

**Land holding in Kenya: unpacking the concept of efficiency under Article 60(1) of the  
Constitution of Kenya 2010**

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**Declaration**

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

Signed: .....

Date: .....

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

Signed: .....

[Claude Kamau]

## **Abstract**

*In Kenya, the principle of efficient land holding is espoused in Article 60(1) of the Constitution of Kenya. This supreme law requires that land be held in a manner that is efficient. However, there is a lack of a framework to facilitate the understanding of what the concept of efficiency, specifically efficient land holding entails in its entirety. Failure to understand this principle in its entirety will result in legislative attempts that are defective and judgements by the court that do not reflect the principle of efficiency. Furthermore, the allocations that are made by institutional officers following the legislation and judgements will fall short of bringing to life this principle. This study will attempt to deconstruct what the concept of efficiency entails and provide a supporting framework that could be used by both the legislature and the court to bring life to this constitutionally provided provision. Building on the existing interpretations of efficient land holding, this study asks: how can the principle of efficiency be interpreted at the legislative and allocative level. In this context, efficiency, as an economic principle is viewed as actions that lead to high benefits where the marginal benefits following the allocation of resources is equal to the marginal social costs. Based on a review of existing literature relating to efficient land holding in Kenya, there is currently no existing framework to determine how efficiency will be interpreted to facilitate legislative attempts to realise this principle for land allocations. Nonetheless, the results of this study indicate that a framework that encompasses the concept of Pareto efficiency and the Kaldor-hicks efficiency model serves as useful method to interpret the principle of efficient land holding in Kenya. On this basis, this framework can also be used in interpreting the principle at the legislative level. A case in point is recently when a commendable attempt was made by the legislature to draft The Minimum and Maximum Land Holding Acreage Bill 2015 to realise this principle. Failure to interpret the principle of efficiency will continue to stand in the way of any efforts to breathe life into this constitutionally provided principle.*

## **List of Abbreviations**

1. AE - Allocative Efficiency
2. CKRC - Constitution of Kenya Review Commission
3. DE - Dynamic Efficiency
4. MMLHA – Minimum and Maximum Land Holding Acreage
5. NLP - National Land Policy
6. PE - Productive Efficiency

## **List of Cases**

*Mellinger V city of Houston* (1887), Supreme Court of Texas.

## **List of Legal Instruments**

1. *Constitution of Kenya* (2010).

# CHAPTER ONE: INTRODUCTION

## 1.1 Background to the study

The universal definition of efficiency denotes measuring whether resources are being utilized to get the most value for money.<sup>1</sup> Another form of efficiency includes overall economic efficiency which is achieved when individuals in society maximize their utility,<sup>2</sup> given the resources available in the economy. Consequently– as regulators such as the legislature strive to achieve - an increase in economic efficiency of holding land improves the wellbeing of the members of the community.<sup>3</sup> However, to achieve efficient use of resources, it is vital to understand what constitutes efficiency. Overall economic efficiency, as a concept, can be further categorized into three facets which will be discussed in Chapter two and other subsequent Chapters of this study. They are Maximum productive efficiency (PE); allocative efficiency (AE); and dynamic efficiency (DE).<sup>4</sup>

Chapter 5 of the Constitution of Kenya (COK) provides for land related matters.<sup>5</sup> This is arguably because of the nature of land being a critical resource to the economic, social and cultural development of Kenya.<sup>6</sup> It is also fundamental to the growth of an economy, reduction of poverty and achieving gender equity. To ensure this, Article 60(1)<sup>7</sup> provides for the principles of land policy. It proffers that land in Kenya shall be held, used and managed in a manner that is efficient *inter alia* and the principles that will guide this provision include:

‘the principle of equitable access to land, security of land rights; sustainable and productive management of land resources; transparent and cost-effective administration of land; sound conservation and protection of ecologically sensitive areas; elimination of gender discrimination in law; customs and practices related to land and property in land; and encouragement of communities to settle land disputes through recognized local community initiatives consistent with this constitution.’<sup>8</sup>

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<sup>1</sup> Palmer S, Torgerson D, ‘Economic Notes: definitions of efficiency, 1136.

<sup>2</sup> Bentham defines utility as that which is derived from property in any object that produces a benefit, advantage, good, pleasure or happiness. Utility is synonymous to satisfaction, well-being, welfare, happiness, pleasure. It can be increased by purchasing things one desires. Kapteyn A, ‘Utility and economics’ University of Southern California, De economist Working Paper Number 133, January 1985, 1.

<sup>3</sup> Palmer S, Torgerson D, ‘Economic Notes: definitions of efficiency, 1136.

<sup>4</sup> Palmer S, Torgerson D, ‘Economic Notes: definitions of efficiency, 1136.

<sup>5</sup> Chapter 5, *Constitution of Kenya* (2010).

<sup>6</sup> Constitution of Kenya Review Commission, Final draft, 2005, 264.

<sup>7</sup> Article 60, *Constitution of Kenya* (2010).

<sup>8</sup> Article 60(1), *Constitution of Kenya* (2010).

This above provision is a product of the grievances of the citizens of Kenya documented in the Constitution of Kenya Review Commission (CKRC) report regarding land tenure and land administration. The grievances stem from the land expropriations in colonial and post-colonial Kenya.<sup>9</sup> These grievances - such as ‘private land not being used or occupied’ – revealed to the commission the need for a comprehensive land policy, revised and rationalized land laws, and a land administration system that is efficient and transparent to deal with the rights of persons holding land in Kenya.<sup>10</sup>

Following the promulgation of the COK 2010, Article 60(2) provides for the principles espoused in Article 60(1) to be implemented through a National Land Policy (NLP).<sup>11</sup> In 2004, drafting of a ‘comprehensive National Land Policy’ began.<sup>12</sup> This document embodied the dialogue and collaboration that took place between the Government and the Citizenry with a vision to ‘guide the country towards a sustainable and equitable use of land as a resource.’<sup>13</sup> This paper was also intended to serve as a starting point for a framework for both the legislative and administrative work that would be arise.<sup>14</sup>

In 2015, the Legislature, in accordance with Article 68(c)(i),<sup>15</sup> drafted a Bill known as the Minimum and Maximum Land Holding Acreage Bill (MMLHA). This Bill sought to reduce the inefficient land holding that exists in Kenya following the number of people in Kenya who own large tracts of land which are not exploited appropriately.<sup>16</sup> The object and purpose of that Bill was to *inter alia*, regulate subdivision of land in order for land to be held in a manner that is economical and the parcels were viable.<sup>17</sup> This was to be achieved through the determination of the minimum and maximum acreage in which private land will be held.<sup>18</sup> To this point, the Bill is arguably the closest Kenya has come to reducing if not ending the problem of holding land inefficiently.

The MMLHA is a product of Section 159 of the Land Act which instructs the Cabinet Secretary (CS), within one year from commencement of the Act, to undertake a scientific study. The

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<sup>9</sup> Constitution of Kenya Review Commission, Final draft, 2005, 276.

<sup>10</sup> Constitution of Kenya Review Commission, Final draft, 2005, 279.

<sup>11</sup> Article 60(2), *Constitution of Kenya* (2010).

<sup>12</sup> Ministry of Lands, ‘National Land policy’, Sessional Paper No. 3, 2009.

<sup>13</sup> Ministry of Lands, ‘National Land policy’, Sessional Paper No. 3, 2009.

<sup>14</sup> Ministry of Lands, ‘National Land policy’, Sessional Paper No. 3, 2009.

<sup>15</sup> Article 68 (c) (i) provides that Parliament shall enact legislation to prescribe minimum and maximum land holding acreages in respect of private land. Article 68 (c)(i), *Constitution of Kenya* (2010).

<sup>16</sup> Ministry of Lands, ‘National Land policy’, Sessional Paper No. 3, 2009.

<sup>17</sup> Section 3(c), *Minimum and Maximum Land Holding Acreage Bill*, 2015.

<sup>18</sup> Section 3(a), *Minimum and Maximum Land Holding Acreage Bill*, 2015.

purpose of this study is to ascertain the economic viability of minimum and maximum acreages of private land for several land zones.

From this, we can discern that the Bill's orientation with respect to efficiency is based on the size of land holdings. However, the absence of a model or methodology to be used to determine what land sizes would amount to efficient holding is a stumbling block. This in turn adversely affects land distribution which is critical to the economic development of Kenya. This is depicted where a number of Kenyans, do not have access to land that will render them capable to undertake useful economic activities. Another contributing factor is the principles of land holding not being understood and upheld by the institutions dealing with land rights. The 'haphazard, expensive, lengthy, cumbersome, littered with bureaucratic red tape' land allocation process which exists for delivering land rights in Kenya is also not to be overlooked.<sup>19</sup> Such a poor allocative process contradicts one of the principles of land holding in Kenya hence, results in many Kenyans being denied access to land. This consequently leads to land not being held, managed or utilized in a manner that is efficient.<sup>20</sup> As this study will attempt resolve, the problem relates to the lack of a proper understanding of what the concept of efficiency denotes. This further deprives an individual who seeks to maximize the use of the land an opportunity to achieve the overall well-being of the individual and the society as a whole.

## **1.2 Background to the Problem**

Having established the legislative and policy provision for efficiency in an attempt to deal with the problem of land holding, it would be a glaring oversight for this study to fail to discuss the root of the problem that resulted in efficiency forming part of the principles of landing.

### **1.2.1 Holding land in Kenya Pre-independence and Post-independence**

The advent of colonialism and the radical changes relating to ownership, control and use of land by the indigenous communities in Kenya led to this immovable resource being one of the key reasons for the struggle of independence since 1963.<sup>21</sup>

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<sup>19</sup> Gikwa, C, 'Public administration Re-engineering (PAR): A case of Land Administration in Kenya' Published, University of Nairobi, Nairobi, 2010, 3.

<sup>20</sup> Gikwa, C, 'Public administration Re-engineering (PAR): A case of Land Administration in Kenya' Published, University of Nairobi, Nairobi, 2010, 3.

<sup>21</sup> Constitution of Kenya Review Commission, Final draft, 2005, 264.

In Kenya 88.4% of Kenyans who own or have access to less than three hectares of land each,<sup>22</sup> leaving 28.9% of the population landless and 27% having access to less than one hectare.<sup>23</sup> These sharp figures illustrate the harsh reality that a small portion of the population which comprises of remaining white settlers, large-scale farmers, power-brokers, current and former politicians, and business people, most of whom are politically connected persons of past, present and post-independence governments, own hundreds of thousands of hectares of land in Kenya.<sup>24</sup> Land holding in Kenya by these elite individuals and their companies are concentrated in Kenya's 17-20% of arable land thus, leaving half of the arable land nationwide being owned by 20% of the population. <sup>25</sup>

Looking back at the history of the struggle of land holding in Kenya, the struggle emerged with respect to ownership, use and management and their adverse contribution to the principles of land-holding.<sup>26</sup> These struggles originate from the land question in Kenya. Patricia Kameri-Mbote observes that 'it is apt to say that there is not a single land question in Kenya but multiple land questions begging for attention and resolution' following the numerous grievances that have been given expression to over time.<sup>27</sup> Present-time manifestations of the land question in Kenya include dispossessions,<sup>28</sup> disparities in land holding,<sup>29</sup> overemphasis on land as a form of property,<sup>30</sup> illegal acquisitions,<sup>31</sup> multiplicity of land laws and break down of land institutions,<sup>32</sup> environmental degradation,<sup>33</sup> poor land use planning<sup>34</sup> and marginalized groups and their rights.<sup>35</sup> In respect of the relevance of this study, it shall dwell on the disparities in land holding. This is because it illustrates the large tracts of land being vested in the hands of

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<sup>22</sup> Syagga P, Land ownership and Use in Kenya: Policy Prescriptions from an inequality perspective' published, University of Nairobi, Nairobi, 316.

<sup>23</sup> Syagga P, Land ownership and Use in Kenya: Policy Prescriptions from an inequality perspective' published, University of Nairobi, Nairobi, 318

<sup>24</sup> Atieno B, 'Assessing the effectiveness of the National Land Commission in addressing irregular and illegal allocation of Land in Kenya' published, University of Nairobi, Nairobi, 2016, 40.

<sup>25</sup> Syagga P, 'Public land, historical injustices and the New Constitution' Society for International Studies, Constitutional Paper No. 9, 16,-<  
[http://constitutionnet.org/sites/default/files/public\\_land\\_historical\\_land\\_injustice\\_and\\_the\\_new\\_constitution-wp9.pdf](http://constitutionnet.org/sites/default/files/public_land_historical_land_injustice_and_the_new_constitution-wp9.pdf)> on 5 November 2019.

<sup>26</sup> Kariuki F, Ouma S and Ng'etich R, *Property Law*, Strathmore University Press, Nairobi, 2016, 171.

<sup>27</sup> Kameri-Mbote K, 'The land question in Kenya: legal and ethical dimensions' Published, Strathmore University and Law Africa, Nairobi, 2009, 1.

<sup>28</sup> Kariuki F *et al*, *Property Law*, 173.

<sup>29</sup> Kariuki F *et al*, *Property Law*, 175.

<sup>30</sup> Kariuki F *et al*, *Property Law*, 176.

<sup>31</sup> Kariuki F *et al*, *Property Law*, 178.

<sup>32</sup> Kariuki F *et al*, *Property Law*, 179.

<sup>33</sup> Kariuki F *et al*, *Property Law*, 180.

<sup>34</sup> Kariuki F *et al*, *Property Law*, 182.

<sup>35</sup> Kariuki F *et al*, *Property Law*, 183.

a few individuals while a majority remain landless following the arrangements by the colonial government to exploit land for production in Kenya.<sup>36</sup>

The land laws that were existent before 2012 resulted in a convoluted land management and administration system. This in turn led to problems such as *inter alia* under-utilization and abandonment of land such as agricultural land. An attempt to address these problems was seen when the government formulated the NLP with the aim of creating a policy that will establish a vision to guide the country towards a sustainable & equitable use of land.<sup>37</sup> At the cradle of its conceptualization, the predicaments it sought to tackle was, *inter alia*, disparities in holding land in Kenya.<sup>38</sup> In doing so, the document singles out three facets: legal, economic and political.<sup>39</sup> The economic aspect of the report reveals the importance of resolving the disparity in land holding to achieve economic growth for the country failure to which large tracts of land will continue to be held and used inefficiently by the owner of the property right.

A look at the political facet reveals, contrary to what many Kenyans envisioned, the progression of policies being accepted by the independence government from the colonial government. Justification for this adoption was based on need to protect property owned by both the settlers who decided to remain in the country and individuals who left to still be able to receive compensation for losing their property.<sup>40</sup> With respect to the legal facet, at the time of independence, there existed a duality in the legal regime where both African Customary Law and laws introduced by the colonial government governed the land tenure system in Kenya. Nevertheless, African Customary Law was subjugated to the statutory land tenure systems.<sup>41</sup> The subsequent effect of this system of governance, was ‘economic relationships that consisted of an export enclave controlled by a small number of European settlers and subsistence periphery operated by a large number of African peasantry.’<sup>42</sup> The dual system of governance also created: a structure where distribution of land was set apart by being highly degraded and disintegrated small holdings and at the same time large holdings of potential land; and development of the economy of the European sector at the expense of undervaluing the African sector through the creation of policies. Consequently, this policy birthed the problem of

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<sup>36</sup> Kariuki F *et al*, *Property Law*, 172.

<sup>37</sup> Ministry of Lands, ‘National Land policy’, Sessional Paper No. 3, 2009.

<sup>38</sup> Ministry of Lands, ‘National Land policy’, Sessional Paper No. 3, 2009.

<sup>39</sup> Ministry of Lands, ‘National Land policy’, Sessional Paper No. 3, 2009.

<sup>40</sup> Kariuki F *et al*, *Property Law*, 171.

<sup>41</sup> Kamei- Mbote K, ‘The land question in Kenya: legal and ethical dimensions’ Published, Strathmore University and Law Africa, Nairobi, 2009, 1.

<sup>42</sup> Kariuki F *et al*, *Property Law*, 175.

disparities in land holding as seen in the large tracts of land being vested in the hands of a few individuals while a majority remain landless. In embracing this policy, the government and the colonial settlers allowed for the application of the provision that a large number of Africans be relocated to the reserves which were known to be unproductive. This paved way for the colonial settlers to take over the large tracts of land that was productive and capable of practicing commercial agriculture.

This problem of holding land trickled down and is unwavering even after Kenya attained independence. Both the succeeding presidents i.e. the late President Jomo Kenyatta and President Daniel Arap Moi also procured large farms with the former amassing land in both the coastal and central regions and the latter securing immeasurable farms in Rongai areas in the Rift Valley, Njoro and Nakuru.<sup>43</sup> The succeeding presidents also rewarded their friends with large tracts of land thus, leaving countless people landless while a few individuals continued to hold colossal tracts of land.<sup>44</sup> The impacts of this form of generational discrimination in succession are several. They include: deterioration in land quality following the poor land use practices and issues of squatters and landlessness, unproductive and speculative land holding especially by the elite, *inter alia*.<sup>45</sup>

### **1.2.2 Land holding in Kenya Post 2010**

Currently, the COK 2010 in Article 60(1) requires that land be held, used and managed in a manner that is efficient.<sup>46</sup> However, prior to the COK requiring the establishment of institutions dealing in land governance, the previous existing institutions are seen to be inadequate in establishing an institutional framework for efficient land ownership, administration and management. Reasons for this are grounded on the inequitable, inefficient, highly centralized, complex and bureaucratic nature of the institutions.<sup>47</sup> It is for this reason that there is inequitable distribution of land in Kenya and denial of access to land rights, and ineffective governmental regulation of private property rights resulting in unplanned settlements and environmental degradation.<sup>48</sup> Attempts to resolve this issue of disparities in land holding are evident in the NLP where land rights ought to be used to realize justice and equity. The NLP

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<sup>43</sup> Kariuki F *et al*, *Property Law*, 175.

<sup>44</sup> Kariuki F *et al*, *Property Law*, 175

<sup>45</sup> Kameri- Mbote K, 'The land question in Kenya: legal and ethical dimensions' Published, Strathmore University and Law Africa, Nairobi, 2009, 13.

<sup>46</sup> Article 60(1), *Constitution of Kenya* (2010).

<sup>47</sup> Kariuki F *et al*, *Property Law*, 339.

<sup>48</sup> Kameri- Mbote K, 'The land question in Kenya: legal and ethical dimensions' Published, Strathmore University and Law Africa, Nairobi, 2009, 19.

of 2009 also proposed the need to recondition the existing institutions governing land administration and use in Kenya. This is achieved through the use of a strategy that involves restructuring holding rights in land while being mindful of the glaring disparities in land ownership and gender and transgenerational discrimination in succession, land transfers and the process that involves decision making over matters that pertain to land.<sup>49</sup> To solve the problems surrounding the institutional framework governing land administration, the supreme law provides for need to recondition the institutional framework and the land laws to be enacted.<sup>50</sup> The current institutions dealing with land administration are the National Land Commission, the Community Land Management Boards, the Ministry of Land and Physically Planning and the Environment and Land Court.<sup>51</sup>

Having understood the origin of the problem this study purports to delve into, it is indisputable that the concept of holding land efficiently in Kenya calls for anatomization. With issues such as the question of disparities in land holding have contributed to the challenge of holding land efficiently in Kenya. The NLP, through putting an end to the disparities in land holding, seeks to establish a system where land is administered efficiently by the citizens of Kenya. In a discussion with many stakeholders in Kenya, the institution of surveyors of Kenya report documents that there is still need to prescribe minimum land acreage sizes for land ownership for purposes of avoiding sub-divisions to uneconomic land sizes that amount to inefficient land holding.<sup>52</sup> This then calls for the need to investigate and understand what the concept of efficiency entails in its entirety.

### **1.3 Statement of the problem**

The COK in Article 60(1) requires that land be held, used and managed in a manner that is efficient. Accordingly, the predicament exists in interpreting the principle of efficiency which is meant to be used at the point of allocation and use of land. This is due to the lack of a supporting framework to facilitate a clear interpretation of what the concept of efficiency encompasses. The consequence of this predicament is the continuance of varied defects in the allocation and use of land in Kenya. What's more, without a clear understanding of this

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<sup>49</sup> Kameri- Mbote K, 'The land question in Kenya: legal and ethical dimensions' Published, Strathmore University and Law Africa, Nairobi, 2009, 3.

<sup>50</sup> *Constitution of Kenya* (2010).

<sup>51</sup> Kariuki F *et al*, *Property Law*, 339.

<sup>52</sup> Institution of Surveyors of Kenya, *Report on Minimum and Maximum Land Holding Acreage in Kenya*, March 2016, 13.

principle, legislative attempts to resolve issues pertaining to land holding that have plagued Kenya Pre and Post-independence will continue to bear no fruit. The resulting effect of the absence of a supporting framework that embodies an understanding of the efficiency principle is mere compliance of the letter of the law without properly understanding the spirit of the law.

#### **1.4 Justification of the Study**

Land is a fundamental resource in Kenya's economic, social, political and cultural history.<sup>53</sup> Lack of access to land is a major determinant of poverty in Kenya.<sup>54</sup> This is because of its nature as a key asset for the rural and urban poor where it provides for a foundation for economic activity and the functioning of market and non-market institutions in many developing countries.<sup>55</sup> It also creates an avenue for generation of livelihood and acts as a vehicle for investing and accumulating wealth for the transfer between generations.<sup>56</sup>

Kenya has a total land area covering 576,076 km<sup>2</sup>.<sup>57</sup> Failure to develop a framework that effectively interprets the principle of efficient land holding will only yield fruitless results in attempts to effectively deal with issues such as the disparities in land holding in Kenya. This leads to inefficient use where some of the large units are not efficiently farmed. This has led to poor productivity from the land, thereby resulting in malnutrition, famine and increased poverty, hence the use of land ceilings to achieve the principle of efficiency.<sup>58</sup> This goes to show the need to understand what amounts to efficient holding land for purposes of facilitating proper efficient management and administration of land through the constitutional required legislative measure termed as the MMLHA Bill 2015.

#### **1.5 Research objectives**

The overarching objective of this study is to unpack the concept of efficiency of land holding in Kenya. To achieve this, the study will aim

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<sup>53</sup> Constitution of Kenya Review Commission, Final draft, 2005, 264.

<sup>54</sup> International Land Coalition, *Irregular and Illegal land acquisition by Kenya's elites: trends, processes and impacts of Kenya's land-grabbing phenomenon*, January 2011, 3.

<sup>55</sup> World Bank Policy, Land Policies for growth and poverty reduction, 2003, xvii.

<sup>56</sup> World Bank Policy, Land Policies for growth and poverty reduction, 2003, xvii.

<sup>57</sup> Institution of Surveyors of Kenya, *Report on Minimum and Maximum Land Holding Acreage in Kenya*, March 2016, 5.

<sup>58</sup> Institution of Surveyors of Kenya, *Report on Minimum and Maximum Land Holding Acreage in Kenya*, March 2016, 5.

1. To clarify the concept of efficient land holding at the interpretation level;
2. To examine the relationship between the additional principles governing land holding in Kenya in Article 60(1) of the COK against the principle of efficiency; and
3. To propose a concise framework to interpret the principle of efficiency that will realise efficient land holding at the legislative and allocative level in Kenya.

### **1.6 Research questions**

The underlying question this study seeks to answer is how should the principle of efficient land holding in Kenya be interpreted? To answer this, the study will be structured around the following research questions:

1. How is the principle of efficiency interpreted?
2. What is the relationship between the additional principles in Article 60(1) of the COK and allocating land efficiently in Kenya?
3. What is the appropriate framework to be adopted at the legislative level to reflect the principle of efficient land holding?

### **1.7 Hypothesis**

Considering the research questions framed above, this study will hypothesize as follows:

- i) There is a need to interpret and understand the concept of efficient land holding.
- ii) Failure to understand the relationship between the principle of efficiency with regards to the four additional principles of land holding in Article 60(1) of the COK will continue to result in poor interpretation of the principle and consequently inoperative legislative attempts, inefficient land allocation by institutions, and use of land that is appalling in nature.
- iii) A clear understanding of what constitutes efficiency will contribute significantly to the attainment of Article 60(1) of the COK in relation to efficient land holding.

### **1.8 Literature Review**

The existing literature surrounding the concept of efficiency and the problem of inefficient land holding in Kenya is wide however, literary contributions to this problem have not effectively addressed the concept of efficiency and what should amount to efficient land holding for the legislature to draft a more informed law that will reduce, if not end the inequitable and inefficient allocation of land.

### 1.8.1 What constitutes efficiency?

Generally, efficiency is defined as the greatest return on capital and labour invested from the area available.<sup>59</sup> Timothy Archer posits that efficiency is defined as the measure of effectiveness that produces the minimum waste of time, effort and skill. Similar to Archer, Uwe E. Reinhardt further contends that in vernacular terms, to be efficient means not to be wasteful.<sup>60</sup> He however, goes on to criticize this definition when applied in a larger context such as an entire health system. The analogy he uses is where a public health facility gives a woman a screening mammogram free of charge when in fact she would have been in the position to pay at most \$30, but the cost is \$60 to produce. If the government run health insurance system offered patients first dollar health insurance all around, it would be viewed as less efficient as opposed to allowing for substantial cost-sharing on patients and leaves millions of them uninsured to confront the full cost of the health care they consume.<sup>61</sup>

In the 19<sup>th</sup> century Vilfredo Pareto, an Italian economist propounds that a situation is also said to be economically efficient if no one can be made better off without making someone else worse off. This is referred to as Pareto efficiency.<sup>62</sup> A situation is also economically efficient when no additional output can be obtained without having to increase the amount of inputs and that production proceeds at the lowest possible per-unit cost.<sup>63</sup> The overall Pareto efficiency in an economy can be further classified into efficiency in the production of goods and services and efficiency in the distribution of services from producers to end users.<sup>64</sup> The study will focus on the latter classification as it is in line with the aim of this study i.e. to understand what amounts to efficient land holding in Kenya as a result of distribution or exchange of this resource from one person to another.<sup>65</sup>

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<sup>59</sup> Food and Agriculture Organization of the United States, *Guidelines for land-use planning*, FAO Development Series No. 1, 1993.

<sup>60</sup> Reinhardt U, 'Reflections on the meaning of efficiency: can efficiency be separated from equity?' 10 Yale Law & Policy Review 2, 1992, 302.

<sup>61</sup> Reinhardt U, 'Reflections on the meaning of efficiency: can efficiency be separated from equity?' 302.

<sup>62</sup> Popa F, 'on Pareto efficiency and equitable allocations of resources' Romanian journal of economic forecasting, 2007, 73, -  
<[https://www.researchgate.net/publication/24047492\\_On\\_Pareto\\_efficiency\\_and\\_equitable\\_allocations\\_of\\_resources](https://www.researchgate.net/publication/24047492_On_Pareto_efficiency_and_equitable_allocations_of_resources)> on 4 November 2019.

<sup>63</sup> Popa F, 'on Pareto efficiency and equitable allocations of resources' Romanian journal of economic forecasting, 2007, 73, -  
<[https://www.researchgate.net/publication/24047492\\_On\\_Pareto\\_efficiency\\_and\\_equitable\\_allocations\\_of\\_resources](https://www.researchgate.net/publication/24047492_On_Pareto_efficiency_and_equitable_allocations_of_resources)> on 4 November 2019.

<sup>64</sup> Reinhardt U, 'Reflections on the meaning of efficiency: can efficiency be separated from equity?' 10 Yale Law & Policy Review 2, 1992, 302.

<sup>65</sup> Reinhardt U, 'Reflections on the meaning of efficiency: can efficiency be separated from equity?' 10 Yale Law & Policy Review 2, 1992, 302.

Allocation of resources is economically efficient where another reallocation will not make one person better off without making another person worse off. There exist three sufficient conditions for economic efficiency: ‘all users achieve same marginal benefit; all suppliers operate at same marginal cost; and every user’s marginal benefit equals supplier’s marginal cost. When marginal benefit is less than marginal cost, society overall could gain by reducing provision of that item, and vice versa.’ Thus, an economically efficient allocation is equivalent to maximum (sum of) buyer surplus and seller surplus. On the other hand, an allocation can also be termed as Pareto superior where the allocation, ‘if and only if makes at least one person feel better off and no one feel worse off.’<sup>66</sup>

Pareto improvement, unlike Pareto superiority involves an allocation which puts at least one individual in a better position without making another individual worse off.<sup>67</sup> While there can be many improvements to be made as regards to the distribution of a resource to make both parties happy, a situation where any change in the distribution of a resource would result in leaving at least one person worse off can occur. This is referred to as Pareto optimal.<sup>68</sup> However, Florin Popa criticizes the concept of Pareto efficiency upon its application in determining the distribution of scarce resources.<sup>69</sup> This is because the concept of Pareto efficiency does not explicitly provide a criterion that can be used to determine distribution of resources in the event that there are many possible Pareto- efficient distributions.<sup>70</sup> Pareto efficiency also fails to yield allocations that are socially desirable because of the absence of a guarantee that the Pareto distributions will be equitable.<sup>71</sup> This criticism has also been developed by Amartya Sen where he avers that plausible conditions where social choices are

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<sup>66</sup> Reinhardt U, ‘Reflections on the meaning of efficiency: can efficiency be separated from equity?’ 307.

<sup>67</sup> Monowaruz Z, ‘An unbiased Pareto Improvement strategy for poverty alleviation’ Munich Personal RePEc Archive, MPRA Working paper No. 27800, January 2011, 4 -<[https://mpra.ub.uni-muenchen.de/27800/1/AN\\_UPI\\_Strategy\\_for\\_PA\\_12.31.10.pdf](https://mpra.ub.uni-muenchen.de/27800/1/AN_UPI_Strategy_for_PA_12.31.10.pdf)> on 4 November 2019.

<sup>68</sup> Popa F, ‘on Pareto efficiency and equitable allocations of resources’ Romanian journal of economic forecasting, 2007, 73, -<[https://www.researchgate.net/publication/24047492\\_On\\_Pareto\\_efficiency\\_and\\_equitable\\_allocations\\_of\\_resources](https://www.researchgate.net/publication/24047492_On_Pareto_efficiency_and_equitable_allocations_of_resources)> on 4 November 2019.

<sup>69</sup> Popa F, ‘on Pareto efficiency and equitable allocations of resources’ Romanian journal of economic forecasting, 2007, 73, -<[https://www.researchgate.net/publication/24047492\\_On\\_Pareto\\_efficiency\\_and\\_equitable\\_allocations\\_of\\_resources](https://www.researchgate.net/publication/24047492_On_Pareto_efficiency_and_equitable_allocations_of_resources)> on 4 November 2019.

<sup>70</sup> Popa F, ‘on Pareto efficiency and equitable allocations of resources’ Romanian journal of economic forecasting, 2007, 77, -<[https://www.researchgate.net/publication/24047492\\_On\\_Pareto\\_efficiency\\_and\\_equitable\\_allocations\\_of\\_resources](https://www.researchgate.net/publication/24047492_On_Pareto_efficiency_and_equitable_allocations_of_resources)> on 4 November 2019.

<sup>71</sup> Popa F, ‘on Pareto efficiency and equitable allocations of resources’ Romanian journal of economic forecasting, 2007, 79, -<[https://www.researchgate.net/publication/24047492\\_On\\_Pareto\\_efficiency\\_and\\_equitable\\_allocations\\_of\\_resources](https://www.researchgate.net/publication/24047492_On_Pareto_efficiency_and_equitable_allocations_of_resources)> on 4 November 2019.

pareto efficient exists however the allocations are inequitable.<sup>72</sup> The last criticism by Popa pertains to the fact that pareto efficiency does not consider the origin of resources or certain rights or entitlements that are associated with it. Instead, it only considers the present distribution of these resources.<sup>73</sup> The study will rely on this criticism to illustrate the importance of a relationship between security of land rights and the realisation of the principle of efficiency as interpreted by Pareto.

James G. March goes on further to list five assumptions that are commonly used in understanding the concept of efficiency.<sup>74</sup> The first assumption is that preferences are absolute. This implies that individuals take their own preferences for granted without questioning their relevance or ‘rationality.’ Others include preferences that are considered relevant because they are consistent with preferences or that preferences are consistent and transitive given the individuals well thought out analysis of his or her own preferences. The last assumption is that preferences are determined by decisions and the decision itself does not affect the preference.<sup>75</sup> The last assumption is of particular relevance to this study in outlining how decisions to be reached by legislative bodies, courts or institutional persons when determining how to allocate land fails to affect what an individual still desired to hold. The decision following the interpretation of the principle of efficiency will determine what the individual holds.

The origin of rights and claims against property is fostered in the economic sector.<sup>76</sup> Utilitarians view property as that which exists to maximize the overall happiness or ‘utility of all citizens. Thus, property rights would be allocated based on the individual who would promote the general social welfare the most. While utilitarianists view property as that which defines human

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<sup>72</sup> Reinhardt U, ‘Reflections on the meaning of efficiency: can efficiency be separated from equity?’ 307.

Popa F, ‘on Pareto efficiency and equitable allocations of resources’ Romanian journal of economic forecasting, 2007, 79,

<sup>73</sup> Popa F, ‘on Pareto efficiency and equitable allocations of resources’ Romanian journal of economic forecasting, 2007, 79, -  
<[https://www.researchgate.net/publication/24047492\\_On\\_Pareto\\_efficiency\\_and\\_equitable\\_allocations\\_of\\_resources](https://www.researchgate.net/publication/24047492_On_Pareto_efficiency_and_equitable_allocations_of_resources)> on 4 November 2019.

<sup>74</sup> Popa F, ‘on Pareto efficiency and equitable allocations of resources’ Romanian journal of economic forecasting, 2007, 75, -  
<[https://www.researchgate.net/publication/24047492\\_On\\_Pareto\\_efficiency\\_and\\_equitable\\_allocations\\_of\\_resources](https://www.researchgate.net/publication/24047492_On_Pareto_efficiency_and_equitable_allocations_of_resources)> on 4 November 2019.

<sup>75</sup> Popa F, ‘on Pareto efficiency and equitable allocations of resources’ Romanian journal of economic forecasting, 2007, 75, -  
<[https://www.researchgate.net/publication/24047492\\_On\\_Pareto\\_efficiency\\_and\\_equitable\\_allocations\\_of\\_resources](https://www.researchgate.net/publication/24047492_On_Pareto_efficiency_and_equitable_allocations_of_resources)> on 4 November 2019.

<sup>76</sup> Ojwang JB, *Laying a basis for rights: Towards a jurisprudence of development*, Nairobi University Press, Nairobi, 1992.

happiness, the economists measure this happiness in monetary terms. They also view private property as that which exists to contribute to the overall wealth of a society. Richard Posner posits that property is the ‘rights to the exclusive use of valuable resources and therefore, allocating such a resource efficiently will entail the individual’s willingness to pay for it at its required value to achieve value maximization. Thus, it is for such reasons that inefficient use of resources such as land include situations where property rights are not specifically vested in a given person.<sup>77</sup> This study will not focus on the utilitarian perspective of allocation of property rights to promote general social welfare however, it will focus on Richard Posner’s view of allocating property rights based on the individual’s willingness to pay for it. This is because of relationship between value maximization and income that will be discussed in Chapter four of this study.

### **1.8.2 Current views on what amounts to efficient land holding**

Considering the contributions made by the above scholars in defining the concept of efficiency, it is of great value to assess what other literary works have posited on what constitutes efficient land holding. FAO has noted that increasing efficiency in land holding can be achieved by matching different land uses with the areas that will yield the greatest benefits with the least cost.<sup>78</sup>

D.k Grover, asserts that researchers have attempted to define certain basic principles and subsequently draft a land policy that will generate higher levels of productivity in agriculture.<sup>79</sup> However, the ‘ideal land policies’ that seek to emphasize ‘owner-operated family farms’ which freely operate land markets and permit land transfers to more efficient and productive users do not fully reflect what exactly constitutes efficiency and even more so, efficiency in holding land.<sup>80</sup> Based on this, it is evident that existing literature speaks to the importance of holding land efficiently however, there exists a lack of proper understanding of this concept. This study will attempt to deconstruct this concept with respect to land holding because of its nature as a constitutional provision.

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<sup>77</sup> The Food and Agriculture Organization of the United Nations, Guidelines for land-use planning, FAO Development series No. 1, 1993

<sup>78</sup> Kariuki F *et al*, *Property Law*, 383.

<sup>79</sup> Kariuki F *et al*, *Property Law*, 383.

<sup>80</sup><https://webcache.googleusercontent.com/search?q=cache:AsTcyuWyqGgJ:https://ageconsearch.umn.edu/bitstream/25615/1/cp061085.pdf+&cd=11&hl=en&ct=clnk&gl=ke&client=safari>

Moreover, land-use efficiency may be measured by using a methodological framework that provides for the conditions, integrated methods, models, classifications, an indicator system, and sequential evaluation procedures.<sup>81</sup> Such systems of achieving efficient land holding should be transparent and cost-effective.<sup>82</sup> The need for transparent and cost-effective systems is brought out in 2004, where an attempt was made following the formulation, by the Government of Kenya, of The National Land Policy (NLP) with a vision to ‘guide the country towards a sustainable and equitable use of land.’<sup>83</sup> This document sought to improve the process involving land administration and land rights delivery to allow for the access to land and use for activities that are economically beneficial. The document was adopted by the Cabinet in June 2009 and it was central in forming the structures needed to remedy land administration problems.<sup>84</sup> This document also provided for an efficiency criterion to be used for land markets related matters in efforts to ‘increase availability and access to land efficiently and guarantee that the land market is liberated from impediments that would fetter its smooth and expeditious operation.’ To achieve this, the government ought to put in place four measures. They are:

- a) ‘Facilitate the commercialization of land rights for ease of land market operation subject to principles of equity and sustainability;
- b) Develop structures and instruments that will make the land market operations more efficient and effective;
- c) Enact legislation to promote individual tenure, provide the investment security in the mortgage market and ensure that adequate information is available to stakeholders in both rural and urban areas so as to protect the rights of both lessors and lessees; and
- d) Create a decentralized system of land registries drawing, where possible, on community level structures and organs of Government.’<sup>85</sup>

Drawing from the proposals in the NLP, it is evident that proposed policy reforms desire to achieve efficient land holding and further lead to great outcomes that maximize the welfare of the society as a whole as opposed to limiting the growth and development of a nation.<sup>86</sup> While

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<sup>81</sup> Auzins A, Geipele I, Stamure I, ‘Measuring Land-use Efficiency in Land Management’ 804 *Advanced Materials Research*, 2013, 205.

<sup>82</sup> Kariuki F *et al*, *Property Law*, 383.

<sup>83</sup> Ministry of Lands, ‘National Land policy’, Sessional Paper No. 3, 2009.

<sup>84</sup> International Land Coalition, *Irregular and Illegal land acquisition by Kenya’s elites: trends, processes and impacts of Kenya’s land-grabbing phenomenon*, January 2011, 1.

<sup>85</sup> Ministry of Lands, ‘National Land policy’, Sessional Paper No. 3, 2009.

<sup>86</sup> Syagga P, ‘Public land, historical injustices and the New Constitution’ Society for International Studies, Constitutional Paper No. 9, 5,-<

the NLP provides for an efficiency criterion, placing a cap on land holding has also been argued to result in ensuring land is held efficiently.<sup>87</sup> Kenya, in 2015 makes a legislative attempt where a MMLHA Bill 2015 was tabled in Parliament with the purpose of responding to the disparities in land holding -as discussed earlier- to place a limit on the amount of land that can be held by an individual.<sup>88</sup>

With the regard to the discussion above, it is evident that the efficient land holding is a principle that both the NLP and the MMHLA are striving to achieve. Therefore, this study seeks to identify a framework that will result in the interpretation of the principle of efficiency. The resulting effect of this is an effective and holistic way of dealing with the land question by the courts, resolving disparities in land holding at the legislative level having in mind the dictates of legality while taking into consideration the concept of efficiency in its entirety.

## **1.9 Conceptual Framework**

Having fully explained the nature of the problem that this study wishes to discuss, it is important to understand the conceptual framework upon which this contribution will be based. The conceptual framework developing this study draws from the economic analysis of law, specifically the Rational Choice Theory and the Coase Theorem.

### **1.9.1 Economic analysis of property law**

Law and economics do not only view law as a variable of the economic system, but also plays a part in researching branches of law which appear to be distant from issues of economics. Both institutions and legal rules are treated as choices that are relevant from the economics point of view as opposed to fixed points outside of the economic system.<sup>89</sup>

Generally, economic analysis of law aims to answer two cardinal questions regarding basic rules. The first question is ‘what are the effects of legal rules on the behaviour of relevant actors?’<sup>90</sup> while the second question looks at whether the effects of the legal rules are socially

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[http://constitutionnet.org/sites/default/files/public\\_land\\_historical\\_land\\_injustice\\_and\\_the\\_new\\_constitution-wp9.pdf](http://constitutionnet.org/sites/default/files/public_land_historical_land_injustice_and_the_new_constitution-wp9.pdf)> on 5 November 2019.

<sup>87</sup> Kariuki F *et al*, *Property Law*, 383.

<sup>88</sup> Kariuki F *et al*, *Property Law*, 383.

<sup>89</sup> Famulski T, ‘Economic Efficiency in Economic Analysis of Law’, *3 Journal of Finance and Financial Law* 15, 2017, 30.

<sup>90</sup> Polinsky M, Shavell S, *The New Palgrave Dictionary of Economics*, 2<sup>nd</sup> ed, New Palgrave Dictionary of Economics, 2008, 1.

desirable.<sup>91</sup> To answer these questions, for the former, the analysis involves a description of the behaviour of individuals with the assumption that they are rational and forward looking while the assessment of the social desirability of outcomes is achieved through a framework of welfare economics.<sup>92</sup> An indispensable topic in economic analysis of property law is the basis of the existence of property rights.<sup>93</sup> These rights, from an economic point of view, exist given their nature in reducing problems of wasteful and destructive efforts to take things and to prevent possession that would only contribute to the aforementioned problem.<sup>94</sup>

Like Posner, Shavell and Kaplow aver that a system of property rights is crucial to the transfer of things freely.<sup>95</sup> This is because if things can be traded freely, then the allocation will be to the person who values it the most. This allocation is made possible because of the existence of property rights which can be viewed as a composition of rights to transfer and possessory rights i.e. the right to use. To promote efficiency, the right of possession and right to transfer are generally combined due to the fact that possessors often make appropriate investments if they are the ones who will benefit from subsequent sales.<sup>96</sup> Therefore, under possessory rights, division of a right to possess land for instance, is valuable where different parties derive different benefits from them. These gains can be achieved following the allocation of rights to an individual who will obtain the most by having that right vested in them.

There are several fundamental concepts underlying the economic analysis of law that this study will use to buttress the interpretation of the principle of efficiency. To begin with the emergence of property rights and the allocation of resources from an economic analysis perspective utilises

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<sup>91</sup> Polinsky M, Shavell S, *The New Palgrave Dictionary of Economics*, 2<sup>nd</sup> ed, New Palgrave Dictionary of Economics, 2008, 1.

<sup>92</sup> Kaplow L and Shavell S, 'Economic Analysis of Law' Harvard Law School and National Bureau of Economic Research, 1666 < [http://www.law.harvard.edu/faculty/shavell/pdf/99\\_Economic\\_analysis\\_of\\_law.pdf](http://www.law.harvard.edu/faculty/shavell/pdf/99_Economic_analysis_of_law.pdf)> accessed on 8 November 2019.

<sup>93</sup> International Encyclopedia of the Social & Behavioral Sciences, 1 ed.

<sup>94</sup> International Encyclopedia of the Social & Behavioral Sciences, 1 ed.

<sup>95</sup> Kaplow L and Shavell S, 'Economic Analysis of Law' Harvard Law School and National Bureau of Economic Research, 1666 < [http://www.law.harvard.edu/faculty/shavell/pdf/99\\_Economic\\_analysis\\_of\\_law.pdf](http://www.law.harvard.edu/faculty/shavell/pdf/99_Economic_analysis_of_law.pdf)> accessed on 8 November 2019.

<sup>96</sup> Kaplow L and Shavell S, 'Economic Analysis of Law' Harvard Law School and National Bureau of Economic Research, 1666 < [http://www.law.harvard.edu/faculty/shavell/pdf/99\\_Economic\\_analysis\\_of\\_law.pdf](http://www.law.harvard.edu/faculty/shavell/pdf/99_Economic_analysis_of_law.pdf)> accessed on 8 November 2019.

two concepts i.e. externalities and transaction costs.<sup>97</sup> Application of these concepts to particular branches of law constitutes the essence of Law & Economics approach.<sup>98</sup>

## 1. Externalities

This refers to decisions, whether good or bad that are external to a decision.<sup>99</sup> The decision can involve the use of a particular resource that will result in some effects invariably falling on other individuals.<sup>100</sup> Ignoring the concept of externalities when examining the principle of efficiency results in inefficient use of resources.<sup>101</sup> A case in point is where the grazing of cattle on a M field yields an annual benefit of \$500 to Y but imposes an annual cost of \$900 on both X and Z.<sup>102</sup> A decision to fence the field, moving and making the shed sound proof would remove the cost of X and Z without eliminate the benefit that Y enjoys. Such a decision is considered to be efficient if it costs less than \$1500 because it would lead to an increase in the aggregate value less the costs of the four individuals. However, from an economist's point of view, such a decision would leave M worse off despite the net gain it would yield as regards to the aggregate.<sup>103</sup> An externality can also result in an inefficient decision to develop resources in an efficient manner. For instance, M has a field that is covered in grass which is mowed regularly but not used. Failure to use the field does not incur a cost or a benefit on Y. A decision to graze cattle on the field will incur a higher cost of \$900 on M annually as opposed to mowing the grass. Nonetheless, it would yield a benefit of \$400 on Y for a year.<sup>104</sup> To achieve value maximization, it would be reasonable to opt for cattle grazing however that choice is not likely to be adopted because it is an external gain. For that reason, such a situation is said to be inefficient and not self-adjusting because, ideally, Y should be willing to pay anything up to \$900 to graze cattle on the field and M should be willing to accept anything over \$900. The absence of such bargains leads to a situation that is not self-adjusting because of transaction costs which will be discussed below alongside the Coase theorem and the bargaining theory.<sup>105</sup>

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<sup>97</sup> Clarke A, Kohler P, *Property Law commentary and materials*, 1 ed, Cambridge University Press, New York, 2005, 45.

<sup>98</sup> Famulski T, 'Economic Efficiency in Economic Analysis of Law', 3 *Journal of Finance and Financial Law* 15, 2017, 30.

<sup>99</sup> Clarke A, Kohler P, *Property Law commentary and materials*, 45.

<sup>100</sup> Clarke A, Kohler P, *Property Law commentary and materials*, 45.

<sup>101</sup> Clarke A, Kohler P, *Property Law commentary and materials*, 45.

<sup>102</sup> Y is a neighbour who likes sheep, X is an individual whose garden is affect adversely by strays and Z is an individual who is disturbed by noise from M field.

<sup>103</sup> Clarke A, Kohler P, *Property Law commentary and materials*, 46.

<sup>104</sup> Clarke A, Kohler P, *Property Law commentary and materials*, 46.

<sup>105</sup> Clarke A, Kohler P, *Property Law commentary and materials*, 46.

## 2. Coase theorem

The Coase theorem is one of the most influential contributions stemming from economics in the last fifty years. It true by virtue of its deduction from the assumptions of a theory.<sup>106</sup> This theorem posits that:

‘If property rights and liabilities for an activity are fully assigned, then an efficient outcome will result, even in the presence of externalities. Moreover, the level at which the activity is carried out will not depend on the particular assignment of rights and liabilities.’<sup>107</sup>

Therefore, the basic idea of the theorem revolves around the structure of the law which assigns property rights with liability not being a cause of concern provided the transaction costs are zero. It also suggests that the role of the law is to assign entitlements to the party who values it the most hence the costly process of exchanging the entitlement is unnecessary. The Coase theorem is regarded as the foundation for both the evolution of property rights and the theory for externality. It is often used as a definite approach to policy and legislation where the law is used to lubricate private bargaining.

### 3.1 Coase theorem, bargaining theory and transaction costs

With regards to the bargaining theory, the Coase Theorem singles out a set of state of affairs which makes no difference in relation to the allocation of resources being variant or the allocation of resources being efficient when viewed in relation to the legal assignment of liability.<sup>108</sup> From this, it can be discerned that liability law can achieve a complete set of markets and despite the presence of externalities, the market will still be competitive. Therefore, an exchange of property rights in a competitive market results in efficiency. Another exegesis of the Coase Theorem does not mention the requirement of competitive markets. Polinsky with reference to the coase theorem offers a compact statement ‘if transaction costs are zero the structure of the law does not matter because efficiency will result in any case.’ The meaning of transaction costs according to Calabresi is the ‘costs like those of getting large numbers of people together to bargain and the cost of excluding freeloaders.’ Therefore, the transaction costs of bargaining pertain to the cost of communicating among the parties, making side payments, and the cost of excluding people from sharing in the benefits exchanged by the

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<sup>106</sup> Cooter R, The cost of Coase, 14 *Journal of legal studies*, 1982, 15.

<sup>107</sup>Cooter R, The cost of Coase, 14 *Journal of legal studies*, 1982, 15.

<sup>108</sup> Cooter R, The cost of Coase, 14 *Journal of legal studies*, 1982, 15.

parties. Furthermore, the cost of obtaining information on the actions of players in the case of contingent commodities is also viewed to be a transaction cost.<sup>109</sup>

In the absence of a competitive market, efficiency can be achieved through bargaining. Calabresi in formulating the Coase Theorem posts that ‘if one assumes rationality, no transaction costs, and no legal impediments to bargaining, all misallocation of resources would be fully cured in the market by bargains.’ This formulation assumes that ‘bargaining games with zero transaction costs leads to solutions that are efficient.’ A further understanding on the analysis of Coase can be viewed in the perspective of bargaining games where the games produced are contingent upon the agreement about distribution.<sup>110</sup>

The bargaining costs will also lead to results that are efficient regardless of the individual who will bear the burden of liability.<sup>111</sup> Drawing from this, it is clear that the structure of the law ought to be chosen for the transaction costs to be minimized for purposes of safeguarding resources utilized during the bargaining process and further promote results that are efficient. From this it is evident that an optimistic approach is taken in the bargaining version of the Coase theorem with regards to the ability of individuals solving the problem of distribution. Costs such as communication, time spent when negotiating, cost of enforcing agreement are obstacles faced during cooperation. These obstacles are described as transaction costs of bargaining. A pessimistic approach on the other hand presumes that even when there are no costs of bargaining, individuals can still fail to solve the distribution problem. This implies that a costless bargaining process can still result in noncooperative outcomes. This suggests that ‘private bargaining to redistribute external costs will not achieve efficiency unless there is an institutional mechanism to dictate the terms of the contract.’ Institutional mechanisms can include competitive markets or compulsory arbitration. Overall, the bargaining interpretation of the Coase Theorem states that externalities will be cured by private bargains even where competitive prices are absent so long as there are no obstacles to the bargaining process.<sup>112</sup>

### **1.9.2 Research Methodology**

The study will constitute largely of qualitative data analysis and review of existing literature on economics in general and laws in relation to land in Kenya. The research will therefore

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<sup>109</sup> Cooter R, The cost of Coase, 14 *Journal of legal studies*, 1982, 15.

<sup>110</sup> Cooter R, The cost of Coase, 14 *Journal of legal studies*, 1982, 15.

<sup>111</sup> Cooter R, The cost of Coase, 14 *Journal of legal studies*, 1982, 15.

<sup>112</sup> Cooter R, The cost of Coase, 14 *Journal of legal studies*, 1982, 15.

undertake a wide literature review covering academic and policy texts, drawing from reports and studies revolving around Economics and land holding in Kenya. The study will also draw from feedback from professionals and academics consulted in this area.

The study will be undertaken in four months from September, 2019 to December, 2019.

### **1.10 Scope and limitations of the study**

The main limitation for the study is that the qualitative research will be substantially informed by secondary sources as opposed to primary sources of data such as rolling out questionnaires and conducting interviews. The secondary sources to be used are also expected to have an element of bias by the authors of for instance, journal articles.

### **1.11 Chapter breakdown**

The study will be divided into five chapters which will be structured as follows:

Chapter one will illustrate the linkage between efficiency and land holding. This discussion is meant to draw the background to an analysis of the importance of dissecting the concept of efficiency for purposes of achieving efficient land holding in Kenya. This Chapter will therefore lay the background that paves the way for an in-depth approach to the research objectives.

Chapter two will embark on an assessment of what the concept of efficiency entails in its entirety. This will be done through an extensive examination how this concept has been interpreted and applied in different economic literatures. This Chapter will also illustrate the relationship between law and economics and its further incorporation into Kenya's legal system. This Chapter will also form the basis of the discourse in Chapter three on land holding in Kenya.

This Chapter three will involve a discussion around the principles of land holding provided for in Article 60(1) of the COK in response to the land question regarding disparities in land holding Kenya. This Chapter in an attempt to answer the second research question, will depict the relationship between the additional principles and how land can be held efficiently at the allocative level following the findings in Chapter two. It will also attempt to conclude the prediction made under hypothesis (ii).

Chapter four will involve an analysis that will revolve around the concept of efficiency in relation to land holding based on the findings in Chapter two and three as against the MMHLA

Bill 2015. The author of this study will depict, through the criticisms, the importance of understanding the concept of efficiency to successfully hold land in a manner that will be deemed to be efficient. This Chapter will also answer the third question by proposing a criterion that incorporates an understanding of the concept of efficiency that will bring life to Article 60(1) of the COK.

Chapter five will entail a brief overview of the research in totality. It will also involve a summary of the findings, recommendations and a conclusion to the study.

## CHAPTER TWO: WHAT CONSTITUTES THE PRINCIPLE OF EFFICIENCY?

### 2.1 Introduction

This Chapter will answer the first research question. It will do so by exploring the various definitions of efficiency following the economic approach to law by looking at the relationship between law and economics to illustrate the need for the provision of efficiency established in the COK 2010. That being said, it will proceed to elaborate three concepts of efficiency, the Marginal Analysis Frame of reference, Pareto Efficiency and the Kaldor-Hicks efficiency model that all speak to the principle of efficiency. These aforementioned concepts will be used in Chapter three in analyzing the challenge in understanding the principle of efficiency at the allocative and interpretation point of view. This will contribute to understanding how this principle makes a whole system work better. This Chapter will conclude by proposing to institutional actors, specifically the legislature and the Ministry of Lands a sound definition of efficiency.<sup>113</sup>

### 2.2 Relationship between law and economics

A proponent of the relation between law and economics is Judge Richard A. Posner of the United States Court of Appeals for the Seventh Circuit.<sup>114</sup> He is a prominent scholar in the field of law and economics who is well known for developing theories that revolve around economic analysis as a ‘valuable tool for understanding, interpreting and creating law.’<sup>115</sup> Economic analysis of law is viewed as ‘an application of methods of economic sciences to research legal rules and legal institutions- how they come into existence, how are they structured, what processes are they related to, and how they affect reality.’<sup>116</sup> Economics as a concept, is defined as ‘the science which studies human behavior as a relationship between ends and scarce means which have alternative uses.’<sup>117</sup> The analysis of law from an economic perspective is a somewhat new scientific movement which commenced in the second half of

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<sup>113</sup> Coleman B, the efficiency Norm, 56 *Boston College law review* 5, 2015, 1778.

<sup>114</sup> Brennan M, ‘Book Review: Overcoming Law by Richard Posner’ 79 *Marquette Law Review* 1, 1995, 329.

<sup>115</sup> Cohen G, ‘Posnerian jurisprudence and economic analysis of law: the view from the bench’ University of pennsylvania Law school [https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=4044&context=penn\\_law\\_review](https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=4044&context=penn_law_review) accessed on 12<sup>th</sup> November 2019.

<sup>116</sup> As cited by Famulski T, ‘Economic Efficiency in Economic Analysis of Law’, 3 *Journal of Finance and Financial Law* 15, 2017, 29.

<sup>117</sup> Clarke A, Kohler P, *Property Law commentary and materials*, 1 ed, Cambridge University Press, New York, 2005, 42.

the 20<sup>th</sup> century in the United States<sup>118</sup> with its origin being grounded on the actuality of the proponents use of a methodology of economics to research every branch of law.<sup>119</sup> Hence, the relationship between law and economics is seen where laws such as Law and economics form part of the subject of economic analysis of law and thus branches of law such as Law and economics are of fundamental legal value in identifying efficiency as a principle in law.<sup>120</sup>

Having established the relationship between law and economics, a look at the economic perspective of property rights commences with the basic principle that the individual forms the basic unit of the analysis and the application of the economic analysis of law with regards to the law of property rights illustrates the individuals' preferences and actions as opposed to the actions and preferences of abstract entities such as communities, governments, societies or corporations.<sup>121</sup> This reveals two key factors; scarcity of resources based on the application of the economic analysis of law and individual choice based of the economic perspective of property rights.<sup>122</sup> These two factors, according to McChesney and Anderson, draw attention to the emphasis made by economics that 'life is a series of choices among alternatives, choices we face because of limits. There is only so much time, so much money, so much land, so much oil and so forth.'<sup>123</sup> This implies that where the behavior of an individual is geared to the realization of a specific goal – acquiring rights in property- given a situation that is subject to limitations -such as money or scarcity of property rights capable of being transferred in land-, individuals in an effort to maximise their own utility, make selfish preferences with regards to ownership of property rights in order to achieve an end yet with a means that is scarce.

In addition to this, the anticipation of the behavior of participants and persons who are regulated by the law is depicted through the use of the economic analysis of law which is reckoned from both a normative and descriptive (positive) point of view.<sup>124</sup> The normative perspective states

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<sup>118</sup> Famulski T, 'Economic Efficiency in Economic Analysis of Law', 3 *Journal of Finance and Financial Law* 15, 2017, 28.

<sup>119</sup> Famulski T, 'Economic Efficiency in Economic Analysis of Law', 3 *Journal of Finance and Financial Law* 15, 2017, 29.

<sup>120</sup> Famulski T, 'Economic Efficiency in Economic Analysis of Law', 3 *Journal of Finance and Financial Law* 15, 2017, 27.

<sup>121</sup> Clarke A, Kohler P, *Property Law commentary and materials*, 1 ed, Cambridge University Press, New York, 2005, 42.

<sup>122</sup> Clarke A, Kohler P, *Property Law commentary and materials*, 42.

<sup>123</sup> Clarke A, Kohler P, *Property Law commentary and materials*, 42.

<sup>124</sup> Posner R, Values and Consequences: An Introduction to Economic Analysis of Law' Coase-Sandor Institute for Law and Economics, Working paper No. 53, 1998, 1 <<https://pdfs.semanticscholar.org/fcca/671b93a88efd6d5807b12ea01f4094a8833c.pdf>> accessed on 12 November 2019.

that legal rules ought to be efficient while the descriptive point of view considers legal rules as economically efficient.<sup>125</sup> Richard Posner who is the guiding exponent of the normative economic analysis attempts to respond to why the law should promote efficiency as opposed to whether a law is efficient<sup>126</sup> while the positive aspect evaluates a set of rules to identify one that is efficient if at all there is any.<sup>127</sup> Therefore, where the existing or proposed land laws in Kenya have inadvertent or abhorrent consequences towards economic efficiency or distribution of either wealth, values or income, the normative analysis undertakes to improve the law by pointing out such consequences.<sup>128</sup> This study will take the normative analysis approach to examine whether the provisions of the proposed land law in Kenya -the MMHLA Bill 2015- correspond to the principle of efficiency.

### **2.3 Deconstruction of the concept of efficiency**

Having identified the relationship between law and economics, it is vital to understand the different ways in which efficiency has been interpreted with regards to land holding in Kenya for purposes of facilitating a clear conception of how well land – whether scarce or not- ought to be held and eventually used by the proprietary owner.

There are a number of definitions of efficiency, nonetheless, they all tie to how well a market system allocates scarce resources to satisfy consumers.<sup>129</sup> The problem however is the application of these definitions at the point of interpretation on the legislative and allocative level. For instance, efficiency with respect to resources at the allocative level refers to apportionment of resources in a manner which results in the value being maximized.<sup>130</sup> The efficient allocation of a resource is depicted in the utilization of the resource. The utilization process involves the performance of a process that transforms a set of inputs into a set of outputs. Economists also view efficiency as a relative concept i.e. a relationship between ends

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<sup>125</sup>Famulski T, 'Economic Efficiency in Economic Analysis of Law', 3 *Journal of Finance and Financial Law* 15, 2017, 29

<sup>126</sup> Coleman J, 'The normative basis of economic analysis: a critical review of Richard Posner's the economics of justice' 34 *Stanford Law Review* 5, 1982, 1105.

<sup>127</sup> Coleman J, 'Efficiency, Utility and Wealth Maximisation', 8 *Hofstra Law Review* 3, 1980, 40.

<sup>128</sup> Posner R, 'Values and Consequences: An Introduction to Economic Analysis of Law' Coase-Sandor Institute for Law and Economics, Working paper No. 53, 1998, 1 <<https://pdfs.semanticscholar.org/fcca/671b93a88efd6d5807b12ea01f4094a8833c.pdf>> accessed on 12 November 2019.

<sup>129</sup> Torgerson D, Palmer S, 'Definitions of efficiency', *BMJ Clinical Research*, 24 April 1999 <<https://www.researchgate.net/publication/13084099>> accessed on 11 November, 2019.

<sup>130</sup> Clarke A, Kohler P, *Property Law commentary and materials*, 48.

and means and the performance of economic units which are compared to a standard.<sup>131</sup> From this process, a situation is presumed to be efficient when a desired outcome is achieved with less value means; or the means employed produces more value of the end desired.<sup>132</sup>

### 2.3.1 Three concepts of efficiency

Based on the discussion above,<sup>133</sup> it is evident that efficiency as a concept seeks to measure whether a resource is being used to get the best value of money.<sup>134</sup> It can be viewed through three concepts namely: Technical, Productive and Allocative.<sup>135</sup> Generally, these concepts are concerned with the relation between resource inputs and other intermediate outputs while other evaluations use intermediate outputs as a measure of effectiveness.<sup>136</sup>

*Technical efficiency* refers to the physical relation between resources and the outcome of using those resources.<sup>137</sup> Koopman posits that ‘ a producer is technically efficient if an increase in an output requires a reduction in at least one other output or an increase in at least one input, and if reduction in any input requires an increase in at least one other input or a reduction in at least one output.’<sup>138</sup> Therefore, a technical efficient position is achieved when the maximum possible improvement in an outcome is obtained from a set of resource inputs while an intervention is technically inefficient if the same or greater outcome could be produced with less of one type of input.<sup>139</sup> Koopmans definition and characterization of technical efficiency is of importance to this study as it relates to the use of land for an outcome an individual seeks and from this, it is evident that technical efficiency resolves the issue of using land to a maximum advantage.

On the other hand, unlike technical efficiency, *productive efficiency* can directly compare alternative interventions. When evaluating production units, it is crucial to measure efficiency and productivity in relation to the performance of different industries or that of a whole

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<sup>131</sup> Forsund F, Lennar H, ‘on the measurement of productive efficiency’ 76 *the Swedish Journal of Economics* 2, 1974, 141.

<sup>132</sup> Forsund F, Lennar H, ‘on the measurement of productive efficiency’ 76 *the Swedish Journal of Economics* 2, 1974, 141.

<sup>133</sup> Part 2.3 of Chapter 2 of this study.

<sup>134</sup> Torgerson D, Palmer S, ‘Definitions of efficiency, BMJ Clinical Research, 24 April 1999 < <https://www.researchgate.net/publication/13084099>> accessed on 11 November, 2019.

<sup>135</sup> Torgerson D, Palmer S, ‘Definitions of efficiency, BMJ Clinical Research, 24 April 1999 < <https://www.researchgate.net/publication/13084099>> accessed on 11 November, 2019.

<sup>136</sup> Torgerson D, Palmer S, ‘Definitions of efficiency, BMJ Clinical Research, 24 April 1999 < <https://www.researchgate.net/publication/13084099>> accessed on 11 November, 2019.

<sup>137</sup> Levin H, Jamison D, Radner R, ‘Concepts of Economic Efficiency and Educational Production’, 1976, 153.

<sup>138</sup> Fare R, Zieschang K, Lovell C, Measuring the Technical efficiency of multiple output production technologies’ *Quantitative studies on production and prices*, in Eichhorn w, Henn R, Shephard R.W, University of Karlsruhe, Germany and Berkley, 1983, 159.

<sup>139</sup> Ouattara W, ‘Economic Efficiency Analysis in Cote d’Ivoire’ 2 *American Journal of Economics* 1, 2012, 38.

economy.<sup>140</sup> This refers to a situation where one intervention produces the same or better outcome with less or more of one resource and more of another.<sup>141</sup> Productive efficiency further connotes to maximization of an outcome for a given cost or the minimization for a given outcome.<sup>142</sup> This concept also allows for the assessment of the relative value for money of interventions with directly comparable outcomes albeit fails to address the impact of reallocating resources at a broader level.<sup>143</sup> For purposes of this study, this concept is useful in assessing the outcome of production units following the intervention by the MMHLA Bill 2015 which seeks to produce the same or better outcome with the introduction of a cap on the size of land a person can own in Kenya.

*Allocative efficiency* also known as Price efficiency looks at the use of inputs in accordance with the current prices on the market.<sup>144</sup> It considers not only the productive efficiency in which a resource is used to produce outcomes but also the efficiency with which these outcomes are distributed among the community.<sup>145</sup> This concept is particularly useful in Chapter 3 of this study in determining the acreage each individual should own when the legislature attempts to legislate on the minimum and maximum land holding as required in Article 68 of the COK 2010.<sup>146</sup> Pareto optimality, under allocative efficiency, is a type of allocation where despite the change in allocation, neither of the consumers will be left in a better position without making one of the consumers worse off.<sup>147</sup> This is because an efficient allocation takes place where an allocation is pareto optimal.<sup>148</sup>

Over and above the three concepts discussed above, proponents of economic analysis of law often assume five efficiency related notions that are relevant to the deconstruction of the

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<sup>140</sup> Reiff A, Sugar A, Suranyi E, Productive Efficiency in the Hungarian Industry, Hungarian Statistical Review, Special number 7, 2002, 45.

<sup>141</sup> Torgerson D, Palmer S, 'Definitions of efficiency, BMJ Clinical Research, 24 April 1999 <<https://www.researchgate.net/publication/13084099>> accessed on 11 November, 2019.

<sup>142</sup> Torgerson D, Palmer S, 'Definitions of efficiency, BMJ Clinical Research, 24 April 1999 <<https://www.researchgate.net/publication/13084099>> accessed on 11 November, 2019.

<sup>143</sup> Torgerson D, Palmer S, 'Definitions of efficiency, BMJ Clinical Research, 24 April 1999 <<https://www.researchgate.net/publication/13084099>> accessed on 11 November, 2019.

<sup>144</sup> Ouattara W, 'Economic Efficiency Analysis in Cote d'Ivoire' 2 *American Journal of Economics* 1, 2012, 38.

<sup>145</sup> Torgerson D, Palmer S, 'Definitions of efficiency, BMJ Clinical Research, 24 April 1999 <<https://www.researchgate.net/publication/13084099>> accessed on 11 November, 2019.

<sup>146</sup> Article 68, *Constitution of Kenya* (2010).

<sup>147</sup> Deng F, Leonard G, 'Allocative and Productive efficiency' 2008, 452 <[https://www.researchgate.net/publication/228269633\\_Allocative\\_and\\_Productive\\_Efficiency/link/5577174a08ae753637538b75/download](https://www.researchgate.net/publication/228269633_Allocative_and_Productive_Efficiency/link/5577174a08ae753637538b75/download)> accessed on 12 November 2019.

<sup>148</sup> Deng F, Leonard G, 'Allocative and Productive efficiency' 2008, 452 <[https://www.researchgate.net/publication/228269633\\_Allocative\\_and\\_Productive\\_Efficiency/link/5577174a08ae753637538b75/download](https://www.researchgate.net/publication/228269633_Allocative_and_Productive_Efficiency/link/5577174a08ae753637538b75/download)> accessed on 12 November 2019.

principle of efficiency in this study. They are Value maximization, Pareto efficiency- sometimes also known as Pareto superiority, Pareto Optimality, Productive efficiency (which has been discussed above), Marginal analysis frame of reference and Kaldor-Hicks efficiency.<sup>149</sup>

### 2.3.2 Value maximization

Having seen that efficiency refers to the allocation of resources to maximise value, it is vital to understand what counts as *value maximization*. Value is ‘how much an individual is prepared to pay for something, or, if they have it already, how much they would demand to part with it.’<sup>150</sup> However, the assessment of value in this case does not consider the amount an individual can afford to pay for the resource but instead how much they would pay for it if they had the money.<sup>151</sup> Based on this, when economists refer to the efficient nature of any process or institution, the two fundamental questions that arise with regards to efficiency are ‘whose valuations do we use’ and ‘how will the valuations chosen be weighted?’ The valuations used in this case are monetary valuations<sup>152</sup> and they are weighted based on those who are willing and able to support their preferences by offering money.<sup>153</sup> However, this method of valuation is broad and useful as it warrants one to take account of and compare the evaluations put forth by various individuals and to respond in a manner that is appropriate for purposes of achieving efficient land holding.<sup>154</sup> To identify the monetary valuations, two pre-requisites are crucial; ‘private ownership of resources and relatively unrestricted rights to exchange ownership.’ This is because adherence to the aforementioned prerequisites results in competing desires to use resources such as land.<sup>155</sup> These competing desires further lead to money prices being established that indicate the value of a parcel of land in its current use. It is individuals who then who raise the price and bid them away from current users if they believe, if employed in some other way, a particular parcel of land would be more valuable.<sup>156</sup> This perspective of

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<sup>149</sup> Clarke A, Kohler P, *Property Law commentary and materials*, 49.

<sup>150</sup> Clarke A, Kohler P, *Property Law commentary and materials*, 49.

<sup>151</sup> Clarke A, Kohler P, *Property Law commentary and materials*, 48.

<sup>152</sup> Heyne P, ‘Efficiency’ The Library of Economics and Liberty, <<https://www.econlib.org/library/Enc/Efficiency.html>> accessed on 13 November 2019.

<sup>153</sup> Heyne P, ‘Efficiency’ The Library of Economics and Liberty, <<https://www.econlib.org/library/Enc/Efficiency.html>> accessed on 13 November 2019.

<sup>154</sup> Heyne P, ‘Efficiency’ The Library of Economics and Liberty, <<https://www.econlib.org/library/Enc/Efficiency.html>> accessed on 13 November 2019.

<sup>155</sup> Heyne P, ‘Efficiency’ The Library of Economics and Liberty, <<https://www.econlib.org/library/Enc/Efficiency.html>> accessed on 13 November 2019.

<sup>156</sup> Heyne P, ‘Efficiency’ The Library of Economics and Liberty, <<https://www.econlib.org/library/Enc/Efficiency.html>> accessed on 13 November 2019.

efficiency is important in assessing the relationship between Sustainable and productive management of land resources and security of land rights in relation to holding land efficiently in Chapter three of this study. It is also important in examining the relationship between efficient land holding and the existence of a system of land administration that is cost-effective. It will also be used in interpreting, at the legislative level, the principle of efficiency in relation to income and population density as provided in the MMHLA Bill 2015.

### 2.3.3 Pareto efficiency

The concept of *pareto efficiency* is another way to look at the concept of efficiency.<sup>157</sup> This perspective conveys a situation where value is maximized when further allocation of a parcel of land fails to yield a better result. Such a situation means that it would be impossible to transfer or reallocate the resources in a way that will make anyone better off without rendering another individual worse off.<sup>158</sup> Similarly, an allocation is viewed to be pareto-optimal where a decision to further reallocate a resource will result in enhancing the welfare of one individual at the expense of another.<sup>159</sup> However, where an allocation leaves no one worse off and the welfare of at least one individual is improved, the distribution is said to be pareto superior.<sup>160</sup> Therefore, both pareto optimal and pareto superior are concepts that illustrate a state of affairs involving allocation of land where the former conveys a standard that links one distribution to all other possible distributions of land and concludes that no pareto improvements can arise from any pareto optimal state because another individual will be rendered better off at the expense of another. The latter depicts that one state of affair is an improvement of another if and only if at least one individual's welfare improves following the distribution of a parcel of land without another's welfare being reduced.<sup>161</sup> This mode of interpretation will be used in Chapter three to determine the relationship between efficient land holding and the principle of sustainable and productive management of land resources and equitable access to land provided for in Article 60(1) of the COK. It will also be applied in Chapter four of this study to illustrate how the principle of efficiency ought to be interpreted at the legislative level for its subsequent application at the allocative level by institutions such as the Ministry of Lands.

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<sup>157</sup> Famulski T, 'Economic Efficiency in Economic Analysis of Law', 3 *Journal of Finance and Financial Law* 15, 2017 32.

<sup>158</sup> Clarke A, Kohler P, *Property Law commentary and materials*, 49.

<sup>159</sup> Coleman J, 'Efficiency, Utility and Wealth Maximisation', 8 *Hofstra Law Review* 3, 1980, 513.

<sup>160</sup> Coleman J, 'Efficiency, Utility and Wealth Maximisation', 8 *Hofstra Law Review* 3, 1980, 513.

<sup>161</sup> Coleman J, 'Efficiency, Utility and Wealth Maximisation', 8 *Hofstra Law Review* 3, 1980, 513.

### 2.3.4 Kaldor-Hicks Efficiency Model

This model is a modified concept of Pareto efficiency which posits that a situation is improved where a change in the social reality benefits at least one person despite the fact that it could worsen another person's position. Despite the similarity with a Pareto efficient outcome, it fails to result in Pareto superiority because the change benefits one person without leaving another person worse off.<sup>162</sup> This is because the model does not factor in fairness or justice in distribution of resources such as land. Hence, the loss of another person is not outweighed by the benefit of another. However, the possibility of loss is capable of being compensated whilst the other person still has their utility elevated.<sup>163</sup> This transaction is therefore still deemed to be Kaldor-Hicks efficient because it leaves the net gainers with a gain that is great enough to compensate the net losers despite the fact that no actual compensation needs to be made.<sup>164</sup> However, this is not always the case under Kaldor-Hicks hence leaving some individuals worse off which then fails to meet the standard of Pareto superiority. Nonetheless, a Kaldor-Hicks efficient allocation can be Pareto efficient where the distribution of a parcel of land renders an individual better off in order for the individual to compensate, fully, those who have worse off while still retaining his net gains.<sup>165</sup> Therefore, this model is functional in interpreting the principle of efficiency at the allocative level by institutions such as the Ministry of lands while exercising their mandate to administer land<sup>166</sup> in a manner that results in efficient land holding as provided for in Article 60 of the COK.<sup>167</sup>

## 2.4 Conclusion

Kenya's existing legal framework recognizes the principle of efficiency as one that should be applied when dealing with matters relating to land holding. The relationship between law and efficiency- a facet of economics- portrays the point at which law and economics meet to produce an efficient outcome. The deconstruction of the principle of efficiency brought out in this Chapter illustrates different ways in which efficiency can be interpreted. The concepts identified all shed light on the actions that are considered to be economically efficient. Furthermore, Pareto superiority, Pareto Optimality, Productive efficiency and Kaldor-Hicks efficiency are all perspectives in which the principle of efficiency can be understood. From

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<sup>162</sup> Calabresi G, Bobbitt P, *Tragic Choices* 1978, 85-86.

<sup>163</sup> Clarke A, Kohler P, *Property Law commentary and materials*, 50.

<sup>164</sup> Clarke A, Kohler P, *Property Law commentary and materials*, 50.

<sup>165</sup> Coleman J, 'Efficiency, Utility and Wealth Maximisation', 8 *Hofstra Law Review* 3, 1980, 513.

<sup>166</sup> Ministry of Lands and Physical Planning, 'Department of Land Administration' 2019, -

<https://lands.go.ke/department-of-land-administration/> on 7 December 2019.

<sup>167</sup> Article 60, *Constitution of Kenya* (2010)

this Chapter, it is apparent that interpreting the principle of efficiency based on Pareto efficiency and the Kaldor-Hicks efficiency model results in achieving efficient land holding in Kenya at the legislative and allocative level respectively. This study will proceed to use both the Pareto efficiency concept and the Kaldor-Hicks efficiency model given that it takes into consideration the will of the individuals in a society.

Therefore, the next Chapter will interpret the principle of efficiency alongside Article 60(1) of the COK using the Pareto efficiency concept and the Kaldor-Hicks efficiency model in achieving efficient land holding in Kenya. The principle will be conveyed in more detail based on the three concepts of efficiency identified in this chapter.

## **CHAPTER THREE: PRINCIPLES GOVERNING EFFICIENT LAND HOLDING IN KENYA**

### **3.1 Introduction**

Following the discussion in Chapter two, this Chapter examines the treatment of the principle of efficiency along-side four additional principles provided in Article 60(1) to facilitate allocation of land efficiently. The discussion will begin with understanding the concept of property with the analysis stemming from the legislative framework that provides for efficient land holding in Kenya. In addition to this, it will also focus specifically on four other principles that the COK identifies, that ought to be adhered to, for land to be held efficiently in Kenya. This analysis will primarily be based on the concept of Pareto efficiency and Value Maximisation in efforts to respond to the second research question that this study seeks to answer.

### **3.2 Understanding the concept of property**

In order to develop a framework that will embody the interpretation of the principle of efficient land holding in Kenya, it is important to understand the nature of land as a concept of property for purposes of recognizing the presence of propriety rights involved during allocation of land that ought to be held efficient.

Property is a ‘concept that is distinct and separate from a thing. It represents a ‘complex group of jural relations between the owner of a thing and all other individuals’<sup>168</sup> with the foundation of rights established in law. A right is a ‘well founded claim which implies that it is nothing more or less than a claim recognized or secured by law.’<sup>169</sup> Therefore, in line with Bentham’s school of thought - ‘Property and law are born together and die together because it is the law that defines property and protects proprietary claims.<sup>170</sup> Jeremy Waldron further states that the ‘the law of property is about things and our relationships with one another with respect to the use and control of things.’<sup>171</sup> Based on this, it can be discerned that property consists of a package of rights that are legally recognized and held by one person with regards to something in relationship with others with the state protecting and enforcing these rights.<sup>172</sup>

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<sup>168</sup> Kariuki F *et al*, *Property Law*, 2.

<sup>169</sup> *Mellinger V city of Houston* (1887), Supreme Court of Texas.

<sup>170</sup> Bentham J, *The theory of legislation*, Oceana Publications, New York, 1975, 69.

<sup>171</sup> Waldron J, Property in law in Patterson D (ed), *A companion to philosophy of law and legal theory*, 2 ed, Blackwell Publishing, Oxford, 2010, 9.

<sup>172</sup> Waldron J, *Property in law*, 9.

Moving on, Honoré developed a limited list of rights of ownership that are central and essential features of ownership that distinguish property from other legal concepts. This list comprises of characteristics of systems of property albeit not all.<sup>173</sup> As stated by Honoré, property comprises of the following bundle of rights. These incidents are vital features of the full concept of property. He avers:

Ownership comprises of the right to possess, the right to use, the right to manage the right to the income of the thing, the right to the capital, the right to security, the rights of incidents of transmissibility and absence of term, the prohibition of harmful use, liability to execution and the incident of residuality.<sup>174</sup>

Kenya's legal system views property as a bundle of rights conferring powers on owners and creating obligations and liabilities on others.<sup>175</sup> Thus, distinct rights in the bundle can be conferred in different persons. However, modern property scholars have, from Honoré bundle of sticks, selected out specific sticks. These sticks also illustrate the essence of property. They are: 'the right to exclude others, the right to possess and use and the right to transfer.'<sup>176</sup> The right to exclude others refers to an individual's prerogative to avert persons from the use or possession of property.<sup>177</sup> The right to possess denotes to the owner of the property being capable of keeping and managing the property under his ownership while the right to use implies that the owner can utilize his property and further enjoy the fruits and profits earned from that property.<sup>178</sup> The right to transfer on the other hand alludes to the owner being capable to transfer his property rights to others. The owner has the right to renounce such rights or dispose of his ownership rights to another person(s). Based on the discussion above, it is clear that property is a right that can be claimed and is protected by a state through legislation. Having settled this, it is necessary to understand the regime governing property in Kenya.

### **3.3 Existing Legal Framework governing property in Kenya**

A regime is a system of rules or regulations.<sup>179</sup> Therefore, by way of deductive reasoning, a property regime is a system of rules or regulations that govern property. Property regimes fulfill

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<sup>173</sup> Honoré A, 'Ownership' in Coleman J (ed), *Readings in the philosophy of law*, Garland Publishing, New York, 1999, 564-574.

<sup>174</sup> Honoré A, 'Ownership' 562-574.

<sup>175</sup> Okoth-Ogendo HWO, *Teaching manuals on the law of property*, University of Nairobi, 1982, 83.

<sup>176</sup> Sprankling, *Understanding property law*, 4 ed, Carolina Academic Press, Durham, 2016, 4-7.

<sup>177</sup> Honoré A, 'Ownership', 563-574.

<sup>178</sup> Honoré A, 'Ownership' 563-574.

<sup>179</sup> The Black Dictionary, 2ed.

a mediation function in the relationship between property, the individual and the state. Such legal regimes guard the right of a person to hold property through enacting legislation and judicial pronouncements.<sup>180</sup> Such measures can extend to defining the way in which individuals transact in proprietary entitlement. Legislation can also be concerned with the distribution of quantum of rights that an individual can enjoy in property.<sup>181</sup>

In Kenya, the law that governs how persons will hold property is first seen in the COK 2010. At the outset, Article 260 defines property as:

‘any vested or contingent right to, or interest in or arising from land, or permanent fixtures on, or improvements to, land; goods or personal property; intellectual property; or money, choses in action or negotiable instruments.’<sup>182</sup>

Land is then defined in Section 2 of the Land Act<sup>183</sup> which refers back to Article 260 of the COK to define land as:

‘the surface of the earth and the subsurface rock; any body of water on or under the surface; marine waters in the territorial sea and exclusive economic zone; natural resources completely contained on or under the surface; and the air space above the surface.’<sup>184</sup>

Based on the legislative framework and the concept of property it is clear-cut that land is legally recognized as property in Kenya with persons having a right to claim and at the same time, have their right protected by the state.

### **3.4 Land holding in Kenya**

According to Merriam Webster, land holding is the state or fact of holding or owning land. It is also understood as property in land.<sup>185</sup> In Kenya, land belongs ‘to the people of Kenya collectively as a nation, as communities and as individuals.’<sup>186</sup> It is further classified into three different types public, private and community.<sup>187</sup> Private land comprises of ‘registered land held by any person under any freehold tenure; land held by any person under leasehold tenure; and any other land declared private land under an Act of Parliament.’<sup>188</sup> Over and above that,

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<sup>180</sup> Kariuki F *et al*, *Property Law*, 2.

<sup>181</sup> Kariuki F *et al*, *Property Law*, 4.

<sup>182</sup> Article 260, *Constitution of Kenya* (2010).

<sup>183</sup> Section 2, *Land Act* (Act No.6 of 2012).

<sup>184</sup> Article 260, *Constitution of Kenya* (2010).

<sup>185</sup> Merriam-Webster, 4 ed.

<sup>186</sup> Article 61(1), *Constitution of Kenya* (2010).

<sup>187</sup> Article 61(2), *Constitution of Kenya* (2010).

<sup>188</sup> Article 64, *Constitution of Kenya* (2010).

land according to Article 60(1) ought to be held, used and managed in a manner that is equitable, efficient, productive and sustainable. In ensuring the principle of efficiency is heeded to,<sup>189</sup> Article 60(2) postulates that this principle, *inter alia*, shall be implemented through an NLP that will be ‘developed and reviewed regularly by the national government and through legislation.’<sup>190</sup> Kenya’s legal system dealing specifically in property rights is connected with the existence of public institutions that govern the economics of property rights. The public institution vested with the mandate to deal with land administration is the Ministry of Lands<sup>191</sup> and this is done by way of contracts that are drafted by legal practitioners to transfer interest in land. In administering property rights in land, the Ministry of Lands ought to comply with the principle of:

- (a) equitable access to land;
- (b) security of land rights;
- (c) sustainable and productive management of land resources;
- (d) transparent and cost-effective administration of land;
- (e) sound conservation and protection of ecologically sensitive areas;
- (f) elimination of gender discrimination in law, customs and practices related to land and property in land; and
- (g) encouragement of communities to settle land disputes through recognized local community initiatives consistent with this Constitution.’<sup>192</sup>

This is because compliance with the above additional principles results in efficient land holding in Kenya at the point of allocation as will be seen in the discussion in Part 3.5 of this study.

### **3.5 Understanding the various principles of holding land efficiently in Kenya**

Land is the ‘centerpiece of Kenya’s development and has often dictated the pulse of nationhood since independence.’<sup>193</sup> Due to the conjunctive nature of Article 60(1) this study will evaluate the first four principles only against the principle of holding land efficiently in Kenya at both the legislative and allocative level. Reasons for selecting the first four principles is because the interpretation of the principle of efficiency will be wide as opposed to the remaining three which are tied to a specific context i.e. ecologically sensitive areas, elimination of gender discrimination and encouragement of communities to settle land disputes.

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<sup>189</sup> Article 60(1), *Constitution of Kenya* (2010).

<sup>190</sup> Article 60(2), *Constitution of Kenya* (2010).

<sup>191</sup> Ministry of Lands and Physical Planning, ‘Department of Land Administration’ 2019, - <https://lands.go.ke/department-of-land-administration/> on 7 December 2019.

<sup>192</sup> Article 60(1), *Constitution of Kenya* (2010).

<sup>193</sup> International Environmental law Research Centre, *Securing Property rights in land in Kenya, Formal versus informal*, 2010, 309.

### 3.5.1 Equitable access to land

Cambridge dictionary defines equitable as ‘treating everyone fairly in the same way.’<sup>194</sup> Based on this, it is correct to infer that everyone should be accorded the same treatment with regards to accessing land. On the other hand, equity connotes to holding land and using the resource in a manner that will cater for intra and inter generations.<sup>195</sup> Equity in management of land also denotes to individuals having equitable access to land for commercial productivity, subsistence or settlement. This elucidates that it has to be used for the benefit of both the present and future generations.<sup>196</sup> Equitable access to land also implies the need for distribution of land and ensures that groups of persons such as women, youth and marginalized groups are not barred from accessing the land. This will result in an increase in the standards of living of individuals in Kenya because of access to facilities such as housing, food that serve as a guarantee to income.<sup>197</sup> The interpretation of efficiency at the allocative level with regards to Pareto efficiency will lead to an improvement in the person who holds the land while another person is left worse off following that allocation. Therefore, in line with the principle of equity, vesting the right to hold a parcel of land in a person to use it in a manner that will benefit both the present and future generation would be considered efficient because it leads to the improvement of the proprietary owner at present. The allocation should however not discriminate against marginalized groups of persons.

### 3.5.2 Security of land rights

The NLP, drafted by the Ministry of Lands, purported to secure property rights in land to result in *inter alia*, reduction in poverty. Vision 2030 has also recognised land reform as a vital act necessary for Kenya’s socio-economic transformation. A well-defined property rights system is crucial to achieve the socio-economic transformation because it leads to improved land allocation and an increase in investment in a society.<sup>198</sup> The land question in Kenya revolves around insecure and unclear property rights with respect to two-thirds of one hundred and forty-four hectares.<sup>199</sup> Over and above that, institutional factors hinder the enforcement of private

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<sup>194</sup> Cambridge Dictionary, 2 ed.

<sup>195</sup> Kariuki F *et al*, *Property Law*, 384.

<sup>196</sup> Kariuki F *et al*, *Property Law*, 383.

<sup>197</sup> Kariuki F *et al*, *Property Law*, 383

<sup>198</sup> Kieyah J, Kameri-Mbote P, *Securing property rights in land in Kenya*, 309.

<sup>199</sup> Kieyah J, Kameri-Mbote P, *Securing property rights in land in Kenya*, Oxford University Press, Nairobi, 2010, 309.

property rights for more than twenty-eight million hectares.<sup>200</sup> Lack of title to ascertain ownership in land also results in the absence of a well-defined and clear enforceable holding of property rights in land. This leads to a failure to induce land owners to invest their resources in productive activities because the resources are often used up in defending their claims instead.<sup>201</sup> Despite the recognition of securing property rights as a vital aspect of reducing poverty in Kenya, the policy does not prescribe measures to be put in place to straighten the issue of security of property rights.<sup>202</sup> Such a dilemma affects the progress of the economy especially given that land title registration in Kenya is influenced by economic factors which ensure efficiency in securing property rights in land results in land development and economic growth.<sup>203</sup>

A system of voluntary registration of titles will also lead to under-utilization of land. This is because the gains anticipated from registration are not likely to be realized for a number of reasons such as the process being voluntary.<sup>204</sup> The culminating effect of this is slower economic growth because the lack of security in property rights will not make it worthwhile to ‘undertake in socially productive activities.’<sup>205</sup> On that account, a formal process of the registration of title ensures economic development due to the fact that

‘An individual owner internalizes some of the gains from formal title- an increase in land value, increased access to credit, for example. But other gains are external to the person receiving the title. The ability to trade with strangers has network characteristics - I gain from you being formalized. Property registration systems help utilities collect from their customers. My cost will be lower if you are forced to pay.’<sup>206</sup>

The presence of such a system that pushes for increased security in land holding will incentivise individuals to acquire property rights in land after a situation where individuals competing desires are recognized and these competing interests further lead to money prices being established that indicate the value of a parcel of land in its current use. The individuals then raise the price and bid them away from current users if they believe, if employed in some other

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<sup>200</sup> Kieyah J, Kameri-Mbote P, *Securing property rights in land in Kenya*, 309.

<sup>201</sup> Kieyah J, Kameri-Mbote P, *Securing property rights in land in Kenya*, 309.

<sup>202</sup> Kieyah J, Kameri-Mbote P, *Securing property rights in land in Kenya*, 312.

<sup>203</sup> Kieyah J, Kameri-Mbote P, *Securing property rights in land in Kenya*, 312.

<sup>204</sup> Kieyah J, Kameri-Mbote P, *Securing property rights in land in Kenya*, 311.

<sup>205</sup> Galiani S, Scharfrodsky E, Land Property Rights and resource allocation 54 *The journal of law and economics* 4, 2011, 329.

<sup>206</sup> Woodruff C, Review of de Soto’s “The Mystery of Capital” 39 *Journal of Economic Literature* 4, 2001, 1217.

way, a particular parcel of land would be more valuable and thus results in efficient land holding.

### **3.5.3 Sustainable and productive management of land resources**

Kenya is reliant on climate-sensitive sectors such as fisheries, water, agriculture, forestry and energy.<sup>207</sup> Both the agricultural and water sectors are the most vulnerable to degradation in Kenya. Sustainable land management (SLM) denotes to ‘the adoption of land use systems that, through appropriate management practices, enables land users to maximize the economic and social benefits from the land while maintaining or enhancing the ecological support functions of the land resources.’<sup>208</sup> It often involves *inter alia* land degradation, maintenance or enhancement of supply in the ecosystem by using goods and services. This leads to the alleviation of poverty and development.<sup>209</sup> From an economical perspective, SLM also looks at paying back investments made by land users.<sup>210</sup> This connotes to investments such as securing title in land by individuals. Therefore, an allocation would be considered efficient where the land is administered to an individual who has made an investment that will maximise its value. Therefore, the land users will invest in land after a high bid is set to bid them away from current users if the administrators believe, if employed in some other way, a particular parcel of land would be more valuable. The efficient allocation that is made based on the value of the land will yield outcomes that exceed their investments. This maximizes their wealth which then trickles back into the economy to further increase economic growth for the society.

### **3.5.4 Transparent and cost-effective administration of land**

Transparency and cost-effectiveness are principles of good land governance.<sup>211</sup> Land governance ‘is a process by which decisions are made regarding the access to and use of land, the manner in which those decisions are implemented and the way conflicting interests are reconciled.’<sup>212</sup> It involves ‘policies, processes and institutions by which land, property and

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<sup>207</sup> Ministry of Environment and Natural resources, *Kenya strategic investment framework for sustainable land management 2017-2027*, 2016, ii.

<sup>208</sup> Ministry of Environment and Natural resources, *Kenya strategic investment framework for sustainable land management 2017-2027*, 2016, ii.

<sup>209</sup> Wachira S, ‘An Evaluation of Potential Sustainable Land Management Practices to Enhance Watershed Ecosystem Services In Upper Tana Catchment: A Case Study Of Kirurumwe River, Ena Basin In Embu County, Kenya’ Published, University of Nairobi, Nairobi, 2013, 15.

<sup>210</sup> Ministry of Environment and Natural resources, *Kenya strategic investment framework for sustainable land management 2017-2027*, 2016, 6.

<sup>211</sup> Chaka M, Putsoa N, Mohafa M, ‘Good Land governance is essential to effective administration of Land, Lesotho Land Administration Authority’ Annual world bank conference on land and poverty, Washington DC, 2018, 6.

<sup>212</sup> Chaka M, Putsoa N, Mohafa M, ‘Good Land governance is essential to effective administration of Land,’ 6.

natural resources are managed.’<sup>213</sup> This includes ‘decisions on access to land, land rights, land use, and land development.’<sup>214</sup> Land administration is defined as ‘the process of determining, recording and disseminating information about ownership, value and use of land and its associated resources.’<sup>215</sup> The processes include the ‘determination of land rights and other attributes, surveying, and describing these, their detailed documentation and the provision of relevant information that supports land markets.’<sup>216</sup> While transparency contributes to ‘efficiency, accountability, fairness and confidence in agency integrity,’ cost effectiveness alludes to the amount of money spent for the land administration system.<sup>217</sup> A transparent and cost-effective process is therefore capable of realizing the principle of efficient land holding. This is seen in the application of the concept of Pareto efficiency where a transparent process would determine the owner of the rights in land and the resources associated with that land to facilitate allocation of that land to enhance welfare of person to whom the rights will be vested without leaving the transferor worse off.

The fact that transparency also reflects the value and use of land, it allows for the use of monetary valuations as regards to the number of persons who are willing and able to support their choice by offering money. In the case where the land is private and there exists unrestricted rights to exchange in ownership, a case of competing desires arises which in turn leads to prices being set to reflect the value of the property. The individual who then views the particular resource as that which would be utilized in a more valuable way then raises the price to bid away from current users. This leads to a pareto efficient outcome where the property is allocated by way of vesting property rights to the person who values it the most.

### **3.6 Conclusion**

Land is the ‘fulcrum’ of Kenya’s development.<sup>218</sup> Kenya Vision 2030 illustrates the critical link between the three pillars of development i.e. political, legal, economic and social. From this, it is evident that failure by the government to properly address the problem of land disparities in Kenya will continue to threaten the social, political and economic well-being of the nation.

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<sup>213</sup> Chaka M, Putsoa N, Mohafa M, ‘Good Land governance is essential to effective administration of Land,’ 6.

<sup>214</sup> Chaka M, Putsoa N, Mohafa M, ‘Good Land governance is essential to effective administration of Land,’ 6.

<sup>215</sup> Chaka M, Putsoa N, Mohafa M, ‘Good Land governance is essential to effective administration of Land,’ 6.

<sup>216</sup> Chaka M, Putsoa N, Mohafa M, ‘Good Land governance is essential to effective administration of Land,’ 6.

<sup>217</sup> Chaka M, Putsoa N, Mohafa M, ‘Good Land governance is essential to effective administration of Land,’ 6.

<sup>218</sup> Kieyah J, Kameri-Mbote P, *Securing property rights in land in Kenya*, 322.

This chapter has illustrated the importance of system in place by the Ministry of Lands that embodies the additional principles stipulated in Article 60(1) of the COK. The establishment of a system that secures property rights with the costs of registration of titles being less than the benefit of registration incentivises persons to register and secure their property rights. This results in an increase in investment by individuals who are ready to acquire rights to the property at a price they would bid to part with the property. Furthermore, a system which guarantees security in property rights induces persons to invest in land, to improve and use the land in a manner that will result in wealth maximization. Such a system will result in efficient land holding because the transfer of property rights to persons is secure, thus, the land is held by an individual who will use it by investing in it to yield a higher outcome because of the certainty in security of title. The system can also achieve efficient land holding through transparency and cost-effectiveness. This is evident where information determining the owner of land allows for equitable access to land by persons who wish to purchase it at a monetary value that reflects the value of the land. Lastly, efficient holding of land by an individual also needs to take into consideration sustainable and productive management of the land. This is achieved through land users will invest in land after a high bid is set to bid them away from current users if the administrators believe, if employed in some other way, a particular parcel of land would be more valuable. The efficient allocation that is made based on the value of the land will yield outcomes that exceed their investments. Therefore, when these additional principles are interpreted alongside the concept of Pareto and Value Maximisation, the outcome of an allocation is considered to be pareto efficient or efficient on the basis of maximizing the value of the parcel of land.

The next Chapter will involve an analysis of an appropriate framework that ought to be adopted by courts, the legislature in drafting the MMHLA Bill and Public institutions such as the Ministry of lands when interpreting the principle of efficiency with regards to efficient land holding in Kenya.

## **CHAPTER FOUR: AN APPROPRIATE FRAMEWORK TO BE ADOPTED FOR THE INTERPRETATION OF THE PRINCIPLE OF EFFICIENCY**

### **4.1 Introduction**

Having interpreted the concept of efficiency in Chapter two, this Chapter will look at the legislative attempts in Kenya made to allocate land efficiently. This Chapter will comprise of the evolution of the MMHLA Bill 2015, an overview of the MMHLA Bill 2015 and a critique of the Bill in an attempt to determine the appropriate criteria to be adopted by the legislature to reflect the principle of efficient land holding. More specifically, it will focus on provision two, three, four and five of the MMHLA Bill 2015 with regards to its contribution in realizing the principle of efficiency at the legislative level. An analysis will also be conducted in relation to the application of the Kaldor-hicks model and pareto efficiency to investigate which model if not all, can be applicable in an attempt to realize the principle of efficient land holding in Kenya. Overall this Chapter will propose a framework to be used when interpreting the concept of efficiency at the legislative level.

### **4.2 Evolution of the MMHLA Bill 2015**

The rationale for creating a minimum and maximum acreage of land to be held by citizens is based on the fact that land ought to be used in a manner that is sustainable because of its nature as a finite resource.<sup>219</sup> With this in mind, the increase in population has led to the increase in demand for land. This has precipitated the increase in fragmentation of land into units that are uneconomic in nature. These units include large pieces of land that are held by a scant number of people but not utilized optimally.<sup>220</sup> The NLP recommended to the government that the subdivisions to be made with regards to land should take into consideration the land use sizes prescribed for different ecological zones.<sup>221</sup> This was to be effected by setting up a system that would determine the economic viability of minimum land sizes for various zones.<sup>222</sup> Such a system would in turn advance observance of subdivisions of land to be in line with the set minimum economically viable land sizes.<sup>223</sup>

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<sup>219</sup> Republic of Kenya, *Sessional paper no.3 of 2009 on national land policy*, 9.

<sup>220</sup> National Assembly Hansard Report, 25 March 2010, 49.

<sup>221</sup> Republic of Kenya, *Sessional paper no.3 of 2009 on national land policy*, 29.

<sup>222</sup> Republic of Kenya, *Sessional paper no.3 of 2009 on national land policy*, 29.

<sup>223</sup> Republic of Kenya, *Sessional paper no.3 of 2009 on national land policy*, 29.

In 2015, the Legislature, in accordance with Article 68(c)(i), drafted a Bill known as the Minimum and Maximum Land Holding Acreage (MMLHA) Bill. This Bill sought to reduce the inefficient land holding that exists in Kenya following the number of people in Kenya who own large tracts of land which are not exploited appropriately.<sup>224</sup> The object and purpose of that Bill was to *inter alia*, regulate subdivision of land in order for land to be held in a manner that is economical and the parcels were viable.<sup>225</sup> This was to be achieved through the determination of the minimum and maximum acreage in which private land will be held.<sup>226</sup> The Bill is the closest Kenya has come to reducing if not ending the problem of holding land inefficiently.

The MMLHA Bill is a product of Section 159 of the Land Act which instructs the Cabinet Secretary (CS), within one year from commencement of the Act, to undertake a scientific study. The purpose of this study is to ascertain the economic viability of minimum and maximum acreages of private land for several land zones. From this scientific study, a report, before being tabled in parliament for debate, would be lay open to a public discussion. If adopted after being debated in parliament, the CS is tasked with formulating rules and regulations that will direct the registrar.

In Kenya, 29% of Kenyans are landless. The land distribution is in favour of the 0.1% farm holdings with an average of 77.8 hectares occupying 39% of farmed land area. This is amid those who already own land. In addition to this, there are continuous sub-divisions in small farms hence reducing the land to uneconomic units despite the fact that it's for the subsistence of agriculture.<sup>227</sup> For purposes of food security and sustainability, it is important to limit how the amount of land to be owned by for instance a family unit. A commendable attempt is made by the legislature but arguably, the Bill has a multitude of defects and among them is the absence of the interpretation of the principle of efficiency. Therefore, it is important to examine how this principle ought to be interpreted and to what extent is Bill in line with the principle of efficiency. On the other hand, the Ministry of lands is also vested with the mandate to ensure land administration is done in a manner that achieves efficient land holding at the allocative

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<sup>224</sup> Republic of Kenya, *Sessional paper no.3 of 2009 on national land policy*, 29.

<sup>225</sup> Section 3(c), *Minimum and Maximum Land Holding Acreage Bill*, 2015.

<sup>226</sup> Section 3(a), *Minimum and Maximum Land Holding Acreage Bill*, 2015.

<sup>227</sup> Institution of Surveyors of Kenya, *Report of Desk study on Minimum and Maximum Land Holding Acreage in Kenya*, 2016, 48.

level. However, there is need to establish an appropriate framework to realise this principle at the institutional level to ensure efficient allocation of land in Kenya.

### 4.3 Overview of the MMHLA Bill 2015

Bearing in mind the evolution of the MMHLA Bill 2015, at this point, it is clear that the Bill seeks to regulate the minimum and maximum land holding subdivision and sizes of private land.<sup>228</sup> The Bill affects all private land in Kenya that is held under both freehold and leasehold tenure and is not meant to apply retrospectively.<sup>229</sup> Instead it establishes a legal framework and procedures that would be used to determine the maximum and minimum acreages that will be held by any individual as regards to private land and regulate subdivisions of private land.<sup>230</sup> To achieve this, a scientific study ought to be taken to determine the economic viability of minimum and maximum acreages in respect of private land.<sup>231</sup>

Part ii of the MMHLA Bill provides for the determination of minimum and maximum land holding acreages. Section 6(1) refers to the First Schedule for the prescribed Minimum and Maximum land holding acreages. The schedule is classified into four thematic areas. They are the prescription of Minimum and Maximum Land Sizes for Wildlife Conservancies, prescription of minimum and maximum land sizes for livestock agriculture and fisheries, prescription of minimum and maximum land sizes for urban and peri-urban land users, prescriptions for residential land user and prescription of minimum and maximum land holding acreages for transport and infrastructure, prescription of minimum and maximum land sizes for public utilities, prescription for minimum and maximum land requirements for social and cultural amenities and prescription for the minimum and maximum land holding for industrial parks, special economic zones and ICT infrastructure.<sup>232</sup>

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<sup>228</sup> Member of Bowman Gilfilian Africa Group, Minimum and Maximum Land holding Acreage Bill, 2015, Coulson Harney Avdicates -<<https://www.bowmanslaw.com/wp-content/uploads/2016/08/CH-Newsflash-Minimum-and-Maximum-Land-Holding-Acreage-Bill.pdf>> on 5 November, 2019.

<sup>229</sup> Member of Bowman Gilfilian Africa Group, Minimum and Maximum Land holding Acreage Bill, 2015, Coulson Harney Avdicates -<<https://www.bowmanslaw.com/wp-content/uploads/2016/08/CH-Newsflash-Minimum-and-Maximum-Land-Holding-Acreage-Bill.pdf>> on 5 November, 2019.

<sup>230</sup> Member of Bowman Gilfilian Africa Group, Minimum and Maximum Land holding Acreage Bill, 2015, Coulson Harney Avdicates -<<https://www.bowmanslaw.com/wp-content/uploads/2016/08/CH-Newsflash-Minimum-and-Maximum-Land-Holding-Acreage-Bill.pdf>> on 5 November, 2019.

<sup>231</sup> Member of Bowman Gilfilian Africa Group, Minimum and Maximum Land holding Acreage Bill, 2015, Coulson Harney Avdicates -<<https://www.bowmanslaw.com/wp-content/uploads/2016/08/CH-Newsflash-Minimum-and-Maximum-Land-Holding-Acreage-Bill.pdf>> on 5 November, 2019.

<sup>232</sup> Section 3(a), *Minimum and Maximum Land Holding Acreage Bill*, 2015.

Part iii provides for the institutional framework that establishes the sub-county and Land Control Committee. It also states the functions and the requirement for a grant or refusal of consent in respect of an application for subdivision of land. Part IV on the other hand looks at the regulation of private land use while Part V looks at the general provisions. This study will focus on prescription of minimum and maximum land sizes for urban and peri-urban land users. It provides that the determinants to be used include ‘land use, type of activity/development, infrastructure and service provisions, income and population density, terrain, market forces, public health provisions, political influence, public policies, and public participation.’<sup>233</sup> The considerations to be taken include ‘habitable conditions, promote optimal productivity, reduce environmental degradation, promote compatibility, enhance sustainability, promote accessibility and connectivity, and mitigate pollution and provide for waste disposal.’<sup>234</sup>

#### **4.4 Critique of the MMLHA Bill 2015**

The MMHLA Bill 2015 is concerned with the distribution of quantum of rights that an individual can enjoy in property.<sup>235</sup> The proposal by the National Land Policy to regulate land sizes is meant to encourage equity and to offload the excessive land that was not put into productive use to the market for use by the citizens. The spirit of this proposal is evident in Article 68 of the COK 2010 where parliament is mandated to enact a legislation that will prescribe the minimum and maximum land. The MMHLA Bill 2015 strives to solve the problem of both maximum land holding and owners fragmenting land into uneconomical sizes to maximize the returns they seek. This will consequently solve problems such as landlessness, food insecurity and land related conflicts in this country. Despite the stipulations made by MMHLA Bill regarding the minimum and maximum land holding acreages that should be applied in different areas, an interpretation of the principle of efficiency even in the form a definition in Section 2 is lacking and thus, it is not clear how the provisions in Part three of the first schedule will be realised.<sup>236</sup> Having recognized the various means of interpretation in Chapter two of this study, the application of two modes of interpretation- concept of pareto and Kaldor-hicks- will be used to illustrate how their application results in breathing life to the spirit of the COK in Article 60(1).<sup>237</sup> This will be done against the provisions in Part three of

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<sup>233</sup> First Schedule, *Minimum and Maximum Land Holding Acreage Bill*, 2015.

<sup>234</sup> First Schedule, *Minimum and Maximum Land Holding Acreage Bill*, 2015.

<sup>235</sup> Kariuki F *et al*, *Property Law*, 4.

<sup>236</sup> Kariuki F *et al*, *Property Law*, 328.

<sup>237</sup> Article 60(1), *Constitution of Kenya* (2010).

the first schedule. These illustrations will be followed by a conclusion proposing which framework is most suitable for interpreting the principle of efficiency.

#### **4.4.1 Pareto Efficiency**

As discussed in Chapter two of this study, the concept of Pareto efficiency denotes a situation where it is impossible to transfer or reallocate the resources in a way that will make one person better off without leaving at least one individual worse off.<sup>238</sup> In the case of land allocation in Kenya, part three of the first schedule of the Bill provides that with regards to the prescription of minimum and maximum land sizes for urban and peri-urban land users, the aspect of land use, type of activity and income and population density will be taken into consideration. These three aspects are examined against the concept of Pareto efficiency below.

##### **a) Land use**

Land use is defined as the processes and anthropogenic activities that are undertaken on a parcel of land. Activities include human activities on the physical *solum*.<sup>239</sup> In Kenya, land ought to be used in line with the principles of land use that were discussed in Chapter three of this study—the principles are sustainability, productivity, efficiency and equitable access to land.<sup>240</sup> It is in line with these principles that land is used for purposes of forestry, agriculture, mining and urbanization.<sup>241</sup> The policy framework governing land use planning includes *inter alia* a draft NLP that was drafted in 2017 to ensure that land is utilized in a manner that is sustainable and provide guidelines that will facilitate land use planning, resource allocation and resource management.<sup>242</sup> From this, it can be inferred that the aim of the aforementioned draft policy is to achieve efficient land holding through sustainable use of land. In order for the MMHLA Bill 2015 to prescribe minimum and maximum acreages that are in line with the aim of the draft NLP of 2017 the Pareto efficiency concept states that where the re-allocation or transfer of a parcel of land occurs and it leaves another individual worse off, the allocation would still be considered inefficient. Therefore, in determining the size of property rights in land, the application of the concept of Pareto in interpreting the principle of efficiency is a cogent framework that can be used by both judicial officers, policy and law makers to examine whether a provision renders another individual better off despite the fact that it is detrimental

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<sup>238</sup> Clarke A, Kohler P, *Property Law commentary and materials*, 49.

<sup>239</sup> Okoth Ogendo HWO, 'Land use Law' University of Nairobi, 2004

<sup>240</sup> Kariuki F *et al*, *Property Law*, 381-383.

<sup>241</sup> Kariuki F *et al*, *Property Law*, 385-392.

<sup>242</sup> Republic of Kenya, *Draft national land use policy*, Clause 1.4.

to another. Such an examination based on the Pareto efficiency framework will allow for land allocations that will not be detrimental to other persons. This will also reduce the problem of a lot of inputs being used such as owning large tracts of land being held but not used to produce outputs that exceed the inputs.

#### **b) Type of activity/development**

An activity is defined as work performed to create a result while development, with respect to land, is defined as adding improvements to land.<sup>243</sup> This determinant is important to take into consideration however, the Bill does not expound on how this determinant will lead to efficient land holding. A look at the concept of externalities reveals that the decision to be made on the size of land to be determined can lead to good or bad effects that affect other individuals external to the decision. This ties in to the concept of Pareto where a legislated prescribed land size for a particular use can result in a decision that adversely affects other individuals external to that decision. The adverse effect of this decision is as a result of interpreting the principle of efficiency inappropriately and thus will render one individual better off and leave one individual worse off. Therefore, in considering the size of land to be allocated, it is vital to bear in mind the type of activity to be undertaken and the effect it will have on other individuals external to the decision to ensure the principle of efficiency is upheld. The Coase theorem further expounds on the ability to achieve an efficient outcome where property rights and liabilities are fully assigned for a specific activity. For that reason, where an activity has been recognized in conjunction with the externalities that come as a result of that activity, assigning property rights to an individual will result in a decision that is efficient. This is because resources will be aligned with the necessary inputs- by the individual who was prepared to pay- that will yield higher outputs sustainably.

#### **c) Income and population density (the principle of equity)**

Income is defined as a gain or recurrent benefit that is usually measured in form of money derived from labor or capital.<sup>244</sup> Population density on the other hand denotes to an estimate of the total land used in a certain area. It can be expressed as the number of persons living per square mile, divided by the total number of square miles.<sup>245</sup> The use of income and population density as a determinant of how land is allocated following the prescribed land size in the Bill

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<sup>243</sup> Black's Law Dictionary, 2 ed.

<sup>244</sup> Merriam-Webster Dictionary, 4 ed.

<sup>245</sup> Black's Law dictionary, 2 ed.

is commendable however, the manner in which it is to be applied is not illustrated in the Bill. To effectively apply this provision, the concept of Pareto following allocation of resources will result in one person worse off while another individual is rendered better off. This determinant should also be interpreted in line with the concept of value maximization. This means that a parcel of land ought to be allocated to the person who is prepared to pay for it and if they already have property rights vested in them, how much they would demand to part with it should be considered. This speaks to the income an individual is ready to pay for a parcel of land.

#### **4.4.2 Kaldor-Hicks Efficiency Model**

The Kaldor-Hicks efficiency model can also be used by institutions such as the Ministry of Lands and legislative bodies to interpret the principle of efficiency and apply it to realise the provision in Article 60(1) of the COK. The Bill stipulates various minimum and maximum acreages with respect to private land. However, if the Bill was implemented, issues such as what would be the fate of land falling below the set minimum? Would they be acquired by way of compulsory acquisition? What of the individuals who have vested property rights in land that exceeds the maximum size prescribed in the Bill? Would the excess parcel of land be allocated to individuals whose size falls below the minimum or will the state acquire it by way of compulsory acquisition?<sup>246</sup>

Application of the Kaldor-Hicks efficiency model can be used to respond to the last two aforementioned questions posed as they speak to the issue of interpreting efficiency at the level of allocating land. This model reveals that where a change in the social reality benefits at least one person despite the fact that another person is left in a worse position, the change is said to be efficient. This model when applied to the provisions of the MMHLA Bill would suggest that one should overlook the idea of fairness and justice in distributing the land. This is because the loss by one person in not being able to reach the required minimum land size because he has a size lower than the minimum does not outweigh the benefit of another individual having land above the maximum acreage prescribed. However, an allocation can be said to be Kaldor-Hicks efficient and Pareto efficient where the allocation of land renders one individual better off and further puts them in a position where the individual who is worse off can be compensated by the individual who was made better off by the allocation of land following the imposition of the land sizes prescribed in the Bill. In the case of the Bill, this means that the

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<sup>246</sup> Kariuki F *et al*, *Property Law*, 328.

individuals who exceed the prescribed maximum acreage compensate the individuals who are externally affected adversely by the decision to continue to hold land beyond the maximum acreage prescribed. A case in point is compensating individuals who were willing to invest in that land if they were granted property rights in it. Doing this will also propel the person holding property rights to the land exceeding the maximum acreage prescribed to ensure the inputs he invests on the land will result in outputs that exceed these inputs. Such a case as posited by Koopman would be considered to be technically efficient.

Contrastingly, the concept of Pareto efficiency would look at a scenario of holding land beyond the prescribed maximum acreage as favourable so long as it does not decrease the utility of land by another person. therefore, where another individual, external to the decision of holding land beyond the prescribed maximum acreage fails to adversely affect any other individual, then the allocation of that land is said to be efficient. consequently, this would negate the need for compulsory acquisition where an individual owns land beyond the prescribed maximum acreage.

#### **4.5 Conclusion**

Based on the analysis above, it is evident that the Bill is silent on how the principle of efficiency will be interpreted to facilitate the allocation of land based on the prescribed land acreages. This silence has resulted in questions such as ‘What of the individuals who have vested property rights in land that exceeds the maximum size prescribed in the Bill? Would the excess parcel of land be allocated to individuals whose size falls below the minimum or will the state acquire it by way of compulsory acquisition’ and the lack of illustrations that embody how efficiency will be realized in terms of land use, type of activity/development and income and population density. Nonetheless, this flaw is addressed in this Chapter using the concept of pareto efficiency and Kaldor-Hicks efficiency Model as a framework which the legislature and judicial officers can use in interpreting the principle of efficiency to further enable the drafting of a Bill as required by Article 68 of the COK 2010. This will ensure the principle of efficiency is reflected in the provisions of the MMHLA Bill 2015 and consequently the allocation of land in Kenya. Correspondence will then result in minimum and maximum land holding acreages in Kenya that comply with the principle of efficient land holding in Kenya.

The next Chapter will summarise the findings of this study and propose recommendations to remedy the research problem this study has attempted to resolve.

## **CHAPTER FIVE: CONCLUSION**

### **5.1 Introduction**

This Chapter reflects on the findings of the study as developed and broken down in previous Chapters of this study. Three recommendations will be made in this Chapter that will facilitate the interpretation of the principle of efficiency at the legislative level- the legislation of the MMHLA in the future as required by the COK in Article 68 and at the allocative level- . This Chapter will then conclude the research paper.

### **5.2 Summary of findings**

This study has scrutinized the concept of efficiency from a general point of view to understanding it from the perspective of efficient land holding. Chapter one formed the basis of the research with establishing the lack of a clear understanding of this concept. This Chapter also illustrated the problems that Kenya is facing as a result of not understanding this concept in its entirety. The Chapter also laid out the objectives of the research, established the specific questions to be researched, reviewed relevant literature, and laid out the conceptual framework of the study. The first research question sought to understand how the principle of efficiency is interpreted. The second research question sought to identify the relationship between the additional principles governing land holding in Article 60(1) of the COK and the principle of efficient land holding in Kenya. The third research question sought to determine an appropriate framework to be used by the legislature and the Ministry of Lands when legislating and allocating land.

Chapter two analysed the different concepts of efficiency, specifically the three concepts namely technical, productive and allocative. This Chapter further discussed three different modes of interpretation namely, value maximization, pareto efficiency, and the Kaldor-Hicks efficiency model. This discussion disclosed the concept of Pareto and Kaldor-Hick efficiency as the ideal model to be used in examining the MMHLA Bill 2015.

Chapter three explored the different principles governing land-holding in Kenya. A discussion around understanding the concept of property rights revealed that land is in fact considered to be property. This Chapter also identified Article 60(1) as the legal framework governing efficient land holding. This set stage for the analysis of how the additional four principles provided for in Article 60(1) result in realizing the principle of efficient land holding together with the interpretation of its meaning in Chapter 2 of this study. This Chapter concluded by

noting the importance of the Ministry of lands adhering to the additional four principles to allocate land in a manner that will ensure efficient land holding.

Chapter four explored the use of the concept of Pareto efficiency and the Kaldor-Hicks efficiency model against Part three of the first schedule of the MMHLA Bill 2015. It begun with understanding the gradual development of circumstances that led to the drafting of the Bill. Following this is an overview of the Bill and then the identification of the shortfalls of the Bill. The shortfalls recognized in Part three of the first schedule were addressed against the Concept of Pareto and the Kaldor-hicks efficiency model. This Chapter ended with concluding that both the Concept of Pareto and the Kaldor-hicks efficiency model are ideal to be used as a framework to interpret the principle of efficiency in the MMHLA Bill 2015.

The present Chapter concludes the analysis of this study by summarizing the findings and offers three recommendations to address the present dilemma of interpreting the principle of efficiency for application at the legislative and allocative level in Kenya.

### **5.3 Recommendations**

This study proposes three recommendations.

First, at the interpretative level of understanding the principle of efficiency, there is a need to define the concept of efficiency based on a three-pronged approach; Value maximization, Concept of Pareto efficiency and the Kaldor-hicks efficiency Model. The introduction of a definition that interprets efficiency ‘as a situation where land is allocated to an individual who will maximise its value. Where an increase in the use of land does not decrease the use of any other person, then the allocation and use of that land is considered to be efficient. However, where the use is viewed to be detrimental to another individual external to the decision made by the National Land Commission and the Kenyan Courts, then the Kaldor-hicks efficiency model kicks in to require that the individual suffering a detriment is compensated by the individual whose utility is increased as a result of that allocation.’ This interpretation is based on both Pareto efficiency and Kaldor-hicks efficiency model and value maximization as has been applied throughout this study.

Secondly, at the legislative level, there is need to revisit the MMHLA Bill 2015 in a bid to reflect the proposed interpretation of the principle of efficiency. This is because the Bill is

silent on interpreting what the principle of efficiency means and what framework they have used to arrive at the acreages prescribed in the Bill to realise Article 60(1) of the COK. To achieve this, the legislature should adopt and apply the proposed definition given in the first recommendation in the interpretation section of the MMHLA Bill 2015. The inclusion of this definition before the Bill is passed will address both the problem of uncertainty and lack of clarity as it will serve as a guiding framework which the legislature can use in determining whether and how the prescribed acreages will amount to efficient land holding following its passing in parliament, assenting by the President and publication in the Gazette.

Lastly, at the allocative level, the application of the proposed definition in the first recommendation will aid institutions such as the Ministry of lands in dealing with land administration. This is because the system put in place by the Ministry of lands that adheres to the additional principles in Article 60(1) results in an allocation of land that is both Pareto efficient and maximises the value of land that is allocated to an individual. The use of both the concept of Value maximization and pareto efficiency are fundamental in determining, at the point of allocation, the value in which an individual is ready to pay, to part with the property rights in a parcel of land during the process of allocation. The reason for this recommendation is to prevent any future disparities in land holding in Kenya because of choosing to look at the amount of money an individual can afford to pay as opposed to take into consideration the money an individual has to part with the ownership rights in land.

#### **5.4 Conclusion**

In sum, this study has found that there is a lack of understanding of the concept of efficiency specifically in land holding. This is further illustrated in the provisions of the MMHLA Bill 2015 that attempts to solve the problem of disparities in land holding in Kenya. The study has also identified various concepts that can be used to understand the concept of efficiency in holding land. From this, it is evident that adoption of the recommendations will result in a reduction if not completely resolving the problem of inefficient land holding in Kenya as a result of false interpretation of the principle. Adoption of the recommendations made in this study will result in an outcome that is in line with the letter and spirit of the COK 2010 to hold land efficiently.

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