background of the Anglo- Maasai agreements of 1904 and 1911 and to what extent they constituted contracts for the transfer of land and the adopted methodology.

Chapter Four: Present situation of the Maasai Community

This chapter looks into the present land tenure of the Maasai community and the impact it has had on their way of life.

Chapter Five: The implication of the Constitution of Kenya on historical injustices

This chapter looks into the specific provisions of Constitution and other legislations on historical land injustices and their implication on the Maasai community.

Chapter Six: The extent the Anglo-Maasai Agreements constitute a basis for historical redress

This chapter looks into the extent to which the Anglo-Maasai agreements constitute a basis for the historical redress of the Maasai community.

Chapter Seven: Conclusion This chapter contains the findings, recommendations and limitations and the conclusion of the study.

CHAPTER 2: LITERATURE REVIEW AND THEORETICAL FRAMEWORK

2.1 Introduction

This research aims at analysing the extent to which the Anglo-Maasai agreements of 1904 and 1911 constitute a basis for historical redress under the Constitution of Kenya 2010. The literature on historical injustices of the Maasai community gives a historical background with regard to the formation of the treaties recognizing dispossession of their land has caused them numerous challenges and addresses the arising gaps. This chapter will also discuss the transitional justice theory and property theories in relation to the historical injustices experienced by the Maasai community.

2.2 Land tenure policies

Before colonialism most African societies governed their land communally. Access to the land was overseen by a political authority that did not own land but ensured equitable access to the land.¹⁴ In order to secure title to the land, capitalistic approaches were used in relation to land by enacting various colonial policies between 1897 to 1963.¹⁵

As per Ojienda T, the colonial land policies were promulgated to take control of land from the natives and neutralize their interests in ownership and control of the land. The colonial policies with regard to land were meant to benefit the colonial government and not the natives.¹⁶ According to Wanjala S, customary property rights were undermined while English law was imposed when the colonial policies were introduced.¹⁷ The colonial government forced the African societies to adopt the English property system. Swynnerton observed that the law was

¹⁴Wanjala S, 'Land Ownership and Use in Kenya: Past, Present and Future' in Wanjala S, (ed), *Essays on Land Law: The Reform Debate in Kenya*, University of Nairobi press, 2000,25-44

¹⁵Kibwana K, 'Efficacy of State Intervention in Curbing the Ills of Individualization of Land Ownership in Kenya', in Wanjala S,(ed), *Essays on Land Law: The Reform Debate in Kenya* ,University of Nairobi press, 2000 180-181

¹⁶ Ojienda T, *Customary land rights and the Adjudication process: Reviewing the procedure for ascertaining and recording land rights in the customary claims*, Land Law reform in Kenya, Vol. 2, Law Society of Kenya, 2003,7,8

¹⁷Wanjala S, 'Land Ownership and Use in Kenya: Past, Present and Future' in Wanjala S, (ed), *Essays on Land Law: The Reform Debate in Kenya*, University of Nairobi press, 2000,25-44

used by the colonial government to destroy the communal land tenure.¹⁸ The primary interest of the colonial government was to weaken the natives, deny them of their land and natural resources and take control. Additionally the Njonjo commission and the National Land Policy of 2009 also observe that the colonial government helped entrench the dominant settler economy, subjugating the African economy through administrative and legal mechanisms.¹⁹

Okoth Ogendo recognized that indigenous land rights were not communal in nature and neither were they collective in ownership. The community could make collective decisions about access to use of land as an entity. His understanding of the indigenous land right systems refers to the manner in which people relate to each other as opposed to an individual relating to his property. It therefore creates reciprocity of rights and obligations that bind the community and the power vested in the community over their land.²⁰

Okoth Ogendo also gives a key distinction of commons; they are not *res nullus*, but rather are *res communis*; they do not represent a species of public property, but of private property controlled by the group of members who have access to the land. The individual members of the group have clear rights and duties in respect of the resources and clear decision-making structures for purposes of utilisation and management. The commons are not open access systems neither are they a species of state, co-operative or socialist property.²¹ This is particularly important to the Maasai community and pertinent to the traditional land tenure system. This research therefore aims at illustrating the extent to which the 1904 and 1911 Anglo-Maasai agreements were a cause for dispossession of land and the extent to which it is a basis for claim for land in redress for the historical injustice under the Constitution of Kenya.

Okoth Ogendo also demonstrates that customary law was ignored and undeveloped. The commons that remained under indigenous occupation were administered as a non-proprietary

¹⁸Swynnerton R, *A Plan to Intensify the Development of African Agriculture in Kenya*, Government Printers, Nairobi, 1955

¹⁹ Syagga P, *Public Land, Historical Land Injustices and the New Constitution*,7

²⁰Okoth-Ogendo HWO, 'The nature of land rights' in *A Classens and B Cousins (eds) Land, Power & Custom*,100

²¹Okoth-Ogendo HWO, *The tragic African commons: A century of expropriation, suppression and subversion*,4

regime despite the fact that all relevant statutes relating to native reserves provided that they would be held according to customary law. The result was that much of what counted as land law in those reserves was, in effect, the law of land administration.²² This will be particularly important in portraying the effect of the Anglo- Maasai agreements. The author did not refer to a particular custom therefore this research delves deeper into the effects of the Anglo- Maasai agreements relating their historical injustice in relation to land to their customary land tenure.

Syagga P makes an analysis of public land ownership in context of the post-colonial era. He recognizes that the historical land injustices experienced by the various communities in Kenya has had an effect on their present situation. He focuses on redress of historical injustices and the role of the National Land Commission under the Constitution. This study seeks to focus specifically on the Maasai community.²³

Authors such as Muigua K. and Kariuki F. give a background of the Anglo-Maasai agreements and its effects to the Maasai community. They also provide a legal framework under the Constitution of Kenya.²⁴ They do not however address the redress of the historical injustice in relation to land caused by the Anglo- Maasai agreements. This research therefore aims at illustrating the extent to which the dispossession in relation to land is a basis for claim for land in redress for the historical injustice under the Constitution of Kenya.

Odote C. takes a historical approach in relation to community land in Kenya. He relates it to the conventions signed by the colonial governments who failed to recognize rights of the indigenous communities thus allocating title to individuals as opposed to the community. He also demonstrates the role of the National Land Commission in relation to initiating investigations of historical injustices. This research aims at illustrating the redress of the historical injustice under the Constitution of Kenya in reference to the Maasai community.²⁵

²²Okoth-Ogendo HWO, *Legislative approaches to customary tenure and tenure reform in east Africa, in Evolving land rights, policy and tenure in Africa*, 2000

²³ Syagga P, *Public Land, Historical Land Injustices and the New Constitution*

²⁴Muigua K and Kariuki F, *Towards Environmental justice in Kenya* ,2015

²⁵Odote C, *Legal and policy framework regulating community land in Kenya*,2013

Hughes L. has done extensive work on the history of the Maasai. She has depicted a thorough outline from the initial stage of colonization to the 21st century.²⁶ She demonstrates a particular emphasis to the manner in which the Anglo- Maasai agreements were made. She does not relate the effect of the Anglo- Maasai agreements to dispossession of land. This research therefore looks into the historical injustice in relation to land under the Constitution of Kenya.

Kantai Parselelo on the other hand depicts the struggle the Maasai have experienced in an attempt to have their land rights and natural resources recognized. He brings out the lack of support by the government.²⁷ The author recognizes the effect that the two agreements have had on the Maasai community. This paper therefore seeks to analyse the historical injustice in relation to the Constitution of Kenya.

Olol-Dapash M. recognizes that the problems experienced by the Maasai are rooted in the colonial policies. He expresses the notion of the Maasai community being recognized as a state not only as an indigenous community.²⁸ He does not illustrate the effect of the Anglo- Maasai agreements in relation to land. This research therefore delves into addressing the effect of the Anglo-Maasai agreement in relation to the dispossession of land under the Constitution of Kenya.

This research seeks to fill the gaps that have not been addressed in the literature. It seeks to address the historical land injustices experienced by the Maasai under the Constitution of Kenya in examining whether they have a right in claiming for redress.

2.2 Tragic African Commons

The investigations of this study are guided by the tragic African commons theory by Prof. Okoth Ogendo. Commons identifies ‘ontologically organised land and associated resources available

²⁶Hughes L, *Moving the Maasai; A colonial misadventure*,2006;*Malice in Maasai land: The historical roots of current political struggles*, African Affairs, Vol. 104, No. 415,2005,207-224

²⁷Kantai P, *In the Grip of the Vampire State; Maasai land struggles in Kenyan politics*, Journal of Eastern African Studies, Vol 1. No.1, 2007, 107-122

²⁸Olol-Dapash M; *Maasai Autonomy and sovereignty in Kenya and Tanzania* ,2001

exclusively to specific communities, lineages or families operating as corporate entities.’²⁹ The African commons is a proprietary system characterised by permanent availability of commons for past, present and future generations.³⁰

Commons are distinguished into structural and normative. At the structural level, commons are managed and protected by a social hierarchy in the form of an inverted pyramid. The tip of the pyramid represents the family, the middle represents the clan and the base represents the community. Decisions at each level are made to respond to the land allocation, use and management of resources within the basis common of scale, need, function and process.³¹

At the normative level, access to the resources is open to qualified individuals and groups on the basis of socially-defined membership. This criterion is reinforced internally by obligations which are assumed on the basis of reciprocity by and to each member of the social hierarchy. Access to rights is dependent on the category of membership of individual, collective holds and the specific function for access to the required resource.³²

The British disregarded the customary ownership of land practiced by the Maasai community by dispossessing them of their ancestral land. They took hold of the highlands which were a means of livelihood for the Maasai community and pushed them into reserves. The reserves were not productive unlike the ancestral land which they occupied and thus pastoralism has since then become a source of livelihood.

Denial of the proprietary character of the commons was primary to the colonial occupation and consequent exploitation of the African commons.³³ The British extended a number of colonial mechanisms that purported to extend powers of control and administration over the land. They

²⁹ Okoth-Ogendo HWO, *The tragic African commons: A century of expropriation, suppression and subversion*,2

³⁰ Okoth-Ogendo HWO, *The tragic African commons: A century of expropriation, suppression and subversion*,2

³¹ Okoth-Ogendo HWO, *The tragic African commons: A century of expropriation, suppression and subversion*,3

³² Okoth-Ogendo HWO, *The tragic African commons: A century of expropriation, suppression and subversion*,3

³³ Okoth-Ogendo HWO, *Property theory and land use analysis: An essay in the political economy of ideas*, Journal of Eastern African Research and Development, 1975,1

bestowed power upon the sovereign to control land where there lacked a settled government and land had not been appropriated to local individuals.³⁴

The effect of appropriation of the commons as Crown land was inter alia to vest land reserved for the use of a native tribe in the Crown. The native rights in such reserved land, whatever they were, disappeared. The natives ultimately became tenants at the will of the Crown of land. The Crown actually occupied land on which huts were built with their appurtenances and land cultivated by the natives.³⁵

Maasai elders filed a suit challenging the legality of the second agreement but they were dismissed on a technicality, a ruling that was upheld by a higher court when it went to appeal.³⁶ The British coerced the Maasai to sign the Anglo- Maasai agreements by making the leaders do so at gun point. The procedure used in acquiring the land by the British does not depict appropriate procedure and consultation of the Maasai community regarding their ancestral land. Failure to render the proper mechanisms in sharing of resources invariably brings about inequality.

The Maasai community ought to be provided with equal opportunity to have resources that can benefit them equally because they are dignified human beings. To attain this justice has to be restored to them. All human beings are born free and equal in dignity and rights.³⁷ All persons are equal before the law and enjoy the same protection.³⁸ Due to unequal sharing of land and natural resources, the Maasai have been at a loss in comparison to a majority of communities in Kenya. Poverty and inequality inhibits the realization of economic, social, and cultural rights within societies in addition to creating sudden and extreme income inequalities. It eventually

³⁴Okoth-Ogendo HWO, *The tragic African commons: A century of expropriation, suppression and subversion* 5-6

³⁵Okoth-Ogendo HWO, *Tenants of the Crown: The evolution of agrarian law and policy in Kenya*.

³⁶*Ole Ole Njogo and Others v The Attorney General Civil Case No. 91 of 1912 (E.A.P. 1914), 5 E.A.L.R. 70*

³⁷Article 1, Universal Declaration of Human Rights

³⁸Article 26, International Convention on Civil and Political rights

causes diversion of these kinds of resources and as result bring about massive human deprivations.³⁹

2.3 Transitional justice

This study seeks to look at the theory of transitional justice in trying to address the historical injustice experienced by the Maasai community. Transitional justice can be defined as the ‘conception of justice associated with periods of political change characterized by legal responses to confront the wrongdoings of repressive predecessor regimes.’⁴⁰ It serves as an effort to combat impunity to reconcile the past historical injustices. Transitional justice is a concept that has gained recognition worldwide in addressing past historical injustices.

Transitional justice requires commitment to political justice. It serves a great role in ensuring successful implementation of transitional justice measures including institutional reform, rule of law, respect of human rights and respect of socioeconomic needs. Transitional justice should seek to contribute to restoration and retributive justice that are consistent with customs and needs of the victims.⁴¹ Restoration should be viewed with a lens of justice. Restorative and retributive justice seeks to repair the harm.⁴²

From the foregoing the goal of transitional justice seeks to address the past historical injustices that have been committed and achieve justice for the historical violations. Transitional justice seeks to promote reconciliation and peace where a wrong has been done. It confronts the past historical violations while allowing the victims to carry on with their lives in order to achieve justice and prevent future violations of their rights. In order to achieve transitional justice, past historical injustices must be investigated by instituted frameworks such as truth commissions and provide appropriate redress such as restitution taking into account their customary practices and respect for human rights.

³⁹ Ndung’u Land report,3

⁴⁰ Teitel R, *Transitional Justice Genealogy*, Harvard Human Rights Journal, Vol.16, 2003,69

⁴¹ Zistel S, Beck T, Braun C, Mieth F; *Transitional justice theories*, Routledge,2014,32-34

⁴² Zistel S, Beck T, Braun C, Mieth F; *Transitional justice theories*, Routledge,2014,68-72

The Truth, Justice and Reconciliation Commission among other things investigated historical land injustices. The report identified colonial historical injustices as well as post colonial injustices. In furthering investigations of the past historical injustices, the National Land Commission was established. The National Land Commission later formed the Taskforce on the formulation of Legislation on Investigation and Adjudication of Complaints arising of historical land injustices. The taskforce has been formulating a bill on investigation and adjudication of historical injustices. This legislation is very important in redressing past historical injustices. Matters relating to land are very sensitive to many ethnic communities especially for communities whose past injustices have not been addressed. The legislation should formulate laws that seek to provide for restitution in order to allow the victims to process their claims and a special Land Claims Court to determine claims emanating from the process.

It is argued that traditional transitional justice tends to focus on civil and political violations of human rights and fails to recognize the social and economic aspects.⁴³ Transitional justice is particularly important for Kenya because it caters for the historical land injustices caused by the colonial government. The Truth Justice and Reconciliation Commission is established under section 3 of the Truth Justice and Reconciliation Commission Act, 2008. The functions of the commission were to promote peace, justice, national unity, healing and national reconciliation among people through inquiry of human rights violations. The report indeed recognized that historical land injustices had been committed against the Maasai among other communities by the colonial government.⁴⁴

The Maasai community owned land communally. The British forced the Maasai out of Rift valley in 1904 to make way for the white settlement.⁴⁵ The 1911 agreement failed to honour the earlier assurance. The Maasai were forced to leave the Northern Reserve of Laikipia and settle in an expanded Southern Reserve.⁴⁶ The Southern Reserve was a rather inferior substitute. It lacked

⁴³Zanaida M, *Effects of invisibility: In search of the 'economic in Transitional justice*, International Journal of Transitional Justice, Vol. 2, 2008,268

⁴⁴ Report of the Truth, Justice and Reconciliation Commission, Volume II B

⁴⁵Hughes L, *Moving the Maasai: A colonial misadventure*, 8

⁴⁶Hughes L, *Moving the Maasai: A colonial misadventure*, 8

sufficient and permanent water sources, accessible forests and drought refuges. These factors have therefore led to acute population pressure, land degradation, erosion of subsistence livelihoods and increased vulnerability to drought.⁴⁷

In seeking to find the truth about the past historical injustices the theory of entitlement to property is paramount. The theory of entitlement of property seeks to demonstrate the manner in which transitional justice could be applied. It establishes a criteria with regard to which one is entitled to private property. The entitlement theory of private property comprises three overriding principles: “the principle of just acquisition of property, the principle of just transfer of property and the principle of rectification of justice where property is unjustly acquired or transferred.”⁴⁸ Justice in property ownership revolves around three mechanisms of conferring and safeguarding title to property. The first is the initial acquisition of property which involves the process of ownership of property by first-time owners and the rights that are conferred through such processes. The second relates to the transfer of property from one person to another party. These means of accessing land can in some instances be abused leading to adverse consequences devoid of distributive justice.⁴⁹

The colonial government actions of unjust acquisition and transfer of land were not justified. They were not entitled to have a claim of ownership on the native’s property. The colonial government also failed to compensate the Maasai community after forcefully driving them away from their ancestral land. Their actions were therefore unjust which entitles the Maasai community a redress to the historical land injustice.

The Maasai community deserves to have their land restored to them. Transitional justice aims at restoring victims to the condition they were in previously had their rights not been violated.⁵⁰ Restorative justice theory centres on the idea that justice must involve a process to

⁴⁷Hughes L, *Malice in Maasai land: The historical roots of current political struggles*, 8, *Moving the Maasai: A colonial misadventure*

⁴⁸Syagga P, *Public Land, Historical Land Injustices and the New Constitution*, 2

⁴⁹ Syagga P , *Public Land, Historical Land Injustices and the New Constitution*,2

⁵⁰ Williams R, *The Contemporary Right to Property Restitution in the context of Transitional Justice*, 2007,1

restore a lost balance.⁵¹ One of the possible ways of restoration is land restitution. Land restitution essentially forces the moral principle of restoration and justice in order to confront the complex practices of determining ownership, defining legitimate claimants and establishing evidence for claims.⁵²

2.4 Conceptual framework

The colonial government viewed the commons as an open access. They disregarded the communal land tenure system by imposing English property systems of individualization. The customs of the natives were undermined and thus they could not hold land communally. The individualization of property was seen to be of greater economic benefit as compared to the communal land tenure system. This was a however a misconception. The commons held by the native had well administered. The individual members of the group had clear rights and duties in respect of the resources and clear decision-making structures for purposes of utilisation and management.⁵³ The British disregarded the proprietary nature of the commons in the 1904 and 1911 Anglo Maasai agreements.

The land that was forcefully taken from the Maasai community can be termed as private property despite the fact that it was held communally. Private property ownership is perceived as the right to exclude non-owners from the land from accessing it and benefiting from it. This was compared to communal property which had many different users who managed the land through a set of customs agreed upon by the people. When the colonial government thus introduced individual land tenure, confusion arose among the people because some people realized that the land they had access to was no longer theirs.⁵⁴ The Maasai community held the land in trust for

⁵¹Zehr H, Changing Lenses: A New Focus for Crime and Justice; Truth and Reconciliation Commission of South Africa Report, 1998

⁵²Fay D and James D, 'Giving Land Back or righting wrongs? Comparative issues in the study of Land restitution' in Bohlin A, Hall R, Kepe T, Walker C,(eds), *Land, Memory, Reconstruction and Justice: Perspectives on Land Claims in South Africa*, Athens, Ohio University Press, 2010, 41-66

⁵³ Okoth-Ogendo HWO, *The tragic African commons: A century of expropriation, suppression and subversion*,4

⁵⁴ Kameri-Mbote P, *Property Right and Biodiversity Management in Kenya*, African Centre for Technology Studies, Nairobi, 2002, 3-6

future generation, each person based on the socially defined membership had the right to access the land. Decisions regarding the use and allocation of the resources thus remained within the Maasai community.

The Constitution of Kenya gives the National Land Commission the mandate to initiate investigations on its own initiative and recommend appropriate redress. The Constitution does indeed recognize that past historical injustices with regard to land have taken place. Given the fact that the land was forcefully taken from the Maasai community without their consent and without an equivalent replacement, they certainly deserve redress for the wrongs committed.

In addressing the past historical injustices, transitional justice serves as a way in which the violations could be confronted. The Anglo Maasai agreements of 1904 and 1911 were cause for dispossession of land. Based on transitional justice the Maasai community has the right to claim for land under the Constitution of Kenya. They were dispossessed of land which they were legally entitled to own. The colonial government would have been entitled to the property had it been justly acquired and transferred or in the case that they compensated the Maasai community for their unjust acquisition. The colonial government failed to accord justice to the Maasai community but rather pushed them to inferior reserves.

Greater emphasis has been given to private property rights over communal property rights several years after colonization. The customary land rights of the pastoralist especially have been greatly undermined with a view to formalizing the land tenure system. Those that advocated for formalization of the land tenure regime failed to recognize customary land rights laws of people. The Maasai community deserve redress for the land dispossession through the Anglo Maasai agreements of 1904 and 1911. They have a right to claim because it was held communally and thus the entire community was not consulted by the British. The Maasai community have a right to claim under the Constitution of Kenya as provided under Article 67(2)(e).

2.5 Conclusion

The Anglo Maasai agreements of 1904 and 1911 stem from the denial of the proprietary character the commons. The English system of private ownership of property failed to recognize

the communal land tenure system. They failed to understand that the communal land tenure system was similar to that of private ownership. They understood commons to be *terra nullius*, an open access and could not comprehend how rights would derive from a person as opposed to a sovereign. Individualization of land tenure should not be imposed on all communities. Communities should be given the freedom to govern their land communally.

CHAPTER 3: THE ANGLO MAASAI AGREEMENTS OF 1904 AND 1911

3.1 Introduction

This chapter will seek to analyse the extent to which the Anglo Maasai agreements of 1904 and 1911 constitute dispossession of land in light of the research objectives. Additionally, this chapter will seek to look at the methodological approach adopted and the sources of data.

3.2 Methodology

The methodology that was adopted was review of literature on land and property rights in the context of historical injustices experienced by the Maasai community.

3.2.1 Data collection

Primary and secondary sources of data were utilized in this research. Some of the primary sources include the Constitution of Kenya, statutes, conventions and the 1904 and 1911 Anglo Maasai Agreements. Some of the secondary sources include journal articles, conference papers, text books, reports, internet and on-line libraries.

3.2.2 Data analysis

The data analysis was qualitative. It was analyzed in context of the research questions using both primary and secondary sources.

3.3 The Anglo Maasai Agreements

The Kenyan Maasai is a pastoral society that lives in a vast arid and semi—arid land that straddles the Kenya-Tanzania border. The society has a great concern for livestock especially cattle.⁵⁵ Lifestyle of the Maasai involves mostly animal husbandry and related activities. The Maasai are inclined to culture as result of the surrounding environmental factors.⁵⁶

⁵⁵Hollis A, *The Maasai: Their Language and Folklore*, Oxford: Clarendon, reprinted by Negro University Press, West Point, Conn ,U.S.A.,1905,

⁵⁶Ronoh. A, "Influence of Indigenous Knowledge on the Adoption of School- Based Education Among Kenyan Maasai: Implications for Curriculum Reform." PhD Thesis, Egerton University, Kenya, 2005

European Settlement took place in sparsely inhabited plains as opposed to densely settled agricultural areas. The Plains could only sustain a sparse population under African methods of utilization.⁵⁷ In 1904, Maasai elders, known locally as laibons, through Lenana, their leader, entered into the first “agreement” with the British administrators in which they purportedly agreed to surrender their major grazing lands in the areas of Suswa, Ol-Joro Orok and Ol-Kalou and move to Laikipia. Approximately 11,200 members of the Maasai community and over two million head of their livestock and land were lost to only 48 Europeans.⁵⁸

The Chief Lybon Lenana on behalf of the Maasai Community and Sir Donald Stewart, on behalf of the British Crown signed an agreement on 10th August 1904, referred to as the Anglo- Maasai treaty:

“We, the Undersigned, being the Lybons and Chiefs (representatives) of the existing clans and sections of the Maasai tribes in the East Africa Protectorate, having this 9th day of August, 1904 met Sir Donald Stewart, His Majesty’s Commissioner for the East Africa Protectorate, and discussed fully the questions of a land settlement scheme for the Maasai, have, of our own free will, decided that it is for our own best interest to remove our people, flocks, and herds into definite reservations away from the railway line, and away from any land that may be thrown open to European settlement.”⁵⁹

In 1904, it was agreed by both parties that “the settlement now arrived at shall be enduring so long as the Maasai race shall exist and that European or other settlers shall not be allowed to take up land in the settlement.”⁶⁰

In 1911 the British signed a second agreement in which the Maasai purportedly gave away the land in Laikipia, having been deemed attractive by the British and agreed to move many miles away to the terrain of the southern Rift Valley, the current Narok and Kajiado. The Maasai

⁵⁷Morgan W, *The White Highlands of Kenya*, The Geographical Journal, vol. 129 No. 2 ,1963, 145- 146

⁵⁸Report of the Truth, Justice and Reconciliation Commission, Volume II B, 182; Ndahinda F, *Indigenouness in Africa: A Contested Legal Framework for Empowerment of “Marginalized” Communities* ,2011

⁵⁹ Kenya National Assembly Official Record (Hansard), Oct 17 1961-Jan 30 1962

⁶⁰Kenya National Assembly Official Record (Hansard), Oct 17 1961-Jan 30 1962

community was faced with enormous challenges that saw heavy loss of human life and livestock and in addition to scarce pasture and water resources and livestock diseases which was worsened by the wildlife in the area.⁶¹ Of the 12,000 square miles (excluding forest reserves) of European settled land, 7000 consist of old Maasai grazing grounds, evacuated under agreements between 1904 and 1913.⁶²

Following the 1911 Anglo-Maasai treaty, members of the Maasai community were unhappy with the move by the British. The Maasai came to the realization that the south might not sustain the livelihood of the Maasai community and were convinced of their inability to militarily resist their removal from Laikipia.⁶³

In pursuit of their land rights, they filed a suit at the High Court of Mombasa in 1913, **Ole Njogo & Others v. The Attorney General & Others**,⁶⁴ challenging the 1904 and 1911 land agreements. The named defendants were the Attorney General, R.M. Combe, three colonial officials and twenty Maasai men who had collaborated with the government.⁶⁵

Shortly before the Maasai Case filed their initial suit in Court, the Maasai won an injunction that sought in the High Court as part of Civil Case No. 91 restraining the British from moving or continuing to move them from Laikipia after the 1911 Agreement. However, this was something short lived victory: it came through on 10 April, a fortnight after the last Maasai had vacated Laikipia.⁶⁶

The Plaintiffs claimed as individuals and on the behalf of the Maasai of Laikipia and the Maasai generally that the 1904 treaty was still in force and effect.⁶⁷ Murket Ole Nchoko, whose name the

⁶¹Report of the Truth, Justice and Reconciliation Commission, Volume II B, 182,

⁶² Morgan W, *The White Highlands of Kenya*, The Geographical Journal, vol. 129 No. 2, 1963, 146

⁶³Report of the Truth, Justice and Reconciliation Commission, Volume II B, 182,

⁶⁴ Civil Case No. 91 of 1912

⁶⁵ Kabourou A, *The Maasai Land Case of 1912; A Reappraisal* , Transafrican journal of History, vol. 17,1988 , 1

⁶⁶ Hughes L, *Moving the Maasai; A colonial Misadventure*, 162

⁶⁷ Hughes L, *Moving the Maasai; A colonial Misadventure*,157

British misspelled Ol le Njogo, the first plaintiff, was described in the plaint as a leading *moran* of the Purko section while his seven fellow plaintiffs were Purko and Keekonyokie.⁶⁸

The Plaintiffs claimed that the 1911 Agreement was void for the following reasons:

- 1) The Plaintiffs and the Maasai community neither consented nor did they give authority to the Defendants to act on their behalf.
- 2) The Defendants did not have authority to alienate the minors' interests and the unborn children of Laikipia, specifically the Maasai districts.
- 3) The agreements were not for the benefit of the Maasai community especially of the Laikipia district and thus the colonial government owed a fiduciary duty to the Maasai community due to the fact that they held land in trust for them
- 4) The Maasai signatories lacked independent legal advice before the execution of the agreements
- 5) Defendants 11-19 had not signed the agreements voluntarily.⁶⁹

The Plaintiffs also voiced the issue on the Maasai defendants' lack of authority from the tribesmen "according to the ancient tribal custom of the Maasai elders such as Defendants Nos. 2 to 19 can give advice only but the actual decision in any particular case rests with a council of Moran or warriors."⁷⁰ Lawyers representing the Maasai, A. Morrison and A.D. Home, brought an action for breach of the earlier agreement on the ground that the compact was a civil contract which was still subsisting. In addition, the new pact had not been made with those Maasai capable of binding the whole tribe. They also claimed an indemnity of five thousand British pounds for damages.⁷¹

⁶⁸Hughes L, *Moving the Maasai; A colonial Misadventure*,156

⁶⁹Sandford G, *Administrative history and political history of the Maasai Reserve*, London, Walter K Son Ltd publishers, 1991, 191

⁷⁰Sandford G, *Administrative history and political history of the Maasai Reserve*, 190

⁷¹ Aman W.Kabourou; *The Maasai Land Case of 1912; A Reappraisal*, Transafrican journal of History, vol. 17, 1988 8; Sandford G, *Administrative history and political history of the Maasai Reserve*, 219.

The case was dismissed on 26th May 1913, on a technicality, that the Plaintiff's claims were not cognizable in Municipal Courts. The Maasai Agreement of 1904 and 1911 were ruled to be not agreements but treaties which were 'Acts of State.' They could therefore not be challenged in a local court. The Plaintiff's pleas were ruled to be uncognizable in the Courts of the Protectorate. It was dismissed on a technicality, preliminary point of law.⁷²

Centred on the status of Protectorate, the King exercised powers by virtue of the Foreign Jurisdiction Act of 1890. The Crown claimed British East Africa was not actually British territory. Interestingly the Maasai were not British subjects with any attendant rights of recourse to British Law.⁷³ One of the plaintiffs' main contentions was that the Maasai signatories of the second agreement did not represent them or the Maasai a whole. The Crown however viewed the Signatories as "persons whom the Commissioner and Governor, acting on behalf of the Crown, chosen as representatives of the Maasai tribe with whom the Crown could enter into such agreements."⁷⁴

The case went to appeal before C.J Morris Carter, Bonham Carter, and J. J. King Farlow in the Court of Appeal for Eastern Africa, in December 1913. The initial verdict was upheld and the action dismissed. The Crown restated its claim that the two agreements did not constitute legal contracts between the Protectorate and the Maasai signatories. The second treaty was termed no more than a "modification" of the first. Morrison, for the Maasai, argued that the existing facts differed from those of 30 years previously. British rule and courts had been established, and the Maasai were not foreigners in the courts but equal to the British in every way.⁷⁵

Justice Morrison made the following remarks: "A treaty can only be entered into with an independent Sovereign State, the chief of which is not subject to the jurisdiction of the Courts as

⁷² Hughes L, Judgment of the High Court in the case brought by the Maasai Tribe against the Attorney-General of the East Africa Protectorate and Others; dated 26th May 1913, page 6

⁷³ Judgment of the High Court in the case brought by the Maasai Tribe against the Attorney-General of the East Africa Protectorate and Others; dated 26th May 1913, page 5

⁷⁴ Hughes L, *Moving the Maasai; A colonial Misadventure*, 164

⁷⁵ Maasai Case, Court of Appeal, E.A.L.R. 5, 80-81.

is the Chief of the Maasai ... If the Maasai took up arms against the Government they would be rebels, liable to penalties for treason, that is to say they have the liabilities and equally the privileges of subjects.”⁷⁶The Privy Council, where the case had been appealed as a final resort, dismissed it on other than legal grounds. It ruled against the case because the plaintiffs had failed to secure costs.⁷⁷

The Maasai community was considered a state for purposes of the 1904 and 1911 Agreements despite the fact that they did not have any sovereign powers. Justice Hamilton defined a treaty as being a pact between nations, and, a nation as distinguished from other people by language, origin, or government.⁷⁸ The court found itself unable to grant relief to the Maasai plaintiffs for the serious damages suffered through deaths of their members and loss of livestock, among others.⁷⁹

Interestingly the law suit failed to challenge the legality of the power to acquire land by the British. It however questioned failure by the British to honour terms of the 1904 Agreement.⁸⁰ The presiding Judge, Justice Hamilton made reference to Lord Kingsdowne in the Privy Council, **Secretary of State for India v K.B. Sahaba** in his final remarks:

“It may have been just or unjust, politic or impolitic, taken as a whole, to those whose interests are affected. These are considerations into which their Lordship cannot enter. It is sufficient to say that even if a wrong has been done, it is a wrong which no Municipal Court of Justice can afford a remedy.”⁸¹

In the case of **Supervisor of Native Affairs v Blantyre and East Africa Company**, Justice John Joseph Numan decided that local chiefs as a class had illegally sold their land to whites.

⁷⁶ Maasai Case, Court of Appeal, E.A.L.R. 5, 80-81.

⁷⁷ Sorrenson M, *Origins of European Settlement in Kenya*, Nairobi: Oxford University Press, 1968, 209.

⁷⁸ Kabourou A, *The Maasai Land Case of 1912; A Reappraisal*, 4

⁷⁹ Report of the Truth, Justice and Reconciliation Commission, Volume II B, 183,

⁸⁰ Kabourou A, *The Maasai Land Case of 1912; A Reappraisal*, 9

⁸¹ Judgment of the High Court in the case brought by the Maasai Tribe against the Attorney-General of the East Africa Protectorate and Others; dated 26th May 1913, 7

Chiefs were not custodians of their tribal lands.⁸² The Maasai community does not place a custodian over their land. The Maasai signatories were merely customary spokesmen and not chiefs.⁸³

It is certainly questionable as to the effect of the Anglo Maasai Agreements of 1904 and 1911 on the Maasai Community. The Court held that the Agreements constituted treaties but not civil contracts contrary to what one would envisage. Despite the fact that the Maasai did not have any sovereign powers, the treaties were termed as acts of a state. One would certainly question the legality of the 'treaties' considering the circumstances in which they were contracted. The Maasai signatories did not represent the Maasai community despite the fact that the British claimed to have chosen them to represent the interests of the entire community. It was merely to fulfil their interests in acquiring the land owned by the Maasai. The Maasai were driven out of their land at gunpoint and corralled along with their cattle in a virtual human zoo.⁸⁴ Coercion imposed on the Maasai does not certainly seem as if the colonial regime had made a pact with the Maasai. The Agreements therefore cannot be termed as contracts that would constitute transfer of land.

3.4 Conclusion

The Maasai community has suffered historical injustices from the inception of the Anglo Maasai agreements of 1904 and 1911. Their land was taken wrongfully without their consent and instead of receiving any compensation they were given inferior substitutes to the land they held during the pre-colonial era. The Maasai community recognized that the wrongful dispossession of land constituted an injustice that has been suffered by many generations. They contested the validity of the agreements but unfortunately the cases were dismissed on the basis of a technicality. Since the dismissal of the cases, no attempt has been made in addressing the grievances of the Maasai community. Justice has not been accorded to the Maasai till to date.

⁸² Judgment dated 28/4/03, Zomba Archives; Hughes L, *Moving the Maasai; A colonial Misadventure*, 2002, 190

⁸³ Hughes L, *Moving the Maasai; A colonial Misadventure*, 190

⁸⁴ Hughes L, *Malice in Maasai land: The historical roots of current political struggles*, 207

CHAPTER 4: PRESENT SITUATION OF THE MAASAI COMMUNITY

Land serves as man's most valuable resource, supporting basic and critical needs of food, shelter and business. Africa's economies particularly rely on agriculture, livestock production, tourism and the exploitation of natural resources.⁸⁵

Cattle is valued highly a mobile form of wealth, medium of exchange, source of food, symbol for relationships and their sacred significance. Increasing numbers of Maasai no longer follow an exclusively pastoral mode of life or restrict their diet to livestock products. Livestock is owned individually but land was not traditionally owned by one person. Customarily the Maasai do not have chiefs or headmen. They were only introduced by the colonial government. Traditionally, authority lay with the age-set spokesmen, elected for their leadership qualities, while spiritual authority was wielded by the prophets.⁸⁶

Before the colonial era, communities in Kenya had their own leadership structures of administering land rights among their members for purposes of construction of shelter, farming, grazing, hunting and gathering. They lived in harmony and occasional fights over territorial claims were resolved by the panel of elders.⁸⁷ The colonial government imposed foreign land tenure relations and conceptual, legal and sociological confusion in traditional tenure systems. It ultimately led to a disruption of African customary land tenure system and laws. Customary law was considered inferior to the private formal property rights based on English law, newly introduced as the tenure for settlers.⁸⁸

In order to attract the white settlers to Kenya, the British protectorate introduced formal land tenure to the country. They also turned plots of Kenyan Maasai land into game reserves aimed at

⁸⁵ Mwathane I, *Land policies in East Africa: Is there way and goodwill for Implementation?* A paper presented to the International Conference on Land policies in East Africa held in Kampala, Uganda on 4-5 October 2012.

⁸⁶ Hughes L, *Moving the Maasai; A colonial Misadventure*, 19

⁸⁷ Mwathane I, *Land policies in East Africa: Is there way and goodwill for Implementation?*

⁸⁸ Kameri-Mbote P, Odote C, Musembi C and Kamande W, *Ours by Right: Law, Politics and Realities of Community Property in Kenya*. Strathmore University Press, Nairobi, 2013

attracting tourists and restricting the Maasai from grazing their cattle. By the end of the colonial rule, the Maasai in Kenya had lost close to half their land and the best grazing areas.⁸⁹

The Maasai claimed that they and their herds succumbed to diseases in the Southern Reserve which were not prevalent in their northern territory, most specifically Laikipia, and that they had been blighted by sickness ever since. They insisted that the land they were moved to was not only grossly inferior to *Entorror* (the Maasai word for the whole of their former northern territory) in terms of water supplies, grazing, and disease vectors, but that the new environment infected and killed them.⁹⁰

In an attempt to solve the deteriorating political climate and the natives advocating for their land, the colonial government set up the Swynnerton commission in 1954 to carry out investigations and make recommendations on how to make the African tenure systems contribute to the development of the colony.⁹¹

After Kenya gained independence in 1964, the government experimented with setting up group ranches. They were created under the Kenya Livestock Development Project and conferred legal ownership over communal land to groups of Maasai pastoralists. Pastoralists who were not part of the group granted ownership were excluded from grazing their animals on these group ranches. Group ranches were set towards private land tenure.⁹²

The group ranches were created for purposes of raising living standards, increasing the chances of procuring loans using the freehold title deed as collateral, minimizing the exploitation of the

⁸⁹ Borwein S, *Privatizing pastures; Land tenure Reform in Kenya's Maasai land*; Volume 4, Issue 2, 2013, 75

⁹⁰ Hughes L; *Rough time in paradise: claims, blames and memory making around some protected areas in Kenya*, 2007, The Ferguson Centre for African and Asian Studies, Faculty of Arts, The Open University, Walton Hall, Milton Keynes MK7 6AA United Kingdom, 311

⁹¹ Swynnerton R, *A Plan to Intensify the Development of African Agriculture in Kenya*, Government Printers, Nairobi, 1955

⁹² Mwangi E, 'The puzzle of group ranch subdivision in Kenya's Maasai land' *Development and Change*, 2007 38(5): 889-910

poor by the rich, promoting Maasai engagement in agricultural and industrial enterprises, and facilitating better maintenance of existing infrastructure.⁹³ Having intended individualized land tenure reform to stimulate economic growth and poverty reduction it had instead, ushered in environmental degradation, increased poverty, increased disparities between the rich and the poor and also threatened the capacity of the Maasai to earn a living through pastoralism.⁹⁴

It is said that perhaps the only reason the Maasai accepted the idea of group ranches was that it gave them protection against further land appropriation from government, against the intrusion of non-Maasai and from a land grab by the elite Maasai.⁹⁵

Individualized land tenure reform has ushered in intensified environmental degradation, increased poverty, increased disparities between rich and poor, and threatened the capacity of the Maasai to earn a living through pastoralism instead of stimulating economic growth and poverty reduction. Having been moved from their best pastures in the north to a southern reserve, it only accounted for half the size of their former territory. The area was about 36,000km² and lower in quality.⁹⁶

Common property regimes were declared incapable of offering an efficient framework for the development of land and associated resources occupied by the natives. The Hardin metaphor was thus translated into legislative policy, which advocated for conversion of common property regimes into individualized private property.⁹⁷

The Swynnerton was a plan to intensify the development of African Agriculture in Kenya. It sought to secure land tenure by promoting acquisition of title by individuals. Allocating the

⁹³ Borwein S, *Privatizing pastures; Land tenure Reform in Kenya's Maasai land*; Volume 4, Issue 2 ,2013,75

⁹⁴ Borwein S, *Privatizing pastures; Land tenure Reform in Kenya's Maasai land*; Volume 4, Issue 2 ,2013,83

⁹⁵ Mwangi E, *The transformation of property rights in Kenya's Maasai land: Triggers and motivations*, International Food Policy Research Institute CAPRI Working, 2005, 109-121

⁹⁶ Rutten M, *Land tenure frontiers and food security among Maasai pastoralists in Kenya*, Kluwen Academic Publishers, 1998, 195

⁹⁷ Okoth-Ogendo HWO, *The tragic African commons: A century of expropriation, suppression and subversion*,112

natives security of tenure over their lands would intensify agricultural production and address the issue of landlessness. The plan thus gave rise to an African middle class but failed to address landlessness especially for those who did not register their land rights, due to lack of appreciation and comprehension of the new system or those that were absent from the process. The plan also failed to appreciate that indigenous peoples preferred to retain their African customary tenure regimes which essentially accommodated the rights of those who resided on those lands.⁹⁸

Indigenous communities, the pastoralists in particular, resisted the individualization of their lands. In 1968, in response to internal pressure, and in a bid to address group rights, particularly in the semi-arid areas where pastoral and nomadic lifestyles demanded collective land rights, the Land (Group Representatives Act) was enacted.⁹⁹ The disadvantage was that the group representatives often disposed of group land without consulting the other members of their groups. There were also questions of legitimacy of the group representatives since they lacked the authority of traditional leaders. In addition, the government policy that favoured individual land rights over group ownership led to defensive subdivision and individual titling of land within group ranches to avoid encroachment by government or other entities.¹⁰⁰

The Anglo Maasai agreements have disadvantaged the Maasai community. They lost land and associated natural resources which could not be substituted to the reserves they were forced to occupy. The concept of commons was undermined by the colonial government as well the government took over after independence. The Anglo Maasai agreements were cause for dispossession of land. In light of this, they have a right to make a claim under the Constitution of Kenya on the basis of the historical injustices. The problem has been ignored in the past and they indeed deserve redress.

“Community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest. Community land consists of— land lawfully registered

⁹⁸ Okoth-Ogendo HWO, *Tenants of the Crown: Evolution of agrarian law and institutions in Kenya*, 69-77

⁹⁹ Land (Group Representatives Act) Laws of Kenya Cap 287

¹⁰⁰ Odote C, *Legal and policy framework regulating community land in Kenya*, 2013, 35

in the name of group representatives under the provisions of any law; land lawfully transferred to a specific community by any process of law; any other land declared to be community land by an Act of Parliament; and land that is— lawfully held, managed or used by specific communities as community forests, grazing areas or shrines; ancestral lands and lands traditionally occupied by hunter-gatherer communities; or lawfully held as trust land by the county government.”¹⁰¹

The Maasai once held a territory that was well-defined with natural boundaries, rivers, mountains, valleys and hills. They practiced their culture and traditions since time immemorial as a sovereign nation.¹⁰² The colonial regime however undermined the customary land tenure held by the Maasai community. The British barely respected the laid out customary tenure with regard to land. As soon as they took hold of the East Africa Protectorate they imposed individualized land tenure contrary to most communities, more so pastoralists such as the Maasai.¹⁰³

Jurisdictions occupied by indigenous people where land was held under a trust such as Tanzania, radical title was supposed to be vested in the people at large. The policy and process of conversion to private property and use through allocation by the state, compulsory acquisition and other irregular purchases, continued unabated the processes of conversion of tenure regimes through adjudication, consolidation and registration, were extended even to the pastoral and other semi-arid areas where the private property regime was clearly inappropriate. Recognition of indigenous values and institutions has served as a meaningful framework for social and economic livelihoods in Africa.¹⁰⁴

The National Land Commission appointed and instituted a Taskforce to formulate legislation on investigation and adjudication of complaints arising out of historical land injustices subject to section 15 of the National Land Commission Act of 2012 and Article 67 of the Constitution of

¹⁰¹Article 63(1),(2), Constitution of Kenya ,2010

¹⁰² Olol- Dapash M., *Maasai Autonomy and Sovereignty in Kenya and Tanzania*, Mining Indigenous Lands,25.1 2001

¹⁰³Okoth-Ogendo HWO, *The tragic African commons: A century of expropriation, suppression and subversion*,113

¹⁰⁴Okoth-Ogendo HWO, *The tragic African commons: A century of expropriation, suppression and subversion*,113

Kenya. The task force mandate was to formulate a bill to provide for investigation and adjudication of claims arising out of historical land injustices. Their duties were to mainly constitute of, first, reviewing literature on the concept of historical injustices with a view to developing a clear, practical, objective and universally acceptable definition as it applies to land in Kenya. Secondly, identify the nature of claims arising out of historical land injustices to provide for national, communal and individual injustices. Thirdly, develop guidelines for investigation of historical land injustices to provide for national, communal and individual injustices. Lastly to conduct stakeholder and expert consultations to receive input on the issues and to develop a draft bill that meets the Constitution, National Land Commission Act 2012, Land Registration Act 2012, Land Act 2012 and Sessional Paper 3 of 2009 provisions.¹⁰⁵

The taskforce having been mandated by the commission to look into historical land injustices has the power to initiate investigations and recommend appropriate redress. The Investigation and Adjudication of Historical Injustices Bill that was formulated by the taskforce has not been passed into law. This bill is paramount as it will serve as a guideline to the taskforce in carrying out their functions with regard to historical land injustices.

¹⁰⁵ Gazette Notice No. 3139, Taskforce on the formulation of legislation on investigation and adjudication of complaints arising out of historical injustices

CHAPTER 5: THE IMPLICATION OF THE CONSTITUTION OF KENYA ON HISTORICAL INJUSTICES

Maasai community are of the view that they were cheated out of their ancestral land through the resettlement programme instituted by the colonial government and later by the Kenyatta government.¹⁰⁶

Individual land ownership is an unfamiliar concept to the Maasai. Land is held communally on behalf of its members irrespective of age and gender. The Maasai community came to be considered as 'acceptees' following the forced evictions from their land by the British in 1904 and 1911. They were dispossessed the best of their land. The British appointed Olonana Ole Senteu as the paramount chief to serve their interests. Of the 16,000 square miles alienated for European settlement, 11,500 square miles (70%) of what became the white highlands was from Maasai land. The British found Olonana to be such great influence over all the Maasai sections and was therefore useful to them.¹⁰⁷

In the case of **Isaka Wainaina & Another v. Murito wa Indagara & Ors**, 1915 Crown Lands Ordinance in Kenya were held to the effect that Africans were mere tenants at will of the Crown with no more than temporary occupancy rights to land. Existing customary laws were thus ignored.¹⁰⁸ It implies the right of the state to confiscate the interests of the natives without compensation. Their natives interests were undermined and their customary way of life as well.

¹⁰⁶Report of the Truth, Justice and Reconciliation Commission, Volume II B, 11,76; Kanyinga K, *The Land Question in Kenya Struggles, accumulation and Changing Politics*, (1988) Phd Thesis

¹⁰⁷Kameri-Mbote P, *Righting wrongs confronting dispossession in post colonial contexts*; keynote speech at the conference on Land, Memory, Reconstruction and Justice; Perspective on Land Restitution in South Africa, 13-15 September 2006, Houw Hoek Inn, Cape Town, 6

¹⁰⁸Kenya Law Reports, 1922-1923, Vol.IX , 102.

The Maasai community has inevitably suffered the most from constitutional dispossession that displaced them their ancestral lands and territories, dispersed them into hostile arid lands and fragmented the process of community disintegration that continues till to date.¹⁰⁹

The Maasai have persistently aired their grievances notably before the Kenya Land Commission in 1932, at the second Kenya Constitutional Conference at Lancaster House, London, in 1962, at the constitutional review discussions in 2003–2004, and threats by Maasai activists to sue Britain again, on the hundredth anniversary of the 1904 agreement.¹¹⁰ In 1932 leading age-set spokesman Parsaloi Ole Gilisho, who had initiated the 1913 lawsuit, gave oral evidence to the Kenya Land Commission in Narok. He expressed bitterness; ‘the Samburu are living in the country in which I used to live. They have gained prosperity and I have had nothing but hardship’.¹¹¹

The Morris Carter Land Commission was set up in 1925 and made several recommendations that sought to address some of the natives’ grievances such as the need for more land and rights. The authorities made and introduced laws on the assumption that problems in the reserves were due to overpopulation, inappropriate land use and defective tenure arrangements.¹¹²

According to the UN Special Rapporteur on Indigenous Peoples, in Laikipia in 2004, Maasai protesters who marked the expiration of leases under the 1904 treaty with the British were severely repressed, resulting in the death of an elder and serious injury to four people. Rape of

¹⁰⁹Kameri-Mbote P, *Righting wrongs confronting dispossession in post colonial contexts*; keynote speech at the conference on Land, Memory, Reconstruction and Justice; Perspective on Land Restitution in South Africa, Cape Town, 13-15 September 2006, 6

¹¹⁰ Syagga P, *Public Land, Historical Land Injustices and the New Constitution*, 7

¹¹¹Kenya Land Commission Evidence (KLC), Vol. 2 (HMSO, Nairobi, 1934). Ole Gilisho gave evidence at Narok on 19 October 1932, pp. 1199–1202. Born Laikipiak but assimilated into the Purko section, Ole Gilisho (c1875–1939); Hughes Lotte, *Malice in Maasai land: The historical roots of current political struggles*; Oxford University Press, 209

¹¹² The Report of the Kenya Land Commission, Carter Report, 1933

women and looting in local villages were also reported as a result of the security operation that ensued.¹¹³

The Constitution of Kenya Review Commission (CRCK), created to form a new Constitution, recognized that the land regime in Kenya faced numerous challenges as result of colonial dispossession of land from the natives, undermining customary laws of the communities in Kenya and land privatization in previously held communal land. Another notable issue was past historical grievances that had not been addressed such as the colonial land dispossession from the Maasai community. The commission also recognized marginalization of pastoral communities due to lack of land from the colonial period. The National Land Commission was identified as the appropriate body to take over matters on land. Some of the recommendations that were made were to make provisions on redress, reparation and compensation on historical injustices committed to the people of Kenya.¹¹⁴

To indigenous groups, land is more than a factor of production. It could be described as a living space within which a complex range of social-cultural and spiritual relationships subsist and are negotiated. Therefore, displacement from such land causes not merely material deprivation, but may result in the physical destruction of the group.¹¹⁵

The National Land Commission notes that the recognition of communal title to land in the Constitution as well as the creation of the National Land Commission, whose mandate includes settling historical land injustices, provides a basis for addressing some if not the majority of these claims.¹¹⁶

¹¹³ Report of the Truth, Justice and Reconciliation Commission, Volume II C, 246; Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen: Mission to Kenya, UN Doc. A/HRC/4/32/Add.3, para. 60

¹¹⁴The Final Report of the Constitution of Kenya Review Commission, 2005,264-285

¹¹⁵Report of the Truth, Justice and Reconciliation Commission, Volume II C, 248; BA Kwonkwo Land Rights of Indigenous Peoples in Africa (2012)

¹¹⁶Report of the Truth, Justice and Reconciliation Commission, Volume II B, 158,

The National Land Policy identifies subsistence farmers, pastoralists, hunters and gatherers as vulnerable groups who require facilitation in securing access to land and land based resources, participation in decision making over land and land based resources and protection of their land rights from unjust and illegal expropriation.¹¹⁷ The National Land Policy also details the land policy principles most of which are relevant for securing community land rights. They include: equitable access to land; secure land rights; access to land information; transparent and good democratic governance of land.¹¹⁸

The importance of recognizing and protecting human rights and the dignity of individuals and communities is fundamental in promoting social justice and realization of the potential of all human beings.¹¹⁹ The rights and fundamental freedoms in the Bill of Rights belong to each individual and are not granted by the State; neither do they exclude other rights and fundamental freedoms not in the Bill of Rights, but recognised or conferred by law, except to the extent that they are inconsistent with this the bill of rights and are subject to the limitations contemplated by the Constitution.¹²⁰

The State has the duty to address the needs of vulnerable groups within society, including minority or marginalised communities, and members of particular ethnic, religious or cultural communities.¹²¹ Every person has inherent dignity and the right to have that dignity respected and protected.¹²² The Maasai being a community that has experienced challenges owing to land dispossession deserve restitution or appropriate redress.

¹¹⁷The National Land Policy, 75

¹¹⁸The National Land Policy, 63

¹¹⁹Article 19(2), Constitution of Kenya 2010

¹²⁰Article 19(3), Constitution of Kenya 2010

¹²¹Article 21(3), Constitution of Kenya 2010

¹²²Article 28, Constitution of Kenya 2010

Every person has the right, either individually or in association with others, to acquire and own property of any description; and in any part of Kenya¹²³ in addition to accessible and adequate housing, and to reasonable standards of sanitation.¹²⁴

Community land shall not be disposed of or otherwise used except in terms of legislation specifying the nature and extent of the rights of members of each community individually and collectively.¹²⁵ National Land Commission has the mandate to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress.¹²⁶

The Constitution of Kenya, 2010 definitely lay a stepping stone towards recognition of historical injustices faced by the people of Kenya. It fundamentally authorized the National Land Commission to initiate proceedings on initiative or complaints into land injustices of the past or present. The Constitution goes further to provide for the fundamental bill of rights which ought to be exercised equally among all citizens. The legislation provides a framework that could be useful if well executed by the relevant players.

The National Land Commission pursuant to Article 67 of the Constitution of Kenya and section 15 of the National Land Commission Act, 2012 appointed and instituted a taskforce to formulate legislation on investigation and adjudication of complaints arising out of historical injustices.¹²⁷ The Investigation and Adjudication of Historical Land Injustices Bill, 2015 crafted by the commission proposed a Special Land Claims Appeal Tribunal where claimants of historical land injustices could address their grievances within five years. The bill however has not come to law. The taskforce is still formulating the legislation of the proposed bill.¹²⁸

¹²³ Article 40, Constitution of Kenya 2010

¹²⁴ Article 40, Constitution of Kenya 2010

¹²⁵ Article 63(4), Constitution of Kenya, 2010

¹²⁶ Article 67 (2)(e), Constitution of Kenya, 2010

¹²⁷ Gazette Notice No. 3139, Taskforce on the formulation of legislation on investigation and adjudication of complaints arising out of historical injustices

¹²⁸ Daily Nation Newspaper, *Draft bill advocates tribunal to address historical injustices*, February 6, 2015

5.2 Conclusion

The Constitution of Kenya does indeed recognize that historical land injustices have taken place in the past. It further provides for the protection of the affected persons under the fundamental bill of rights. The Constitution of Kenya establishes the National Land Commission under as the institution that is responsible for redress of such claims. The taskforce formed by the National Land Commission is responsible for investigation and adjudication of historical injustices arising out of colonial injustices. One of the responsibilities constitutes formulating legislation regarding past historical injustices. The legislation is very important as it will serve as a guideline in handling past historical injustices and providing the appropriate redress for the victims.

CHAPTER 6: THE EXTENT THE ANGLO MAASAI AGREEMENTS CONSTITUTE A BASIS FOR HISTORICAL REDRESS

This chapter will analyse the extent to which the Anglo Maasai agreements constitute a basis for historical redress and a further comparative analysis of South Africa which has experienced historical land injustices during the colonial period and steps taken to realizing the appropriate redress for the claimants.

While land and land-based resources remains the single most important economic factor in Kenya, its mismanagement and maladministration has led to massive human rights violations throughout history.¹²⁹ It was at the core of the anti-colonial wars waged in a number of countries on the continent.¹³⁰

The British administration was keen on increasing the number of settlers after World War 1 in order to increase settler land, boost agriculture and provide them with good infrastructural services. The colonial administration therefore took the most fertile regions inhabited by the Africans. The main injustice on Africans was land alienation and creation of African squatters especially in the Central and Rift Valley regions of colonial Kenya.¹³¹

The colonial administration introduced the Crown Lands Ordinance of 1915¹³² which declared all 'waste and unoccupied' land in the protectorate 'Crown Land' subject to the governor's powers of alienation.¹³³ Further to this, no cognizance to the customary tenures was given by the British and by 1914 nearly 2 million acres of land had been taken from the Kikuyu, Maasai and

¹²⁹ Justice Delay, A Status Report on Historical injustices in Kenya; Kenya Human Rights Commission, April 2011, 11

¹³⁰ Ndung'u Land Report

¹³¹ Report of the Truth, Justice and Reconciliation Commission, Volume II A, 11

¹³² Wanjala S, *Essays on Land Law: The Reform Debate in Kenya*, 2002.

¹³³ Syagga P, *Public Land, Historical Land Injustices and the New Constitution*

Nandi communities. It led to the creation of dual reserves located away from the European settlement.¹³⁴

In a letter, the then Commissioner of the British East Africa protectorate, Sir Charles Eliot to Lord Lansdowne, 11 April 1904 wrote; “I have no desire to protect Masaidom. It is a beastly, bloody system, founded on raiding and immorality, disastrous to both the Maasai and their neighbours. The sooner it disappears and is unknown, except in books of anthropology, the better.”¹³⁵ The British did not have the interests of the Maasai at heart as it would seem, they drove them out of their land to fulfil their selfish gains.

The Maasai community have the right to claim for redress given the historical land injustices as result of the agreements. The principle of entitlement of private property provides a criteria for justifying property acquisition. They comprise the following; the principle of just acquisition of property, the principle of just transfer of property and the principle of rectification of justice where property is unjustly acquired or transferred. The colonial government forced the Maasai into signing the agreements without due knowledge. Further to this, they resettled the Maasai into inferior reserves that could not sustain their livelihoods. The colonial government did not rectify their unjust acquisition of the land from the Maasai.

The Maasai are clear on the fact that they were swindled out of their land through the Maasai Agreements of 1904 and 1911.¹³⁶ The Maasai grazing areas were split by a colonial frontier installed between Kenya and Uganda at the end of the nineteenth century. It is estimated that the Maasai lost one-third of their territory through coercive treaties in 1904 and 1911 and were allowed to retain only small amounts of marginal land in the Kenyan districts of Narok and Kajiado. In Laikipia District, 75 percent of the land still remains in the hands of European owners. The Special Rapporteur observed that traditional rangelands were being fenced off, thus

¹³⁴ Mamdani M, *Citizen and Subject: Contemporary Africa and the Legacy of the Late Colonialism*, 1996; Report of the Truth, Justice and Reconciliation Commission, Volume II A, 11,

¹³⁵ Hughes L, *Moving the Maasai; A colonial Misadventure*, 2002,19

¹³⁶ Report of the Truth, Justice and Reconciliation Commission, Volume II B,157

restricting the movement of the livestock herds of the nomadic pastoralist communities, as well as restraining the natural ecosystems of wildlife, including migratory routes.¹³⁷ After independence in 1963, the formerly closed Maasai districts were opened to immigration from other ethnic groups, based on the false assumption that large areas utilized by the Maasai for seasonal grazing were idle land.¹³⁸ The colonial government dispossessed the Maasai community of their land through the Anglo Maasai agreements which was furthered by the government at independence by allowing other communities to settle on the land previously owned by the Maasai community. It was done in the least consideration of the Maasai who were at the time were occupying the southern reserves that proved rather inferior compared to the land they held initially.

The colonial government undermined the African commons which they saw as an open access. Disregarding customary laws of the Maasai community has also led to their deprivation of livelihood. The Maasai community deserve redress for the injustices experienced. Transitional justice would be important in trying to address the appropriate redress that should be accorded to the Maasai community. Transitional justice encompasses aspect of political justice, socioeconomic justice, institutional reform and the rule of law. It advocates for restoration as a way to realize justice for the victims. Restitution and compensation are some of the modes that address the historical injustice.

In the case of **Ledidi Ole Tauta & Others v Attorney General & 2 others**,¹³⁹ the petitioner claimed pursuant to the Anglo-Maasai agreements signed between the Maasai and protectorate government on 15th August 1904 and 4th April 1911, the Maasai people vacated all the area and land known as Nairobi County and settled on Ngong Hills and surrounding areas. It was the Petitioners averment that the Maasai had been living in the said area as a community practicing their culture and sustaining their economic lifestyle for decades.

¹³⁷Report of the Truth, Justice and Reconciliation Commission, Volume II C, 248

¹³⁸Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen: Mission to Kenya, UN Doc. A/HRC/4/32/Add.3, para. 31

¹³⁹Kenya Law Report; Constitutional Petition 47 of 2010, High Court of Nairobi

The Court held that the forum was not right for the petitioners to voice their claims founded on historical injustices by the colonial masters. The constitution also acknowledges there could have been historical injustices in the manner land issues were handled by past regimes and hence among the functions and mandate of the National Land Commission established under Article 67(1) of the Constitution is to investigate historical injustices and to make recommendations for redress.¹⁴⁰

I am of the opinion that the ruling granted by the Court was unjustified. The Court was not right in indicating that the Court was the wrong forum for the petitioners to voice their claims founded on historical injustices. The Constitution of Kenya does indeed establish the National Land Commission as the body that is responsible for investigating historical injustices and providing appropriate redress. The Constitution however does not provide for a land claims court or tribunal to deal with matters of historical injustices. The petitioners are therefore justified to bring the claim before the High Court. The Investigation and Adjudication bill formulated by the Taskforce instituted by the National Land Commission has not yet come into law. It established a special Court that would deal with matters of historical injustices. The petitioners therefore had the right to therefore bring the claim before the Court.

In light of transitional justice, restitution could be utilized in addressing historical injustices. It intends to restore the condition of the victims to the condition they were previously in had their rights not been violated. The Truth Justice and Reconciliation Commission conducted investigations on historical land conflicts and consequently the National Land Commission was established. The Commission was mandated to carry out investigations on historical land injustices and recommend appropriate redress. The Commission instituted a Taskforce to investigate and adjudicate the historical land injustices. Among its primary task was to formulate legislation. The legislation is yet to be passed. One of the steps that could be taken include institution of a Land Claims Court which can hear and determine the claims. Of importance is to outline a thorough framework of restitution and compensation for the victims.

¹⁴⁰ Kenya Law Report; Constitutional Petition 47 of 2010, High Court of Nairobi, 16

The National Land Policy identifies subsistence farmers, pastoralists, hunters and gatherers as vulnerable groups who require facilitation in securing access to land and land based resources; participation in decision making over land and land based resources; and protection of their land rights from unjust and illegal expropriation.¹⁴¹ The National Land Policy details the land policy principles most of which are relevant for securing community land rights. They include: equitable access to land, secure land rights, access to land information transparent and good democratic governance of land.¹⁴²

The Sessional Paper on the National Land Policy defines historical land injustices grievances as colonial land administration practices and laws that resulted in mass disinheritance of communities of their land, and which grievances have not been sufficiently resolved to date. Sources of these grievances include land adjudication and registration laws and processes, and treaties and agreements between local communities and the British. The grievances remain unresolved because successive post independence governments have failed to address them in a holistic manner.¹⁴³

“Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. They also have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired. States shall give legal recognition and protection to these lands, territories and resources in which such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.”¹⁴⁴

“Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources

¹⁴¹The National Land Policy, 75

¹⁴²The National Land Policy, 63

¹⁴³Sessional paper no 3 of 2009 on National Land Policy

¹⁴⁴ Article 26, United Nations Declaration on the Rights of Indigenous Peoples

which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.”¹⁴⁵

In order to effectively address indigenous peoples’ needs, it is paramount that states acknowledge and give regard to the status and situation of indigenous peoples within their territories. Due regard need not be special or specific to indigenous peoples, but rather one that is suited to redress the historical and continued discrimination and exclusion of all marginalised communities within a state. This could be in the form of protection of fundamental human rights in accordance with their customs and beliefs.¹⁴⁶

The Maasai community was dispossessed of their land through the 1904 and 1911 Anglo Maasai agreements. Land was held communally and access was based on socially defined membership. It excluded other members that did not belong to the particular community. The colonial government however in disregard of the African commons, forcefully evicted the Maasai from their ancestral land.

The Maasai community is an indigenous community owing to the fact that it has suffered historically and marginalized compared to other communities. The State has the responsibility to protect its indigenous peoples’ needs especially with regard to the ownership, occupation and use of land and natural resources. Their rights ought to be protected and their customary practices preserved. The Constitution of Kenya does indeed recognize that past historical injustices have taken place. It establishes the National Land Commission to investigate the historical injustices and recommend appropriate redress. The Maasai community certainly deserve redress for the historical injustices suffered.

“Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary

¹⁴⁵ Article 28, United Nations Declaration on the Rights of Indigenous Peoples

¹⁴⁶ Anaya J ‘*Indigenous peoples’ participatory rights in relation to decisions about natural resource extraction: the more fundamental issue of what rights indigenous peoples have in lands and resources*’ 22 *Arizona Journal of International & Comparative Law*, 2005, 17

compensation or other appropriate redress.”¹⁴⁷ The Maasai community has continued to suffer as a whole owing to the historical injustices they have experienced in the previous century. They have definitely encountered difficulties due to dispossession of land. The Anglo Maasai agreements are responsible for the economic and social problems they continue to face today.

6.2 South Africa

South Africa like many other nations has experienced historical injustices in the past. The Native Administration Act of 1913 was enacted to confine the natives in ‘Bantustans/homelands.’¹⁴⁸ Forced displacement and dispossession was at the heart of the apartheid regime.¹⁴⁹

South Africa took up land restitution as one of the reforms to solve the issue of historical injustices. Land restitution was implemented in the Interim Constitution of 1993 and the subsequent 1996 Constitution and the enabling legislation, 1994 Restitution of Land Rights Act (RLRA). Additionally, the law lay out who qualified for a claim and the set cut off dates to 1913. This was when the Native Administration Act was enacted. Unjust claims and those that had been compensated at the time of dispossession could not be entertained. Claims would be lodged within five years and completed within ten years. Under the RLRA, restitution was in the following forms: land restoration or a right in the land in which the claim was made, alternative state owned land, inclusion of the claimant in state support programme based on housing or development of rural based land, monetary compensation or any other alternative relief.¹⁵⁰

The Restitution of Land Rights Commission (RLRC) and the Land Claims Court were established to handle restitution claims. RLRC received and screened all the claims, verified,

¹⁴⁷Article 33, United Nations Declaration on the Rights of Indigenous Peoples

¹⁴⁸Dorsett S, ‘*Making Amends for Past injustice: Restitution of Land Rights in South Africa*’ Indigenous Law Bulletin, 4(23), Australia, 1999, 911

¹⁴⁹Gibson J, *Overcoming Historical Injustices: Land Reconciliation in South Africa*, Cambridge University Press, 2009, 328

¹⁵⁰Syagga P, *Public land and historical injustices and the New Constitution*, 19

notified the interested parties, prepared project plans for claimants, prepared negotiation positions and presented in court. Additionally it provided post settlement support to claimants, land transfer and secure development funds or financial compensation or other forms of redress if land was not restored. Matters not resolved by the RLRC were referred to the Land Claims Court.¹⁵¹

The deadline having been ten years in 2008, 79, 696 claims had been lodged and only four percent of the claims had not been completed. At the time, 606,000 hectares of land had been delivered, being agricultural and conservation land at US\$440 million having benefited 750,000 people. The process was also met with a number of challenges such as increased land costs, delays in identification of documents to support land claims by current land owners. Some cases therefore remained unresolved due to the challenges faced as well as the opposition to restitution that was met by the current land owners.¹⁵² Restitution in South Africa indeed resolved the claims that were lodged though not entirely, it was deemed rather successful. It serves as a great lesson to Kenya despite the fact that we are different levels of economic development. South Africa is certainly at an advantage due to the fact that it is a developed country as opposed to Kenya which is still developing.

6.3 Conclusion

Kenya has numerous lessons to borrow from South Africa. Kenya should adopt legislation on land restitution. Effective institutions should be put in place to implement the laws on restitution with a clear time limit as to when the matters should be handled. The taskforce on investigation and adjudication of complaints arising out of historical injustices should play the primary role of ensuring that justice is accorded to the victims. The taskforce should on examine all cases of historical injustices on a case by case basis in determining the appropriate redress. The dispossession in relation to land is a basis for claim for land for the historical injustice under the Constitution of Kenya. South Africa has experienced historical land injustices and has been able

¹⁵¹ Syagga P, *Public land and historical injustices and the New Constitution*, 20

¹⁵² Syagga P, *Public land and historical injustices and the New Constitution*, 20

to overcome the injustices by initiating mechanisms that were suitable for the affected indigenous communities.

Kenya can learn from South Africa given that our legislative framework recognizes the need to address historical injustices. Kenya is however limited due to the fact that it is a developing country while South Africa is a developed country. Some of the mechanisms adopted by South Africa such as financial compensation may pose as a challenge to Kenya's economy. Despite the foregoing, an opportunity to correct the historical injustices certainly presents itself. The dispossession in relation to land is therefore a basis for claim for land redress for the historical injustice under the Constitution of Kenya.

CHAPTER 7: CONCLUSION

7.1 Limitations of the study

There is inadequate legislation relating to the redress of historical land injustices within the Kenyan legal framework.

7.2 Recommendations

“Land is indeed Kenya’s most intractable national issue. Access to and ownership of arable land without a doubt underlines the deep-seated political, socio-economic and regional inequities in Kenya.”¹⁵³

The Maasai community has greatly suffered especially through the oppressive colonial regime as opposed to any other community in Kenya. They continue to face enormous challenges that have not been addressed till today. They were merely victims of circumstances. They have experienced economic, social and culture problems owing to the dispossession of their ancestral land by the colonial government. The National Land Commission has not lived up to its mandate from the time of its inception and it has delayed justice for the Maasai community.

There is indeed no doubt that there is unprecedented opportunity to right the historical wrongs that were inflicted upon the African commons by restoration or reconstituting them to a better alternatives alongside other property systems recognized by law.¹⁵⁴The Maasai community deserves redress for the historical injustices they have faced.

The laws of Kenya recognize that historical injustices have been suffered by various communities in Kenya. For this reason the National Land Commission was established to deal with the injustices and other issues relating to land. The legislation is well implemented with regard to land. It would only require the execution by the relevant stakeholders.

¹⁵³Report of the Truth, Justice and Reconciliation Commission, Volume II B, 157,

¹⁵⁴Okoth-Ogendo HWO, *The tragic African commons: A century of expropriation, suppression and subversion*, 116

The National Land Commission ought to play its role in protecting the rights of the indigenous Maasai by providing appropriate redress. The Maasai land problems should be carefully evaluated to provide for solutions that will enable the Maasai to improve their standards of living and also grant them justice for the wrongs that have been committed.

To guarantee the independence of the commission, there ought to be minimal interference from the arms of the government to ensure their decisions and works are objective. The National Land Commission should at the same time be in a position to impose sanctions.

The National Land Commission should also be accessible to the public to enable any individual with a complaint to address it. This would also help the commission to be accountable to the public for all their actions and steps taken to providing appropriate redress.

In adjudicating the claims the National Land Commission should on a case-by-case basis evaluating the land claims and use three approaches to land restitution: First, restoration of land under claim particularly where such land is either undeveloped or can be put to original use by the claimants, secondly financial compensation for lost land at market prices and thirdly grant of alternative land.¹⁵⁵

Maasai indigenous land and other rights must be restored to ensure cultural continuity and basic survival. “Economic and cultural exploitation of the Maasai people is undermining our culture, pride, dignity, spirituality, and our ability to remain self-sufficient through wise use of natural resources.”¹⁵⁶

There is indeed need for recognition that the value of land and resources associated with it goes beyond monetary value to identity of people, general social and political expression. Restitution is not necessarily about giving money or land back. Empathising with people’s plight and situations and finding the best ways of compensating them and including them is very important.

¹⁵⁵ Syagga P, *Public land and historical injustices and the New Constitution*, 25

¹⁵⁶ Olol-Dapash M, *Maasai Autonomy and Sovereignty in Kenya and Tanzania*

Certainly in some instances, giving land back may not even be feasible. Restitution is more of bringing people to identify with the forms of property management and to feel that their best interests are taken care of through guaranteed access to resources and sharing of benefits even if they are not the owners or controllers of the resources.¹⁵⁷

7.3 Conclusion

The Constitution of Kenya and the National Land Commission Act establish the National Land Commission and the given mandate to address historical injustices. The Maasai community deserves redress for the colonial dispossession of land. The Constitution provides a basis for claim of their rights. The commission should therefore initiate the process of providing redress for the Maasai. The taskforce established under the National Land Commission Act on the formulation of legislation on investigation and adjudication of complaints arising out of historical injustices should be proactive in initiating the process of providing appropriate redress. The taskforce should make law regarding historical injustices. Legislators should also seek to draft further laws on restitution. Further delay would certainly be a great hindrance to justice owed to the Maasai community.

¹⁵⁷ Kameri-Mbote P, *Righting wrongs confronting dispossession in post colonial contexts*,9

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