

**Evaluation of the mandate of the relevant
institutions in addressing the squatter problem in
Kenya**

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DEDICATION

My work is dedicated to God, my dear parents who have been supportive through out.

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DECLARATION

I, FIONA WANJIRU GITHUNGURI, 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:.....

Mr Francis Kariuki

LIST OF ABBREVIATIONS

MRC Mombasa Republican Council

NLC National Land Commission

TJRC Truth, Justice & Reconciliation Commission

LIST OF STATUTES

Abolition of Racially Based Land Measures Act (Act No.108 of 1991).
Community land Act (Cap 27 2016).
Constitution of the Republic of South Africa Act (Act No. 108 of 1996).
Crowns Lands Ordinance of 1915 (repealed).
Crowns Lands Ordinance (1902) (repealed).
East Africa Lands Order in Council (1889) (repealed).
East African Land Regulations (1897) (repealed).
East African Order in Council (1897) (repealed).
Extension of Security of Tenure Act (Act No. 62 of 1997).
Foreign Jurisdiction Act (1890) (repealed).
Government Land Act (Cap 280) (repealed).
Green Paper on Land Reform.
Group Areas Act (Act No. 36 of 1966) (repealed).
Group Areas Act (Act No. 41 of 1950). (repealed).
Indian Lands Acquisition Act (repealed).
Indian Transfer of Property Act (1882) (repealed).
Kenya Annexation Order-in-Council 1921 and *Kenya Colony Order-in-Council* (1921).
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Prevention of Illegal Squatting Act (1951) (repealed).
Public Procurement and Disposal Act (Act No 3 of 2005).
Recapitalization and Development Policy Programme (‘Recap’) of 2014.
Reconstruction and Development Programme (Act No. 41 of 1950).
Reconstruction and Development Programme Policy Framework (1994).
Registered Land Act (Cap 300 Laws of Kenya).

Registration of Documents Ordinance (Cap 285) (1915) (Repealed).

Registration of Titles Ordinance (Cap 281 No 6 of 1919).

Restitution of Land Rights Act, (Act No 22 of 1994).

Restitution of Land Rights Amendment Act 2014 (Act No. 15 of 2014).

Robertson's Recommendations.

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Ahmed Abdulla Mohamed & 3 Others v Attorney General [2012] eKLR.

Attorney General of Uganda v Omar Awadh & 6 Others [2013] eKLR.

Ayuma & 11 Others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 2 Others [2010] eKLR.

Baartman, Baartman v Port Elizabeth Municipality 2004 (1) SA 560 (SCA).

Beja and Others v Premier of the Western Cape and Others 2011 (10) BCLR 1077 (WCC).

City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another (CC) [2011] ZACC 33.

City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another (CC) [2011] ZACC 33.

In the Matter of the National Land Commission [2015] eKLR.

Isaka Wainaina & Another v Murito wa Indagara & Ors (1923) 2 KLR 102.

Jabulani Zulu and 389 Others v eThekweni Municipality and Others [2014] ZACC 17.

James and others v The United Kingdom, Application no. 8793/79, Judgment of 21 February 1986.

Kalabri v A.G [1938] 18 KLR.

Kuria Greens v The Registrar and Another (eKLR).

Mahlangu v De Jager, LCC SA235, 1996.

Mwangi Muguthu v Maina Muguthu (1972) EA 227.

Residents of Joe Slovo Community, Western Cape v Thubelisha Homes 2010 (3) SA 454 (CC).

Residents of Joe Slovo Community, Western Cape v Thubelisha Homes, 2010 (3) SA 454 (CC).

Sawhoyamaya Indigenous Community v. Paraguay, IACtHR Judgment of 29 March 2006.

The Government of the Republic of South Africa v Irene Grootboom, 2001 (1) SA, 46.

The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria, ACmHPR Comm. No. 155/96 (2001).

Van Zydam v Zulu, LCC Case 27/98.

Wainaina v Murito [1923] 2 KLR 102.

Chapter One

Introduction to the study

1.0 Introduction

This research seeks to evaluate the mandate of relevant institutions charged with the task of addressing the squatter problem in Kenya. It will look at the causes of squatting, evaluate the legal infrastructure for the implementation of the mandate and give various recommendations to curb this phenomenon in Kenya.

1.1 Background

Squatter settlements are considered as residential areas inhabited by the very poor who have no access to land tenure of their own, and hence "squat" on vacant land, either private or public.¹ Squatter settlement is the absence of security of tenure and planning.² The defining characteristics of a squatter settlement³ are: firstly, physical characteristic, such as ,services and infrastructure at below minimum level this includes roads and water services. Secondly, social characteristic as they are inhabited by persons who belong to a lower income group mostly working in the informal sector, predominantly migrants. Thirdly, legal characteristic, which is the lack of ownership of the land in which individuals have settled, it could be public or private land. They have no security of land tenure and are constantly exposed to eviction and violence.⁴

The land question at the Coast predates British colonization. The declaration of protectorate status gave the Imperial Power more than just political power rights over land. The domination by the Arabs at the Coast led to the British and the Germans deciding to leave the Ten Mile Strip to the Sultan of Zanzibar.⁵ The agreement between the Sultan of Zanzibar and Imperial British East Africa in 1895, stated that the Sultan had all rights to land in his territory except private lands ,and that the railway construction that extended into the Ten Mile strip of mainland within the Sultan's dominion had not been expropriated by individuals. Africans had only occupational rights but no title to land.⁶

Robertson's Recommendations⁷ upheld the 1895 agreement that the land title deeds should be acknowledged and guaranteed. The agreement between Kenyatta and the Sultan of

¹ <http://www.gdrc.org/uem/squatters/define-squatter.html>

² Section 209, *National Land Policy (Sessional Paper no 3 of 2009)*

³ <http://www.gdrc.org/uem/squatters/define-squatter.html>

⁴ UN Habitat III Issue Paper 22, *Informal Settlements*, 31st May 2015 at New York.

⁵ Mwaruvie JM, *The Ten Miles Coastal strip: An Examination of the Intricate Nature of Land Question at Kenyan Coast*, International Journal of Humanities and Social Science at Moi University, 2011, 178.

⁷ Colonial Office, *Report of the Commissioner, presented to Parliament by Secretary of State for Colonies by command of Her Majesty*, December 1961. Cmnd 1585, London: Her Majesty's Stationary Office, 1961.

Zanzibar signed in London on 5th October 1963⁸ reassured land security for the Arabs at the coast, leaving indigenous Africans as squatters. There were demands for establishment of a foreign office to allow for enactment of legislation authorizing compulsory acquisition for construction of the railway and beyond the Sultan's dominion. The *Indian Lands Acquisition Act* was then extended to Zanzibar in 1896, section 8 of the *Zanzibar Order in Council*, stated that any future actions by the Governor of India would be applicable to Zanzibar.

The *1897 East African Land Regulations* gave the Commissioner power to sell freehold in land within the Sultan's dominion. It was enacted for the purpose of securing land for settlers, drawing differences between land in the sultan's dominion and that under the protectorate. The *East African Order in Council 1897*, this incorporated the *Indian Land Acquisition Act (1894)*, which provides for compulsory land acquisition for the railway and Ten-mile strip and establishment of government buildings and other purposes. It did not however provide for resale of land acquired.⁹

The *Crowns Lands Ordinance of 1901* stated that Crown Lands are vested in the Commissioner in trust for her majesty. This Order in Council empowered the commissioner to sell freehold land and land that was not under Africans without the consent of tribal chiefs referred to as 'waste and unoccupied land'.¹⁰

The *1902 Crowns Lands Ordinance*, gave the Commissioner power to grant freeholds in the crowns lands to any purchaser, nothing would invalidate a sale. The result of the ordinance before and that of 1902 Ordinance were such that ,no native had title to land, all unoccupied land was crowns land ,all vacated by a natives reverted to the Crown, prohibited grants of land in the actual occupation of the Africans, and provided that where any grants happened to include native settlement excluded from the grant vacated no claim to title in land.¹¹

The *1915 Crown Lands Ordinance* provided for a system of registration of title, that was influenced by political leverage of the settlers, and a discrimination principle in governance by colonial regime laws which were intended to exclude Indians and Africans from owning any lands in the highlands securing settler interests, thus security of tenure. Established Native reserves exclusively for Africans. Its aim was to secure the lands held by the white

⁸ Kenya Coastal Strip, *Agreement between the Government of the United Kingdom, His Highness the Sultan of Zanzibar, the Government of Kenya and the Government of Zanzibar*. Cmnd. 2161, London: H. M. Stationary Office, 1963.

⁹Wakoko V, The Evolution of Land law in Kenya. Accessed from:
https://www.academia.edu/8972722/THE_EVOLUTION_OF_LAND_LAW_IN_KENYA.

¹⁰Wakoko V, The Evolution of Land law in Kenya. Accessed from:
https://www.academia.edu/8972722/THE_EVOLUTION_OF_LAND_LAW_IN_KENYA.

¹¹Ogendo O, *Tenants of the Crown: Evolution of Agrarian Law and Institutions in Kenya*, Kenya Africa Centre for Technology studies (ACTS). Nairobi,1991.

settlers, leaving the natives with limited rights to commodity production within the precincts reserved for them.¹² This already created landlessness as the natives were a majority.¹³ In *Wainaina v Murito*, it was held that the native tribes could not lawfully alienate land but were mere tenants of the Crown of the land.¹⁴

The *Registration of Titles Ordinance*,¹⁵ stated that when land was bought under it all other registration laws ceased to have effect in relation to that land, certificate issued under it was conclusive evidence. This completed the disinheritance of natives within the framework of colonial laws.¹⁶ This law redefined Crown land to mean land that was also under occupation by the natives, thus no more community land. Customary laws continued to be applied, by virtue of a Repugnancy clause, as they were subordinate to the British Law, those repugnant were considered void. Natives only had occupancy rights.¹⁷ The *Kenya Annexation Order-in-Council 1921* and *Kenya Colony Order-in-Council 1921*, took away the absolute rights in land by Natives.

Government Lands Act,¹⁸ gave the president power to sign documents granting title and power to delegate this power to the Commissioner of Lands, leading to abuse of power thus causing land issues as we know today. Section 3, only changed the powers that were vested in the commissioner to be vested in the president. This conferred upon the president powers to make grants of the freehold or leasehold of unalienated government land to individuals and corporations. This system of grants, paved way to massive illegal allocation of public land by the government of independence. These provisions facilitated for public land to be administered and allocated in interest and in accordance with legal provisions, (president not to allocate land without consultation with commissioner of lands) these safeguards have been disregarded leading to illegal and irregular allocation mostly in 1980s and 1990s land was allocated for political rewards and speculation purposes. The Circular issued by the Governor in 1951, objectives were among them the prevention of speculative accumulation of land by the wealthy, was also to enhance development of the colonial economy, which did not include the interests of the Natives.

¹² Ojienda O.T, '*Principles of Conveyancing in Kenya, A Practical Approach*'.2007,49.

¹³ Omboi BM and Gachaba M L, 'Factors leading to squatter problem in Rift Valley Province in Kenya', 49.

¹⁴ [1923] 2 KLR 102.

¹⁵ (No 6 of 1919).

¹⁶ Ogendo O, '*Tenants of the Crown: Evolution of Agrarian Law and Institutions in Kenya*', Kenya Africa Centre for Technology studies (ACTS). Nairobi,1991.

¹⁷ Wakoko V, 'The Evolution of Land law in Kenya'. Accessed from:
https://www.academia.edu/8972722/THE_EVOLUTION_OF_LAND_LAW_IN_KENYA

¹⁸ (Cap 280 Laws of Kenya).

Different regions, however, have various factors leading to the creation of the squatter problem. This paper focuses on the squatter problem at the Coast of Kenya and thus shall focus on causes of creation of the squatter problem at the Coast. The land question at the coast predates British colonization.¹⁹ With the agreement between the Sultan and Imperial British East Africa and later with Jomo Kenyatta, the Mijikenda were left having no title deeds in support of their traditional claims to land, thus disinheritance of people from their ancestral lands during the colonial period²⁰. The mechanisms for the purchase of land, both market and non-market, have then led to further unjust and inefficient modes of transfer and acquisition of land²¹, only the rich would benefit. Land that did not have title deeds was then declared trust land. Later the independence government exploited this to settle both politically and ethnically correct people, leading to the issue with illegal and irregular acquisition of public land.²² Such historical injustices led to the creation of the squatter problem at the coast.

The previous land laws did not seem to adequately deal with this problem thus necessitating formation of the National Land Commission. It is established under Article 67(1) of the *Constitution of Kenya, 2010*, to, *inter alia*, manage public land on behalf of the National and County Governments. Its conception was through the policy adopted in parliament in 2009, The National Land Policy, with section 232 defining the National Land Commission. It is further espoused as a constitutional body in chapter 15 of the *Constitution of Kenya*, with the powers privileges and authority accorded to constitutional bodies. Established under article 67, it is further constituted by the National Land Commission Act. Its mandate is espoused in the Constitution, The *National Land Policy* and the various land laws such as the *National Land Commission Act*, the *Land Act* and the *Land Registration*.

The Commission is given the mandate of the establishing Settlement Schemes as per section 135 of the *Land Act*,²³ to provide access to land to displaced persons and squatters. It also provides for a procedure of identification of beneficiaries of these schemes. Settling the landless in public land and where unavailable purchase private land subject to *Public Procurement and Disposal Act*²⁴. Such land acquired for settlement shall not be transferable except through succession. Section 135, establishes a Land Settlement Fund, it states the

¹⁹ Collins O R, 'Eastern Africa: VOL. II of African History, Text and Readings', Markus Wiener Publishing, 1990, at New York, 48-49.

²⁰ *Ndungu Land Commission*, Commission of inquiry on Illegal and Irregular Allocations of Public Lands (2003/2004), Government of Kenya, 2004.

²¹ Syagga P, 'Public land, historical land injustices and the new Constitution', Society for International Development (SID), Nairobi, 2011, 10-12.

²² Syagga P, 'Public land, historical land injustices and the new Constitution', 9.

²³ (No 6 of 2012).

²⁴ *Public Procurement and Disposal Act* (Act No 3 of 2005).

sources of capital for the fund and the application to which such fund is to be applied such as the provision of access to land to squatters and displaced persons, and the purchase of private land. These laws have been put to place to control land grabbing in areas designated for settling squatters as was experienced in the prior legal framework.

The Waitiki Area in Likoni, Mombasa is private land, invaded by squatters. The area is about 960 acres is full of squatters and has permanent structures.²⁵ Recently an agreement was made between the government and Mr. Waitiki, however the procedure used to acquire this land is flawed as it is not supported by any law. It involved the formalization of an illegality, where Mr. Waitiki was evicted from his land by youths during the 1997/8 Kaya Bombo clashes.²⁶ This decision allows one to benefit from an illegality, as invaders claimed the land owned Mr. Waitiki was their ancestral land. This decision is dangerous as it threatens the policy enshrined in *The Constitution* article 60 on security of land rights and article 40 on the right to own property not subject to arbitrary deprivation aside from compulsory acquisition in sub-article 3. This settlement scheme is as a result of invasion, it was previously held on leasehold tenure, change of user is therefore mandatory. This procedure of change of user is also questioned, did it comply with the provisions of the *Land Registration Act*.²⁷ It is important to also highlight that the county and national governments had not agreed on land rates and rent therefore questioning how the occupants obtained certificates.²⁸

Among the mandates of the National Land Commission is settling of squatters. Since the formation of the National Land Commission many of its mandates have been impossible to realize. This has however been attributed to the lack of authority to issue title deeds and superiority conflicts between the National Land Commission and the Ministry of Land amidst these wrangles.

1.2 Statement of the problem

Recently the National Land Commission was mandated to solve the squatter problem, this task is now assigned to the Ministry of Lands. However, this mandate has become impossible to realize due to inadequacies in the legal framework and political wrangles in administration of land. This problem could however be solved through creation of an enabling legal framework and a good political will.

1.3 Objectives

1. To examine the legal framework meant to address the squatter problem in Kenya.

²⁵ http://www.kecosce.org/downloads/land_status_coast.pdf

²⁶ <http://www.nation.co.ke/news/Uhuru-helps-end-Waitiki-land-row/-/1056/2962196/-/938n67/-/index.html>

²⁷ (Act No 3 of 2012).

²⁸ <https://landportal.info/news/2016/02/kenya-why-titles-given-waitiki-land-beneficiaries-may-be-irregular>

2. To highlight the challenges in addressing the squatter problem in Kenya.
3. To come up with necessary reforms and recommendations in realization of the mandate of the relevant institutions charged with the task of solving the squatter problem brought by historical injustices in the coast.

1.4 Hypothesis

The existing land laws are not adequate in addressing the squatter problem in Kenya.

1.5 Literature review

Paul Syagga discusses the impact of colonial administration in causing landlessness through laws and policies such as, the enactment of the *Registration of Documents Ordinance*²⁹ which was enacted together with *Crown Land Ordinances of 1915* amending the 1902 legislation. This law redefined Crown land to mean land that was also under occupation by the natives, thus no more community land. Natives only had occupancy rights.³⁰ At the Coast region, the *Land Titles Ordinance 1908*, required all persons with claims to land to present them to the Land Registration Court, failing which all unclaimed land was deemed to be Crown Land. With the lack of verifiable evidence of ownership, Africans at the Coast were dispossessed and have continued to live as “tenants at will” at the mercy of those who made claims without their knowledge.³¹

The individualization of tenure, though justified on economic basis created the African rural elite phenomenon, contributed to the creation of squatter phenomenon. The reforms suggested by the *Swynnerton Plan* led to land consolidation and increased the problem of landlessness, though African ownership was accommodated through customary tenure, their rights were violated through registration.³²

The policies and laws practiced after independence continued the colonial pattern, for instance the Million-Acre scheme which was to aid in transfer of the European owned farms to Africans. the transfer was based on willing buyer willing seller principle, with a loan given to those who qualified to repay, leading to politicians getting large tracts of land while the poor were left landless. The land grabbing phenomenon in the 1980s and 1990s, where those in government offices would use the authority given to them by law to landlessness and unfair allocation of land through the government land act.³³

Paul Syagga, suggests that a legislative framework be made to aid in restoration of

²⁹ (Cap 285).

³⁰ Wakoko V, ‘The Evolution of Land law in Kenya’, accessed from: https://www.academia.edu/8972722/THE_EVOLUTION_OF_LAND_LAW_IN_KENYA

³¹ Syagga P, ‘Public land, historical land injustices and the new Constitution’,9.

³² Syagga P, ‘Public land, historical land injustices and the new Constitution’,8.

³³ Syagga P, ‘Public land, historical land injustices and the new Constitution’,10.

people's entitlement to land and efficient outcomes in ownership of land. And that the settlement of squatters takes both market and non market mechanisms. Adjudication be carried out through restitution, repossession and restoration being guided by regulations. Disputes be solved through a land claims court and establishment of an independent administrative body National Land Commission.

Karuti Kanyinga focuses on the squatter problem in the Coastal region, and traces the epidemics origin to colonial land laws and policies. He highlights the *Swynnerton Plan 1954*, as a contributing factor as it proposed for privatization of property rights. He also mentions the role of the successive governments since independence in propagating this problem. Through its failures to settle squatters where, settlement schemes established for the landless in the coast would be used to resettle upcountry groups in spite of the landlessness amongst the locals and political patronage in the allocation of plots in the schemes to elites. The government acknowledged the squatter problem as an obstacle to social and economic development ,but however neglected the inequalities in land ownership.³⁴

Stephen Chege, acknowledges the fact that issues of landlessness can be traced from the colonial period having settler rights protected through political process that were authenticated by legal instruments. And that the colonial government and the successive governments have attempted to solve this problem through creation of settlement schemes on government land or on purchased land. Categorization of land into private, public or community land, does not solve the problem but rather contributes to the exclusion of squatters in law.³⁵

The Ndungu report, acknowledges that the dawn of colonization alters this mode of land administration from that which was which was customary law. The enactment of the *Crowns Lands Ordinance of 1902* then the *Crowns Lands Ordinance 1915*, gave the colonial government a lot of power in dealing with giving the governor power to make grants of freehold and leasehold land in favours of individuals and corporates on behalf of the crown. Transfer of letters of allotment which were not transferable during the colonial times and early years of independence enabled for the procurement of the titles illegally and irregularly then selling them to third prices at very high rates. Allocation of land was also done by officers and persons without the authority to allocate land, such as chiefs, provincial commissioners and even members of parliament. Trust lands that fell in the adjudication of local authorities was dealt with in a way that defeats the interests of local residents. It gives various recommendations

³⁴ Kanyinga K, *Struggles of Access to land. The 'Squatter Question' in Coastal Kenya*, CDR Working Paper 98.7, June 1998.

³⁵ Njoroge S C, *Limitations of The Current Land Laws in Addressing the Squatter Land Problem in Kenya.*,2013.

such as prosecution of land grabbers, establishment of land tribunals and adoption of a land policy.³⁶

Sessional Paper,³⁷ mentions that the peculiarity of the land question at the Coast have roots in historical and legal origins, such as the enforcement of the *Land Titles Act*,³⁸ took away land from many indigenous communities at the Coast, causing the problem of landlessness and absentee land owners. Slow adjudication has also led to delay in settlement programs and thus the security in land tenure. Among the suggestions to settle the problem of landlessness is the establishment of legal and administrative mechanisms to address historical claims ,to take an inventory of the Ten Mile Coastal strip and other parts of the province where the problem of squatters is prevalent and come up with a formula for resettlement ,and adequate legal framework to protect the tenants at will.³⁹

The Truth Justice and Reconciliation Commission Report, states that land and conflict are divided into two parts, one the colonial era where the colonial method used laws to be able to obtain land from local communities such as Native reserve forcing eviction of many communities from their lands ,these laws and polices had a permanent impact on the local communities such as permanent displacement and left a system of ethno-specific boundaries which gave the impression that certain communities would enjoy land rights within particular boundaries in certain areas, this still haunts Kenya to date. The second phrase is the post independence era, where the independence government turned foreign funded settlement schemes into cartels for their own benefit. The government swindled communities which were entitled to settlement schemes. The three different categories of land, trust land, government land and private land were governed by laws which were not respected thus leading to illegal and or irregular allocation of land. State officials such as provincial administrators continued historical injustices related to land such as forceful evictions of individuals and land grabbing for personal gain. The commissions findings include land injustices starting from colonization of coast by Arabs then the British to the post independence governments failure to address the problem of landlessness, taking of these problems to address social issues such as political differences and inciting people to violence. For some Coastal communities such as Mijikenda and the Taita have suffered the most from land injustices .Some of the recommendations by this commission include the investigation of irregular allocation of land by the National land

³⁶Ndungu Land Commission, Commission of inquiry on Illegal and Irregular Allocations of Public Lands (2003/2004), Government of Kenya, 2004.

³⁷ *National Land Policy* (no.3 of 2009).

³⁸ (Cap 282).

³⁹Section 9, *National Land Policy* (no.3 of 2009).

commission and reparation of these injustices.⁴⁰

Tom ojienda discusses the general issues in the practice of conveyancing and acknowledges the developments and reforms in land law thus essential to this study.⁴¹

Njonjo land commission observed that colonial administration entrenched a dominant settler economy while subjugating the African economy.⁴²

This study is to analyze the land laws, identify the loopholes and overlaps in mandates of the land administrative bodies that have made the realization of settling squatters and effects of political wrangles in settling squatters. Giving recommendations as to how to best deal with this situation.

1.6 Theoretical framework

1.6.1 Adverse possession

Adverse possession is the process by which a person can acquire a title to someone else's land by continuously occupying it in a way that is inconsistent with the right of the owner. If the person in adverse possession continuously occupies the land, and the owner does not exercise his right to recover it by the end of the prescribed period of 12 years, the owner's remedy as well as his title to the land are extinguished by virtue of the provisions of sections 7,9,13,37 and 38 of the Limitation of Actions Act Cap 22.

In the case of *Kahindi Ngala Mwangandi v Mtana Lewa*, it was held that the provisions of the Limitations of Actions Act are compatible to the provisions of the Constitution.⁴³ This doctrine is a common law principle, applicable in Kenya even before the enactment of the Limitation of Actions Act in 1967 .

It states that '*...if one is unwilling to pursue a cause of action within a reasonable period of time, then he cannot allege that the law is arbitrarily just because it says that he must assert his rights within a prescribed period. Indeed, the principle that pervades statutes of limitation is that limitation extinguishes the remedy, but not the right. This means that the legal right to own property is not defeated but only the right to lay a claim over the property is extinguished... Constitution at Article 60 (1) provides that land shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable. These principles of the Constitution therefore behoove the owners of land to use their land lest they lose it to those who are enthusiastic in utilizing the said land ...*'⁴⁴

⁴⁰ Truth Justice and Reconciliation Commission of Kenya (2013) Accessed at: <http://digitalcommons.law.seattleu.edu/tjrc/1/>

⁴¹ Ojienda T, *Principles of Conveyancing in Kenya, A Practical Approach*.2007,49.

⁴² Njonjo Land Commission, *Commission of inquiry into the Land Law System of Kenya*, 1999/2009.

⁴³ *Kahindi Ngala Mwangandi v Mtana Lewa* [2014] eKLR.

⁴⁴ *Kahindi Ngala Mwangandi v Mtana Lewa* [2014] eKLR.

In *Attorney General of Uganda v Omar Awadh & 6 Others*⁴⁵, it was stated that stale claims prejudice and negatively impact the efficacy and efficiency of the administration of justice. Thus the overriding rationale for statutes of limitations, such as the time limit of Article 30(2) of the EAC Treaty is to protect the system from the prejudice of stale claims and their statutory effect on the twin principles of legal certainty and of response.

In *Adnam v Earl of Sandwich*⁴⁶ in this case it was held that the default or neglect on the part of a legitimate owner in asserting their rights it will then be considered that they slept on their rights for so long rendering it inequitable for them to disturb the lengthened enjoyment squatters of which they have been tacit parties.

Squatters have de facto rights to their residential property but hold no formal, legally enforceable title.⁴⁷ The doctrine of adverse possession states that if one keeps possession of property against a legal possessor for 12 years they may get legal title to the property. The following conditions must however be satisfied, one must be in continuous and uninterrupted possession which is assumed where it can be established that the possessor had remained in occupation of the property and that at no time had the possession been discontinued, that the possession was open not secret, not forceful and not by the consent of the owner.⁴⁸

This doctrine can be used to secure the interests of squatters over land that they have used continuously for more than 12 years, and as per Oliver Wendell Holmes, rights of ownership are substantially incident to possession⁴⁹. The squatters had a right to use, and enjoyment of fruits of the land as per Roman law definition of ownership, once after the expiry of the limitation period they enjoy all rights of ownership including right to transfer and security of tenure, and thus this doctrine is essential to understand and protect rights of squatters.

1.6.2 Property rights theory

Article 40, the protection of rights to property that an individual or a group of persons are entitled to own or acquire property, law against arbitrary deprivation of property.⁵⁰

Article 17, states that everyone has the right to own property alone as well as in association with others and that No one shall be arbitrarily deprived of his property.⁵¹

⁴⁵ [2013] eKLR.

⁴⁶ [1877] 2 QBD 485.

⁴⁷ Field and Torero, Galiani and Schargrotsky, *A detailed analysis on the impact of land titling on securing property*, 2006

⁴⁸ *Mulcahy v Curramore Pty Ltd*, (1974) 2 NSWLR 464.

⁴⁹ Sanford J. and Oliver D. Hart, *The costs and benefits of ownership: A theory of vertical and lateral integration*, *Journal of Political Economy*, 1986, 691-719.

⁵⁰ *Constitution of Kenya 2010*.

⁵¹ UNGA, Universal Declaration of Human Rights, General Assembly resolution 217 A, 10 December 1948, Article 17.

In the *Muthurwa case*,⁵² the court acknowledged the denial of access and adequate housing which was threatened by their eviction from the land previously owned by Kenya Railway Corporation, threatened the enjoyment of other rights such as right to inherent human dignity⁵³, The right of every child to be protected from inhuman treatment⁵⁴, The right not to be treated in a cruel, inhuman or degrading manner.⁵⁵

In the case *The Government of the Republic of South Africa vs. Irene Grootboom*, the court used another South African precedent where the petitioner, Irene had no access to housing and applied to the government to provide temporary housing as she looked for residents as she had been evicted from her informal settlement. The courts found that the state had a duty to provide housing for all the citizens irrespective of other legislative obligations and the resources available to the government.⁵⁶

In Yacoob J's words, the right to housing encompasses, '*a right to access to adequate housing*' as distinct from the right to adequate housing encapsulated in the Covenant. It recognizes that housing entails more than bricks and mortar. It requires available land, appropriate services such as the provision of water and removal of sewage and the financing of all of these, including the building of the house itself. For a person to have access to adequate housing all of these conditions need to be met [and] there must be land, there must be services, there must be a dwelling. Access to land for the purposes of housing is therefore included in the right of access to adequate housing in Section 26. A right of access to adequate housing also suggests that it is not only the state who is responsible for the provision of houses, but that other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing.'

In the case of *Sawhoyamaxa Indigenous Community v. Paraguay*, an indigenous community had been denied rights to its ancestral lands being forced to live in bad conditions and had limited access to food resulting to the death of many from their population. In the court decision the right to life was highlighted as a fundamental right which is important for the enjoyment of other rights. If not respected the other rights do not make sense. It stated to take the indigenous people away from their ancestral lands that they would have used its resources for their survival was a violation of their right to life. The ruling stated that Paraguay had

⁵² *Ayuma & 11 Others V Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 2 Others* [2010] eKLR.

⁵³ Article 28, *Constitution of Kenya (2010)*

⁵⁴ UNGA, *Convention of the Right of the Child*, General Assembly resolution 44/25, 20 November 1989, Article 53(1) (d) and article 37.

⁵⁵ Article 29(f), *Constitution of Kenya (2010)*

⁵⁶ *The Government of the Republic of South Africa vs. Irene Grootboom*, 2001 (1) SA, 46.

violated both the right to life and the right to property.⁵⁷

The African Commission on Human and Peoples' Rights in the *Ogoni case*⁵⁸ in dealing with the violations of human rights addressed violations of economic social and cultural rights. It emphasized that the right to property and the right to food are intimately interdependent. The right to property is important in the conservation of human life and dignity as it contributes to the realization of other social and economic rights such as right to housing ,food and social security.⁵⁹This right maybe limited in the bid to resolve social injustices and encourage development of a group of disadvantaged persons.⁶⁰

With the cases above one can clearly see that the denial of one right leads to the denial of enjoyment of other rights, in this case the denial of the right to property leads to the denial of other essential rights for good living. Social attributes of the “landless” being linked to poverty and vulnerability.⁶¹

1.6.2 Social Justice and Common Good Theory

The purpose of the state is to protect the common good by “keeping the peace, by organizing and harmonizing the activities of citizens, by providing for the resources to sustain life, and precluding or thwarting obstacles and hindrances to the good life.”⁶² Locke in his *The Second Treatise of Government*, “explains that the function of legitimate civil government is to preserve the rights of life, liberty, health, and property of citizens and to prosecute and punish those who violate the right of others.”⁶³Which in this case social justice is an aspect of distributive justice. Common good being conditions of life that enables individuals and groups to achieve their own fulfilment, which is ranked higher than individual good.⁶⁴

Article 40 (3)(b)⁶⁵ a limitation to the right to property, where the state has an obligation to squatters and can therefore acquire private land for this purpose where the state may deprive a person of property for a public purpose or public interest a process carried out in accordance to the constitution and various statutes. Whereby public purpose is defined as among other definitions settlement of squatters, the poor and landless, and the internally displaced persons.⁶⁶

⁵⁷ *Sawhoyamaya Indigenous Community v. Paraguay*, IACtHR Judgment of 29 March 2006.

⁵⁸ *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, ACmHPR Comm. No. 155/96 (2001).

⁵⁹ Legal Opinion the Right to Property from A Human Rights Perspective Dr. Christophe Golay and Ms. Ioana Cismas

⁶⁰ *James and others v. The United Kingdom*, Application no. 8793/79, Judgment of 21 February 1986, para 47.

⁶¹ James D, *The landed and the landless: strategies of territorial integration and dissociation in Africa*, May 27-29 2002 Dept of Anthropology LSE.

⁶² http://rebirthofreason.com/Articles/gasser/Aquinas_and_Locke_on_Politics.shtml

⁶³ http://rebirthofreason.com/Articles/gasser/Aquinas_and_Locke_on_Politics.shtml

⁶⁴ Marquee University, Social e-Publications@Marquee, *Justice and Common Good What Are They for?* Thomas Hughson, 2011.

⁶⁵ *Constitution of Kenya*, (2010).

⁶⁶ Section 2, *Land Act* (Act No.6 of 2012).

1.7 Justification of the study

There have been many laws that have been enacted by the government to solve the squatter problem, however the settling of squatters has not received enough government attention. Many scholars have also written in regards to this problem, yet not as much has been borrowed from their extensive research. This study is important as it seeks to address the solving of the squatter problem through a study of experiences elsewhere that have worked and to see how it can be applied to Kenya. It will also serve as an eye opener to policy makers on the defects in the legal framework in addressing the squatter phenomenon.

1.8 Methodology

This study will use a qualitative approach. It will rely on secondary data to analyze the legislative framework in place such as books, journals, to look at the works and commentaries of scholars and reports by Commissions to be able to understand the history, background and situation currently on the squatter problem. Also it will rely on primary sources of data such as the Constitution of Kenya, statutes and other relevant laws to be able to understand the legal and regulatory framework that is to help curb the squatter phenomenon.

This data will be obtained through library research to access books written about this squatter phenomenon and internet research to be able to access books, journals and reports that are web based.

These methods will help frame and put into context the situation at hand and as such will enable the analysis of data in light of the research statement, objectives and hypothesis.

1.9 Chapter breakdown

This paper is divided into five chapters.

Chapter 1- Introduction

This Chapter will entail a background to the squatter problem, literature review, justification, hypothesis and theoretical framework.

Chapter 2- History and development of laws addressing the squatter phenomenon.

This chapter will deal with how the problem escalated, the laws that were put in place to deal with the squatter problem, outlining the rights of registered land owners vis a vis that of the landless, analyzing the laws impact to date.

Chapter 3- Comparative Study.

This chapter will involve the study of various countries such as South Africa which had a history of laws that led to the creation of the squatter phenomenon as Kenya did and also give a detailed case study on actualization of the laws in a particular settlement scheme. This chapter will also look at the resolution of the squatter problem in Namibia particularly borrowing from the resolution mechanism.

Chapter 4- Best Practice on squatter settlement from South Africa.

This chapter will deal with the identification of the gaps in the legal framework and practice in Kenya and what can we learn from the best practice in South Africa as it takes in to account the similarities and differences in legislation in Kenya and South Africa.

Chapter 5- Recommendation and Conclusion.

This chapter will contain a summary of the findings from the study making relevant recommendations to inform policy and legislation making in Kenya.

Chapter Two

History and development of laws addressing the squatter phenomenon in Kenya

2.0 Introduction

This chapter will deal with how the squatting phenomenon escalated, the laws that were put in place to deal with the squatter problem, outlining the rights of registered land owner's verses that of the landless and analyzing the impact of such laws to date.

Historical trends of dispossession and competing claims to land predate colonial times. Historical records and oral tradition indicate that competing claims to indigineity shaped tribal clashes before European colonialism. Thus, the question of who the original inhabitants were, and how far back historical claims of land ownership should go is complex.¹ Another problem encountered was that it was difficult to register any land that bordered Arab or Swahili land due to absence of these land owners.²

2.1 Pre-colonial era

The squatter problem at the Coast predates colonization, where the land previously administered by Persians, Indians and Arab Sultans. It was characterized with multiplicity of laws applying to land and brought confusion in land administration. Indigenous inhabitants used African customary law ,while the Muslim community used Islamic law and sometimes applied Mila, and with the dawn of colonization ,the situation grew more complex.³This problem was escalated with the rising population, increased demand for land ,unrestricted land ownership and unfair laws propagated by the colonialists which were later were used by the African elites to grab land.⁴ The relationship between the Sultanate of Zanzibar and the people living along the coast was vaguely defined and depended very much upon the personality of the sultan and importance of internal political and economic factors.⁵And with the introduction of the Liwali system of land administration, changed the local systems of land tenure. Resulting to Land ownership being concentrated in fewer hands and introducing new legally approved rights of land ownership.⁶

There was an increase in complexities in land administration with the population

¹Concordis International, Institute of African Realities, *Putting Land Grievances Behind Us in Kenya*, August,2011.

² *The 'Squatter Question' in Coastal Kenya*, June 1998,9.

³Hamid Abdi Hamid, University Malaya, African Studies Association of Australasia and the Pacific 2003 Conference Proceedings - African on a Global Stage, *From Bad to Worse: The Implementation of the Land Titles Ordinance in Coastal Kenya*, 1908-1960s,2.

⁴ http://www.kecosce.org/downloads/land_status_coast.pdf

⁵ Pouwels R.L., *Horn and Crescent: Cultural Change and Traditional Islam on the East African Coast*, Cambridge University Press, London, 1987,108.

⁶ Hamid Abdi Hamid, *From Bad to Worse: The Implementation of the Land Titles Ordinance in Coastal Kenya*, 1908-1960s,6.

movements happening at the coast, some of which were a result of political uncertainties brought about by the emergence of the Sultanate of Witu in the 1860s.⁷ In the southern part of the coast, majority of the defeated Mazrui of Mombasa moved to Takaungu in the north, and south to Gasi affecting the system of land ownership in those areas.⁸

Abolition of slavery in 1907 aggravated land administrative problems, as most of the ex-slaves continued to stay on their ex-owner's land after they were emancipated as access to, and use of, the land assisted their survival.⁹

Later on certain groups of people, such as the Indians and Arabs, 'misunderstood' or 'manipulated' the meaning of land transactions according to customary law to their advantage blinding elders of the indigenous communities with gifts in order to obtain permission to occupy and use their land, which they later to claimed had been sold to them.¹⁰

2.2 Colonial era

In 1895, East Africa was declared a Protectorate.¹¹ The *1889 the East Africa Lands Order in Council (repealed) was enacted*. This law allowed the colonial authorities power to exercise the substance of English law in force at the time in Kenya, to the extent that the circumstances permitted.¹²

The *1890 Foreign Jurisdiction Act*, prescribed how power of the Crown could be exercised in a protectorate¹³, through the Orders in council, giving her majesty power to control and disposition over 'waste and unoccupied land in protectorates where there was no settled form of government...' This law marked the start of individualization of land ownership in Kenya and the beginning of settler incursion and agriculture, and emancipation of community in planning and defining expansion of settlement.¹⁴

In 1897, the *East African Order in Council* was enacted with this law the government incorporated the *Indian Land Acquisition of Act (1894)*, which provides for compulsory land acquisition for the railway and Ten-mile strip and establishment of government buildings and other purposes.¹⁵

⁷ Pouwels R.L., *Horn and Crescent: Cultural Change and Traditional Islam on the East African Coast*, 1987, 113.

⁸ Koffsky P.L., 'History of Takaungu, East Africa, 1830-1896', Ph.D. Dissertation, University of Wisconsin, 1977, 31-81.

⁹ KNA(Nbi), DC/Lam/3/2, Lamu Political Record Book (PRB).

¹⁰ Hamid Abdi Hamid, *From Bad to Worse: The Implementation of the Land Titles Ordinance in Coastal Kenya, 1908-1960s*, 12.

¹¹ Hardinge, Parliamentary Papers no. LX, 1898, The Report of the East Africa Protectorate, 1895-1896, 1.

¹² Rutten, Ombongi, *Kenya: Pre-colonial, Nineteenth Century* New York: Fitzroy Dearborn, 2005.

¹³ Ghai, Y.P. & McAuslan, J.P.W.B., *Political Law and Public Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to Present*, Oxford University Press, Nairobi, 1970.

¹⁴ Wakoko Valentine, 'The Evolution of Land law in Kenya'.

https://www.academia.edu/8972722/THE_EVOLUTION_OF_LAND_LAW_IN_KENYA

¹⁵ Wakoko V, *The Evolution of Land law in Kenya*, 5.

Then the East African Land Regulation was enacted, this law was enacted for the purpose of securing land for settlers, drawing differences between land in the Sultan's dominion and that under the protectorate.

In *1901 the Registration of Documents Act (Cap 285) (repealed)*, Section 4 of the Act, makes it compulsory that all documents conferring or purporting to confer, declare, limit or extinguishing any right, title or interest in land be written. Thus excluding the native Africans in ownership of land as their ownership was not written.

The *1897 East African Land Regulations (repealed)*, gave the Commissioner power to sell freehold in land within the Sultan's dominion. It was enacted for the purpose of securing land for settlers, drawing differences between land in the sultan's dominion and that under the protectorate.

Prior to the enactment of the 1908 Ordinance, the British authorities had assumed jurisdiction over the ten-mile coastal strip, which was before then under the sovereignty of the Sultanate of Zanzibar, by virtue of an Administrative Agreement entered into in 1895 with the Imperial British East African Company (IBEAC)¹⁶ transferring control over lands ceded to the latter by virtue of the concession Agreement signed by the Sultan. Under this Agreement, all rights to land in the Sultan's territory, except private lands, were ceded to the company. Any other land was vested on the colonial government and upon independence the Government of Kenya.¹⁷ With that Africans had only occupational rights but no title to land.

The *Crowns Lands Ordinance of 1902* and later the *Crowns Lands Ordinance of 1915 (repealed)*, was enacted to give effect to the 1901 Order in Council empowering the commissioner to sell freehold land and land that was under Africans without the consent of tribal chiefs referred to as 'waste and unoccupied land'.¹⁸ This law forced people to forfeit any land not developed or occupied, this land could be sold or leased disregarding any claims to ownership. Where native Kenyans owned the land, their rights were violated or ignored through the judicial system in favour of the settlers, thus the historical roots of land related grievances. Its major purpose is to define Crown Land. It gave the colonial government authority to grant large amounts of 'unoccupied land' to those they thought capable of developing them.¹⁹ Thus giving a lot of power to the colonial government to deal with what had now been declared Crown Land. The governor would make grants of land freehold or leasehold

¹⁶ Sorrenson, M.P.K., *The Origins of European Settlement in Kenya*, Oxford University Press, London, 1968,25.

¹⁷ Ojienda O.T, *Principles of Conveyancing in Kenya, A Practical Approach*.2007,50.

¹⁸ Wakoko V, *The Evolution of Land law in Kenya*,5.

¹⁹ Cooper F, *From Slaves to Squatters: plantation Labor & Agriculture in Zanzibar & Coastal Kenya ,1890-1925*, Heinemann, London,1997,175.

to individuals or corporate bodies on behalf of the Crown.²⁰ As seen in sections 15 and 25 giving the governor power of allocation of town plots and agricultural land.

The *Land Titles Ordinance of 1908*, was promulgated to enable colonial authorities to determine the extent of private possessions before they alienate land for the Crown and give grants to individual settlers also enabling the British administration to penetrate and control the interior. This law required all persons with claims to land to present them to the Land Registration Court, failing to do so would result to all land which was unclaimed to be deemed to be crown land. And thus with the dearth of information and lack of verifiable evidence of ownership, the Africans at the Coast, particularly within the 10-mile strip, were dispossessed and have continued to live as “tenants at will” at the mercy of those who made claims without their knowledge.²¹ Its effects were seen in the alteration of land among the Arabs and the Swahili, closing the avenues through which the indigenous Mijikenda and ex-slaves would have made any claim to the land along the costal belt. It also led to the moving of natives from certain areas giving way to European settlement.

Reasons why the indigenous people at the coast lost their land include: the fact that they had no knowledge of the existence of the Ordinance and those that had the knowledge of its existence did not understand its provisions, the Ordinance had no relevance to the indigenous people conception on land tenure, the Ordinance was biased against the indigenous people as neither the colonial government nor the court had any regard as to African land ownership, communal or individually owned and thus treated their land as ownerless, investigation on claims as to ownership of land was done by Mudirs, Mazrui Arabs absorbed into colonial administration and were generally unsympathetic to indigenous people. Another reason was that the time limit within which persons were to make claims was extremely short and lastly the Ordinance introduced a British conception of land thus making the indigenous people lose land and all that was attached to the land as this concept of law stated that one would own land and and that which is attached to the land.²²

It established a Department of Recorder of Titles, which was responsible for administering a system of land registration. This office was bureaucratic in the processing of claims and also raised problems, inadequacies and inefficiencies of government. Adding on to the unwillingness of local people to cooperate with the implementation of the *Land Titles Ordinance*, due to reasons such as illiteracy and ignorance of the law and thus failed to put

²⁰ Government of Kenya, *Ndungu Land Commission, Commission of inquiry on Illegal and Irregular Allocations of Public Lands (2003/2004)*, 2004.

²¹ Paul Syagga, ‘*Public land, historical land injustices and the new Constitution*’, Constitution Working Paper No.9.

²² Ojienda Principles of Conveyancing in Kenya ,50.

their application on time thus losing their claim of ownership on their land. Thus making indigenous persons of the coast squatters by default.²³

The *1915 Registration of Documents Ordinance (Cap 285) (Repealed)*, was the first registration statute in Kenya, enacted together with *Crown Land Ordinances of 1915 amending the 1902 legislation*. This law redefined Crown land to mean land that was also under occupation by the natives. Thus, there was no more community land. Customary laws continued to be applied, by virtue of a Repugnancy clause, as they were subordinate to the British Law, those repugnant were considered void. Natives only had occupancy rights and no ownership.²⁴ It required all documents relating to land be registered and provided for a system of registration of title, that was influenced by political leverage of the settlers, and a discrimination principle in governance by colonial regime laws which were intended to exclude Indians and Africans from owning any lands in the highlands securing settler interests. It led to establishment of Native reserves exclusively for Africans. Its aim was to secure the lands held by the white settlers, leaving the natives with limited rights to commodity production within the precincts reserved for them.²⁵ This created landlessness as the natives were a majority.²⁶ In *Isaka Wainaina & Another v Murito wa Indagara & Ors*²⁷ the interpretation by Chief Justice Barth's of the provisions of the Crown lands Ordinance 1915 was that Natives were tenants at will of the crown with no more than temporary occupancy rights to land, it was therefore held that the native tribes could not lawfully alienate land. Thus the effect of the Crown Lands Ordinance 1915, the Kenya Annexation Order-in-Council 1921 and Kenya Colony Order-in-Council 1921 which took away the absolute rights in land by Natives. The Registration of Titles Ordinance No 6 of 1919, stated that when land was bought under it all other registration laws ceased to have effect in relation to that land, certificate issued under it was conclusive evidence. This completed the disinheritance of natives within the framework of colonial laws.²⁸

In 1954, The *Swynerton Plan*, had recommendations of land reform as to tenure, consolidation of fragmented holding, issuing of freehold land title, intensifying and development of agriculture.²⁹ It was aimed at displacing indigenous land tenure systems and

²³ Njonjo Land Commission, *Commission of inquiry into the Land Law System of Kenya*, 1999/2009.

²⁴ Wakoko V, *The Evolution of Land law in Kenya*, 6.

²⁵ Ogendo O, '*Tenants of the Crown: Evolution of Agrarian Law and Institutions in Kenya*', Kenya Africa Centre for Technology studies (ACTS). Nairobi, 1991, 49.

²⁶ Omboi BM and Gachaba M L, '*Factors leading to squatter problem in Rift Valley Province in Kenya*', 49.

²⁷ (1923) 2 KLR 102.

²⁸ Ojienda O.T, '*Principles of Conveyancing in Kenya, A Practical Approach*'. 2007, 49.

²⁹ Wakoko V, *The Evolution of Land law in Kenya*, 7.

imposing private property rights along the lines of English land law.³⁰ Individualization of tenure was justified on economic grounds however its implementation had political motive³¹ as many people were evicted from their land for the purpose of consolidation to make the parcels viable for farming. Its implementation impacted customary law by making it obsolete in administration of land, thus natives could not sell their land.³²

The 1960 Land Order in-Council This was enacted for the purpose of providing legislation for the conversion of leaseholds into freeholds; acquisition of land in the highlands by Africans or through purchase by post-colonial state for resettlement and redistribution.³³ The 'Million Acre Scheme' of 1962 was designed to accommodate about 35,000 land-poor and landless families. However, such schemes did not address the problem of landlessness adequately, but triggered more problems about unequal distribution of land.

*Robertson's Recommendations*³⁴ upheld the 1895 agreement that the land title deeds should be acknowledged and guaranteed at the coast. And that the strip should be integrated with Kenya before independence with the 1895 agreement being abrogated.³⁵

The British entered a pre-independence agreement with the Kenyatta administration and the Sultan regarding control of the land in Mwambao.³⁶ This agreement entailed the recognition of private land rights at the Coast and promised to adjudicate and register such rights were they were not registered, negating the land rights of the indigenous groups, thus continuing propagation of the squatter phenomenon.

2.3 Post-colonial era:

2.3.1 The Jomo Kenyatta era

*The Government Lands Act (Cap 280 Laws of Kenya)*³⁷ Replaced the *Crown Lands Ordinance 1902 and 1915* having better provisions for the regulation of leases, dispositions of Government Land and other such issues.³⁸ Superficial changes to the Crown Ordinances allowed the President to act as the 'Crown' and perpetuate powers to alienate and allocate land. The Ndungu report details how the President allocated public land to his ministers, loyalists,

³⁰ Land Reform Report 1954, *How to Intensify the Development of African Agriculture in Kenya*.

³¹ Syagga P, 'Public land, historical land injustices and the new Constitution', Society for International Development (SID), Nairobi, 2011, 10-12.

³² Wakoko V, *The Evolution of Land law in Kenya*, 7.

³³ Ojienda T, *Principles of Conveyancing in Kenya*, 52.

³⁴ Colonial Office, *Report of the Commissioner, presented to Parliament by Secretary of State for Colonies by command of Her Majesty*, December 1961. Cmnd 1585, London: Her Majesty's Stationary Office, 1961.

³⁵ Mwaruvie J M, *The Ten Miles Coastal strip: An Examination of the Intricate Nature of Land Question at Kenyan Coast*, Department of History Political Science and Public Administration, Moi University, 7.

³⁶ Ghai, V.P. & J.W.B. Mc Auslan, *Public law and political change in Kenya*, Oxford University Press, Nairobi, 1970, 187-1, 88.

³⁷ (*Repealed*).

³⁸ Wakoko V, *The Evolution of Land law in Kenya*.

family, and himself. Forests were allocated to influential people as farm land.³⁹Section 3, only changed the powers that were vested in the Commissioner to be vested in the President. It conferred upon the President powers to make grants of the freehold or leasehold of unalienated government land to individuals or corporations. It gave the president power to sign documents granting title and power to delegate this power to the Commissioner of Lands. Section 12 regulating how town plots for buildings for business and those of residential purposes would be allocated and section 19-20 dealt with allocation of agricultural land. Thus, has led to abuse of power thus causing land issues as we know today. This system of grants, paved way to massive illegal allocation of public land by the independence government. Thus, continuing the squatter problem.

*The Lands Title Act (Cap 283)*⁴⁰ Previously the Land Ordinance 1908, was enacted for the purpose of alienation of Crown Land at the Coast. Facilitated the colonial Government's need to distinguish between Crown Land and private land along the Ten Mile Coastal Strip.⁴¹

The Circular of 1951, formalized the allocation of crown land through direct grant, which later facilitated illegal and irregular allocation of public land by the government after independence. through abuse of office.⁴²

*In 1963 The Registered Land Act (Cap 300 Laws of Kenya)*⁴³ The main objectives of this Act were, to enable land owned by Africans to be registered in law and simplification and unification of the registration process. It converted the registration under any other statute to registration under this statute.⁴⁴Registration for Africans was done under customary law, thus achieving individual ownership and registration of land.⁴⁵In the case of *Kalabri v. A.G*⁴⁶, the court acknowledged the right of natives of perpetual possession with respect to the reserves they occupied subject to the authority of the governor as he would expropriate land for public purposes. This Act repealed the *Land Registration (Special Areas) Act 1959*, was enacted after the *Natives Land Registration Ordinance* which were both focused on the recognition and registration of claims of natives to land under customary law.⁴⁷Registration of titles statutes declared that once a person was a registered owner of land or lease, the title is not capable of

³⁹ Government of Kenya, *Ndungu Land Commission, Commission of inquiry on Illegal and Irregular Allocations of Public Lands* (2003/2004), 2004.

⁴⁰ (Repealed).

⁴¹ Ojienda T, *Principles of Conveyancing in Kenya*,50.

⁴² Government of Kenya, *Ndungu Land Commission, Commission of inquiry on Illegal and Irregular Allocations of Public Lands* (2003/2004), 2004.

⁴³ (Repealed)

⁴⁴ Ojienda T, *Principles of Conveyancing in Kenya*,53.

⁴⁵ Wakoko V, *The Evolution of Land law in Kenya*,9.

⁴⁶ [1938] 18 KLR.

⁴⁷Ojienda T, *Principles of Conveyancing in Kenya*,53.

being defeated by other claims unless an instance of fraud or overriding interest is established which is through compulsory acquisition as per section 73 of the *1963 Constitution of Kenya (Repealed)*. Title to land would not be questioned even before a court of law.⁴⁸ This law legitimized land that had been illegally allocated but continuing the perpetuation of the squatter phenomena. The independence government favored private property rights despite the how they had been acquired. This was besides the fact that there was no common-law concept on absolute title in land, as it maybe rectified or revoked on various grounds through the Registration of Titles Act and Registered Land Act, as some better right to land may be established.⁴⁹

An agreement was made between Kenyatta and the Sultan of Zanzibar signed in London on 5th October 1963.⁵⁰ Its effect was that the government would allow free exercise of religion, allow exercise of jurisdiction of Chief Khadhis and freehold title will be recognized. In the second agreement on 8th October 1963, agreed further that the territories that formed part of the Sultan's dominion form part of Kenya and the 1895 agreement cease to take effect.⁵¹

Consequently, the government acknowledged the problem of squatters and established several settlement schemes for the landless and introduced a land purchase programme for the African middle class to accede to the scheduled areas.⁵² The settlement schemes established to settle the landless at the Coast were however used to settle groups from upcountry.⁵³ Increasing number of outsiders and malpractice in the allocation of plots gradually increased hostilities between the indigenous groups and the new beneficiaries with the local people often accusing the local Provincial Administration of tantalizing squatters with promises of more land.

Political patronage in allocation of plots furthered the problem whereby provincial administration and upcountry political elites were second to Arab and Swahili land owners in getting private land rights and titles thus less land for resettlement.⁵⁴

2.3.2 The Daniel Arap Moi era

The Magarini Settlement Scheme Complex started in 1978, for instance, local politicians often complained of biases by settlement officers, in the allocation of the plots and

⁴⁸ Government of Kenya, Ndungu Land Commission, Commission of inquiry on Illegal and Irregular Allocations of Public Lands (2003/2004), 2004.

⁴⁹ Government of Kenya, Ndungu Land Commission, Commission of inquiry on Illegal and Irregular Allocations of Public Lands (2003/2004), 2004.

⁵⁰ Kenya Coastal Strip, *Agreement between the Government of the United Kingdom, His Highness the Sultan of Zanzibar, the Government of Kenya and the Government of Zanzibar*. Cmnd. 2161, London: H. M. Stationary Office, 1963.

⁵¹ Mwaruvie J M, *The Ten Miles Coastal strip: An Examination of the Intricate Nature of Land Question at Kenyan Coast*, 7.

⁵² Government of Kenya, Njonjo Land Commission, *Commission of inquiry into the Land Law System of Kenya*, 1999/2009.

⁵³ Kanyinga K, *Struggles of Access to land. The 'Squatter Question' in Coastal Kenya*, 7.

⁵⁴ Kanyinga K, *Struggles of Access to land. The 'Squatter Question' in Coastal Kenya*, 17

of evictions of coastal beneficiaries and their replacement with upcountry ones.⁵⁵ These Acts continued the problem that already existed of landlessness of the indigenous coastal communities. In 1984, controversy over these allocations indeed reached the floor of parliament where it became clear that Senior Government Officials listed their constituents and friends and recommended them to be given plots by the settlement officers.⁵⁶ To avoid embarrassment and possible political backlash, the government emphasized that all land in Kenya was national land on which anyone could be settled irrespective of ethnic identity and that Magarini was not a scheme only for the coastal people.⁵⁷

Land was used as a source of patronage, the Ndungu report, details how old graveyards and other public utility lands were allocated to individuals, and landlessness was never addressed and as a consequence all elections from 1992 except 2002 have been marred with ethnic conflict associated with land related grievances. The Mau task force report stated that prominent persons had been allotted land in the forest catchment area ,that was set a side for squatter settlement.⁵⁸The same also happened in the Kiptagach extension settlement scheme, where land that was meant for settlement of squatters was allocated to government officials and political leaders, as patronage.⁵⁹In 1991 a parliamentary select committee, mandated to study the squatter situation, found this was the only place in the early 1890s that was issuing title deeds, in areas such as Watamu. The process leading to this ‘ownership’ was dispossession of land from the Mijikenda (Giriama, Digo, Choni), who ran away to the interior during the Sultanic period of enslavement, leaving it under Arab control.⁶⁰

In Kilifi area, where squatters had refused to relocate, a settlement scheme was established in 1982, this programme was however left in the hands of some Government Officers in the Department of Settlement who answered to a District Commissioner led Committee. This process was faulted with abuse of power and corrupt practices and furthered the problem it was created to solve. Complaints made by those affected by eviction due to irregular practices to District Commissioner and Provincial Commissioner which were unsuccessful, with empty promises that the government would look into the matter.⁶¹

The lack of adequate resources on the part of the government to support the reform affected the settlement programs. When such resources were available they are expended in

⁵⁵ Kanyinga K, *Struggles of Access to land. The 'Squatter Question' in Coastal Kenya*, 17-18

⁵⁶ Kanyinga K, *Struggles of Access to land. The 'Squatter Question' in Coastal Kenya*,18

⁵⁷ Weekly Review, *The Weekly Review*, Nairobi, 4 May ,1984.

⁵⁸ Paul Syagga, ‘*Public land, historical land injustices and the new Constitution*’,13.

⁵⁹ Okemah, D, ‘*How Moi Allies Acquired Land Meant for Ogiek*’, *The Daily Nation*, 6 December, 2009,9

⁶⁰ Historical Roots of Land Related Grievances,10.

⁶¹ Kanyinga K, *Struggles of Access to land. The 'Squatter Question' in Coastal Kenya*,1998.

demarcating land along the coastal line where influential political elites had an interest in beach plots for the rapidly growing tourist industry.⁶²

In 1994, with allocations being mainly through direct grants, the government, under *Legal Notice No. 305 of 1994*, allowed for the ‘selling’ of allotment letters to third parties on payment of consent fees equivalent to 2 per cent of the selling price or capital value of the land, whichever was higher. It was this provision that fuelled the “land grabbing” mania in the country.⁶³

2.3.3 Mwai Kibaki era

This era was a new dawn for land laws as many commissions were formed to investigate historical injustices in land and to make recommendations that would inform the drafting of new land laws.

The *Njonjo Commission Report* of 2002, this was an inquiry into the land law systems of Kenya. It traces the beginning of the land question from the colonial era with the implementation of laws that favored the settler economy subjugating the African economy. It goes further to expound on the issues that faced the 10 mile coastal strip, which included the implementation of laws that made indigenous groups tenants at will of the crown and on land owned by absentee landlords, displaced them from their ancestral lands. It states that this problem has further shaped the economic, social and political parameters of these people. It recommended the formulation of a National Land Policy which was later formulated in 2009, which would address various constitutional issues, land tenure, land administration issues and institutional framework. Securing of national interest, confer benefits to local communities advise better laws of compulsory acquisition and where such land has been found to contain various minerals.⁶⁴

The *Ndung’u Commission Report of 2004* was an inquiry into the illegal and irregular allocation of land, the commission found that at least 200,000 illegal titles to public land had been created between 1962 and 2002, 96% of them in the period 1986-2002, during the presidency of Daniel Arap Moi. The categories of public land affected include forests, national parks and game reserves, wetlands, research farms, roads, government offices, settlement schemes, state corporation land and trust land. The Ndung’u report also showed how the constitutional requirement for public land to be administered “in the public interest” was consistently perverted by Presidents Jomo Kenyatta and Moi, public officials, members of the

⁶² Kanyinga Struggles of Access to land. The ‘Squatter Question’ in Coastal Kenya, 12.

⁶³ Paul Syagga, ‘Public land, historical land injustices and the new Constitution’, 23.

⁶⁴ Government of Kenya, Njonjo Land Commission, *Commission of inquiry into the Land Law System of Kenya, 1999/2009*. This informed The National Land Policy, Chapter 3.3.3.5(94 (a) & (b)).

judiciary, well-connected politicians and businesses. To take urban land as an illustration, the commission found evidence of widespread abuse of presidential discretion with regard to unalienated urban land, that is to say public land legally available for allocation to schools, playgrounds and hospitals for the public good. Both presidents allocated land appropriated from landowners despite having no legal power to do so. Far from upholding the rule of law, the legal profession played a central role in land corruption for personal benefit, as did other professions.⁶⁵ Identity of any individuals or corporations, to whom such land was allocated by ‘unlawful or irregular’ means and the public officials involved in such activities. Among its recommendations were legal and administrative measures for restoration of lands to their proper title and purpose and measures for prevention of illegal allocation. Which include computerization of land records, establish a National Land Commission for the administration of public lands harmonization of legal instruments and upgrade informal settlements.⁶⁶

Truth, Justice & Reconciliation Commission was established by the *TJRC Act of 2008* mandated to carry out investigations on historical injustices their causes, effects and possible solutions. This included issues as to how indigenous and minority groups lost their land due to failure of the state to address historical injustices brought about by colonialism. Historical injustices originated from the time when Kenya was declared an East African Protectorate in 1895. Native communities were driven out of their ancestral land by Arab invaders looking for permanent settlement and slaves. When the British and German governments established the 10-mile coastal strip in 1886 which was under the sultanate of Zanzibar. The implementation of the *Land Titles Ordinance* section 17(1), that all land that would not be claimed within a period of six months would be considered Crown Land. Thus, resulted to 95% of the land within the ten-mile coastal strip being recorded under Arab ownership and the rest declared Crown land for lack of claims, which was later government land. Thus, left the indigenous inhabitants landless. They became squatters on government land and absentee landlords and lacked access to the sea. Efforts to settle these squatters has been slow and marred with fraud and lack of transparency thus denying locals secure access to land. Successive governments have maintained this status quo, the Arab Swahili control has been addressed decades after independence and that move did not benefit the local communities. This land was given to agro-investors with sisal estates, tourist purposes and for private developers and thus control of land being handed over to politically correct upcountry citizens and foreigners many of them

⁶⁵ <http://www.africaresearchinstitute.org/newsite/publications/whose-land-is-it-anyway/#S2>

⁶⁶ Government of Kenya, Ndungu Land Commission, Commission of inquiry on Illegal and Irregular Allocations of Public Lands (2003/2004), Government of Kenya, 2004.

being absent landlords. More displacement occurred in regions such as Lamu, where security was used as an excuse to dispossess indigenous people from their land. The land question may pose as a potential trigger of conflict and has had a role in the economic marginalization, illiteracy and lack of access to basic services as they have been linked to various acts of dispossession.⁶⁷

Waki Commission Report of 2008, involved an inquiry into the post-election violence following the December 2007 elections. Among the causes of conflict include the issue of land and inequality. It acknowledges that through the 1980's and 1990's public land was illegally and irregularly allocated with no regard to public interest or the law, as it was used for political patronage, to reward politically correct individuals. It stated that many areas outside major cities and towns are homogenous ethnically. And that inequality in this instance was viewed through inequality and marginalization in ethno geographic terms. Kalenjins argue that the violence erupted as a result of frustration over land distribution after independence. That land was alienated by the colonial government then unfairly distributed to Kikuyus and other groups they viewed as outsiders. It highlights that there has been corruption in misallocation of land both in settlement schemes ,countryside and urban areas affecting especially areas that are not homogenous .⁶⁸

*National Land Policy 2009*⁶⁹ recommendations on resolving the squatter problem at the Coast, includes taking an inventory of all government land Within the 10-mile coastal strip, covering 1,128 parcels measuring 80,000 hectares in Kwale, Kilifi, Mombasa, Malindi, Lamu and Tana River districts.⁷⁰It recommends various settlement and land allocation principles. With settlement procedures identifying genuine squatters and ensuring equitable and accountable allocation of settlement scheme land among other provisions set out to curb the squatter problem.⁷¹

Before the operationalization of the National Land Commission, the Government had already settled 70,790 families in settlement schemes covering 35,300.5 hectares in Kwale, Kilifi, Malindi and Lamu, from a region where 128,900 squatter families have been identified and registered. The Ministry of Lands has also audited absentee landlords in the coastal region and found they own an estimated 77,753.02 hectares, although comprehensive data is still being sought to establish the actual acreage controlled by this category. It is worth noting that in some

⁶⁷ Truth, Justice and Reconciliation Commission, TJRC *Final Report-Volume IIB* ,3 May 2013 Version, page99-108.

⁶⁸ http://www.knchr.org/portals/0/reports/waki_report.pdf

⁶⁹ *National Land Policy*, Sessional Paper No. 3 of 2009.

⁷⁰ *National Land Policy*, Sessional Paper No. 3 of 2009, s193(b).

⁷¹ *National Land Policy*, Sessional Paper No. 3 of 2009, s3.5.3.

areas such as Msambweni, land has been adjudicated and registered but 14,000 titles have not been collected. At the same time, following the 2007 nullification of allocations done in Mbughuni in the 1990s, fresh survey and demarcation has been initiated. Besides survey demarcation and settling of squatters and the landless, the Ministry of Lands has also been resolving disputes as exemplified by the Tumbe Settlement Schemes in Kwale, Where the allocation process had to be carried out afresh after local residents complained.⁷²

The Constitution of Kenya 2010, Article 40 (1) states that all individuals ,individually or in association with others have a right to own property, thus ownership of land as private ownership or communal land as further expounded in articles 62 and 63.ownership of land is linked to various socio-economic rights such as access to clean environment ,housing and water as well as the very fundamental right to life as held in the case of *Sawhoyamaxa Indigenous Community v. Paraguay*⁷³Also in another case ,it was stated that for a person to have access to adequate housing all of these conditions need to be met; there must be land, there must be services, there must be a dwelling.⁷⁴ Article 40 (6) states that “The rights under this article do not extend to any property that is found to have been unlawfully acquired”, therefore land found to have been acquired through fraud or mistake can not be protected with this right. Article 60 (1) sets out the principles governing land policy and provides that “Land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable”. Article 61 (1) states that “All land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals”. Articles 62,63 and 64 states the different categories of land public, community and private land. Article 68 (a) provides that Parliament shall revise, consolidate, and rationalize existing land laws. Article 68 (c) to regulate the manner in which land may be converted from one category to another; to “protect, conserve and provide access to all public land”.

Land Act,⁷⁵repealed the Land Acquisition Act, Cap 295 and the Wayleaves Act, Cap 292 Laws of Kenya, as per article 68 of the Constitution of Kenya, on revision and rationalization of land laws. Public purpose according to this Act includes settlement of squatters, poor and internally displaced persons. A “squatter” is defined as a person who occupies land that legally belongs to another person without that persons consent as per section 2. It makes provisions of settlement programs administered by the National Land Commission as per section 134, to make land accessible to squatters. Establishes a land settlement fund is

⁷² <http://softkenya.com/kenya/land-in-kenya/>

⁷³ IACtHR, Judgment of 29 March 2006.

⁷⁴ *The Government of the Republic of South Africa vs. Irene Grootboom* ,2001 (1) SA, 46.

⁷⁵ (No 6 of 2012)

to be used for making land accessible to squatters and in the purchase of private land to enable settlement as per section 135. Section 160 gives power to the Cabinet Secretary or the National Land Commission to make rules in carrying out the provisions of the Act and as regards squatters, they are empowered to facilitate negotiation between private owners and squatters where squatter settlements are found on private land. Also, to aid in the transfer land belonging to absentee landlords to squatters as per Section 160 (e) (ii) and (iii). There is however need to reconcile the provisions of the Land Registration Act and the Land Act. Whereas it is possible for people to be made squatters by registration of land in the names of few private individuals, the Land Act provides for making of rules to transfer unutilized land to squatters.⁷⁶ The main issue of dispute arising where there is need to transfer land that has already been registered. Also settlement through this act limits rights of squatters who would have deserved restitution instead of resettlement through schemes.⁷⁷ In the case *Kuria Greens v The Registrar and Another*⁷⁸ the Registrar of Titles published a notice in the Kenya Gazette revoking 14 titles in Limuru land had been reserved for Agricultural Research Institute and the titles had been allocated to private developers. It was held that such act was *ultra vires* as cancellation can only be done by the court where it is established that title was obtained through fraud or mistake during first registration upholding section 23 of the repealed Registration of Titles Act. That gives absolute ownership of land to owner of property also protection provided by article 40 of the Constitution of Kenya 2010 this protection however does not extend to any property that has been found to be unlawfully acquired. Thus, making it hard to solve squatter problems due to such legal complexities.⁷⁹ This case was decided on the basis of the repealed Registration of Titles Act however the Land Registration Act is no different in this sense. Settlement of squatters is defined as public purpose, settling the poor and landless, and internally displaced persons.⁸⁰

National Land Commission Act,⁸¹ established by this act and the *Constitution of Kenya* article 67. The Commission is mandated to carry out investigations on its own motion on historical land injustices and make recommendations for appropriate redress, to recommend a National Land Policy a registration program for titles in Kenya. The mandate of this Commission is set out in this act and the powers both in the Act and the Constitution. The

⁷⁶ Njoroge S C, *Limitations of The Current Land Laws in Addressing the Squatter Land Problem in Kenya*. 2013,67.

⁷⁷ Njoroge S C, *Limitations of The Current Land Laws in Addressing the Squatter Land Problem in Kenya*. 2013,67.

⁷⁸ Petition No 107 of 2010 Nairobi (eKLR).

⁷⁹ Commentary by P. Mwaura, *Title Deed Makes one Indefeasible Owner of Land despite Historical Injustices* Daily Nation
2nd February 2013,14.

⁸⁰ Section 2, *Land Act*, (Act No.6 of 2012).

⁸¹ (Act No 5 of 2012).

Commission is mandated with the task of alienation of public land on behalf of or with the consent of National and County Governments. Also, as per section 5, ensure unregistered land in Kenya is registered within 10 years since the commencement of the Act. It is also to review all grants establishing its legality and propriety and make recommendations within a period of five years on its own motion or on request of National and County Governments. Only for public land as per section 14.

The *Ministry of Lands, Housing and Urban Development*, has had various initiatives of dealing with the squatter problem in Kenya. It has a department dealing with settling squatters in Kenya.⁸²The shortcomings of this department are due to lack of legislative structures to effectively carry out settlement.

The *Land Registration Act*⁸³, it repealed the *Indian Transfer of Property Act 1882*, *Government Land Act Cap 280*, *Registration of Titles Act Cap 281*, *Land Titles Act Cap 282* and *Registered Land Act Cap 300* Laws of Kenya. Its purpose was to give absolute title to the registered land owner bringing all parcels registered under previous statutes under it. Absolute right that cannot be defeated and are to be held free from all other interests and claims section 24 (a).⁸⁴Land together with all rights and privileges belonging or appurtenant thereto and not liable to be defeated except as provided for in Section 30 of the Act. Rights of a proprietor whether acquired through first registration shall be indefeasible. Section 29, states that customary claims are not extinguished by registration of land. Section 26, states that fraud, misrepresentation or where the title is acquired illegally as the exceptions to absolute ownership. The nature of title it gives to a proprietor is not different from the previous registration Acts *Registration of Titles Act* and *Registered Land Act Cap 300*, and thus a limitation in solving the squatter problem.⁸⁵ In the case of *Mwangi Muguthu v Maina Muguthu*⁸⁶ it was held that first registration of land was not a bar to creation of a trust. *Esiroyo v Esiroyo* and *Obiero v Obiero*⁸⁷held that first registration of land extinguishes customary claims, trust and rights. As seen above both cases give conflicting results. The Court of Appeal has however done very little to reconcile the two interpretations leaving a degree of uncertainty that does not help to curb the squatter problem.

2.3.4 Uhuru Kenyatta era

The task in this era is to implement the various land laws had had come in place. the

⁸² www.lands.go.ke

⁸³ (Act No 3 of 2012).

⁸⁴ Section 28, *Registered Land Act*, (Act Cap 300) .

⁸⁵ Njoroge S C L, *Limitations of The Current Land Laws in Addressing the Squatter Land Problem in Kenya*. 2013,65.

⁸⁶ HCCC No 377 of 1986 (unreported).

⁸⁷ (1972) EA 227.

problem being the various problems brought about by grey areas in the law. Where various mandates are given to the commission but not being given implementing and enforcement power leaving the country in limbo as the various land administration bodies battle for power.⁸⁸This is despite the ruling given by the court clarifying the role of the land administration bodies.⁸⁹

The *Mombasa Republican Council*, attributes its ‘Pwani si Kenya’ problem to the 1895 and 1963 agreements transferring the 10-mile coastal strip to the Kenyan government. MRC states that these agreements are invalid as they did not involve Coastal Stakeholders and that the government did not do anything to protect the coastal population. MRC grievances stem from the inferior socio-economic position the coastal population, land situation, which is primary the factor driving political discontent on the coast .Post-independent demographic growth and commercialism aggravated the situation, while the politics of social exclusion have further antagonized local communities.⁹⁰The 1997 Kaya Bombo violence exemplifies how the Moi government used minority discontent over these issues to promote its own agenda instigated the violence that erupted in Likoni and spread further up the coast in August. It erupted further in Mshoromoni, Kongowea, Kisauni, and Mtwapa, and then spread to attacks on upcountry residents and their property in Malindi and Taita Taveta. This violence targeted the ‘indigenized’ settlers at the Coast. It was also manifested after the 2007 National Elections where clashes erupted in Ukunda Diani biased against a particular tribe. Mghanga’s data on land and electoral violence demonstrates impact of tribalism on land ownership, provision of public education and social service.⁹¹These acts of violence have continued in and seem to still be unsettled due to political discontent.

In the *Waitiki case*, it is an Area in Likoni, Mombasa is private land, invaded by squatters. Of about 960 acres with more than 100,000 squatters and has permanent structures.⁹²An agreement was made between the government and Mr. Waitiki , to acquire this land for settlement of squatters. The procedure was however flawed as it was not supported by any law as it involved the formalization of an illegality, where Mr. Waitiki was evicted from his land by youths during the 1997/8 Kaya Bombo clashes.⁹³the national land commission was

⁸⁸http://www.standardmedia.co.ke/?articleID=2000105610&story_title=ngilu-swazuri-battle-stalls-much-needed-change-in-the-land-sector/

⁸⁹ *In the Matter of the National Land Commission* [2015] eKLR

⁹⁰Report based on Research Commissioned by Kenya Civil Society Strengthening Programme, Paul Goldsmith, *The Mombasa Republican Council, Conflict Assessment: Threats and Opportunities for Engagement*, A, November 2011,8.

⁹¹Report based on Research Commissioned by Kenya Civil Society Strengthening Programme, Paul Goldsmith, *The Mombasa Republican Council, Conflict Assessment: Threats and Opportunities for Engagement*, A,20-25.

⁹² http://www.kecosce.org/downloads/land_status_coast.pdf

⁹³ <http://www.nation.co.ke/news/Uhuru-helps-end-Waitiki-land-row/-/1056/2962196/-/938n67/-/index.html>

not involved in the negotiation for this land as it was being handled at the ministry level.⁹⁴This decision allows one to benefit from an illegality, as invaders claimed the land owned Mr. Waitiki was their ancestral land. This decision is dangerous as it threatens the policy enshrined in the Constitution article 60 on security of land rights and article 40 on the right to own property not subject to arbitrary deprivation aside from compulsory acquisition in sub-article 3. This procedure of change of user is also questioned, did it comply with the provisions of the Land Registration Act No 3 of 2012. It is important to also highlight that the county and national governments had not agreed on land rates and rent therefore questioning how the occupants obtained certificates.⁹⁵

Another notable case is that of the High court ruling on the Mazrui family ownership of 3000 acre land whose title was cancelled by the government leading to a 21 year legal battle from 1989. In a judgment delivered in 2012, The Mazrui family was declared the legal.⁹⁶ Mazrui were declared the lawful owners within the meaning contained in the said Act, and to the exclusion of all other persons. The ruling also stated that if the said land would be used to settle other persons other than Mazrui family a just and full compensation should first be paid to the Mazrui in accordance with the provisions of Section 75(i) (c) of the said former Constitution, and Article 40 (6) of the new Constitution.

Other land laws have come into force such as the Community Land Act and the Land Laws Amendment Act. *The Community Land Act*, provides for protection of community land rights in section 5 of this Act. It goes further to state in subsection (4) *Subject to Article 40 (3) of the Constitution and the Land Act, no interest in, or right over community land may be compulsorily acquired by the State except in accordance with the law, for a public purpose, and upon prompt payment of just compensation to the person or persons, in full or by negotiated settlement.* Which in this case public purpose as per the Land Act includes the settlement of squatters or internally displaced persons in Section 2. And thus this Act provides for settlement of squatters on community land.⁹⁷

The *Land Laws Amendment Act*,⁹⁸ section 89 of this Act states that the National Government is tasked to implement settlement programs, and to administer the settlement programs in consultation with the Commission and the respective county governments. It sets out that commission shall reserve public land for the establishment of settlement programs and

⁹⁴ <http://www.standardmedia.co.ke/mobile/article/2000091094/test-for-uhuru-kenyatta-as-coast-squatters-landowners-await-fair-verdict?pageNo=2>

⁹⁵ <https://landportal.info/news/2016/02/kenya-why-titles-given-waitiki-land-beneficiaries-may-be-irregular>

⁹⁶ *Ahmed Abdulla Mohamed & 3 Others V Attorney General* [2012] eKLR

⁹⁷ (Cap 27 of 2016).

⁹⁸ (Cap 28 of 2016).

where public land is not available the Board of Trustees shall purchase or acquire land for settlement .That land acquired through settlement shall be subdivided and transferred through succession.⁹⁹It further states that the settlement fund shall instead of being administered by the National Land Commission, shall be administered by a Board of Trustees, Land Settlement Fund Board of Trustees members include Cabinet Secretary for Land ,for National Treasury ,that responsible for Agriculture among others, its responsibilities include provision of access to land to squatters displaced persons among others. It is further entrusted with the duty of purchasing private land for settlement programs.¹⁰⁰

⁹⁹ Section 89, *Land Laws Amendment Act* (Act No. 8 of 2016).

¹⁰⁰ section 90, *Land Laws Amendment Act* (Act No. 8 of 2016).

Chapter Three

A comparative study of the South African legal framework.

3.0 Introduction

This chapter will discuss the legal framework and history of the squatting problem in South Africa and the legal and practical measures they have taken to solve it. This reason for choice of South Africa as the country for comparative study is the fact that this country has faced similar predicament as Kenya in the formation of landlessness through use of a legal framework that dispossessed indigenous persons of their land vesting land to European settlers. This country has also faced various problems in trying to address the issue of landlessness such as issues on lack of political good will and capacity by the Department of Land. It has however also had various changes in law that seek to provide tenure security and development in jurisprudence by the courts, to protect squatters from illegal evictions while protecting human rights that are tied to the enjoyment of tenure security.

3.1 Legal Framework

3.1.1 Legislative framework enforcing territorial segregation

3.1.1.1 *The Natives Land Act 27 of 1913*

It was formalized limitations on black land ownership,¹ and is regarded as one of the cornerstones of apartheid.² Section 1(1) states, *Except with the approval of the Governor-General - a native shall not enter into any agreement or transaction for the purchase, hire, or other acquisition from a person other than a native, of any such land or of any right thereto, interest therein, or servitude there over; and a person other than a native shall not enter into any agreement or transaction for the purchase, hire, or other acquisition from a native of any such land or of any right thereto, interest therein, or servitude there over.*³ This section brought about segregation based on race, as natives were now prohibited from occupying or acquiring land.⁴

Section 1(2) states that *a native shall not enter into any agreement or transaction for the purchase, hire or other acquisition, direct or indirect, of any such land or of any right thereto or interest therein or servitude there over, except with the approval of the Governor-General.*⁵ This meant that any agreement concluded in contravention to this prohibition is *ab*

¹ Robinson L, "Rationales for rural land redistribution in South Africa", Brooklyn J Int'l L, 1997, 472.

² Fenyes T, Van Rooyen C and Vink N, "Reassessment of the Land Acts of 1913 and 1936", Development Southern Africa, 1990, 583.

³ *The Natives Land Act* (No 27 of 1913).

⁴ HJ Kloppers and GJ Pienaar, *The historical context of land reform in South Africa and early policies*, volume 17 no 2, 2014, 6.

⁵ *The Natives Land Act* (Act No. 27 of 1913).

initio null and void as per section 1(4). And that such contravention of the Act was punishable by fine or imprisonment with or without hard labor, for not more than 6 months, as per section 5 (1). With that it was estimated that the area which was reserved for black South Africans was about 8%.⁶

3.1.1.2 Native Trust and Land Act⁷

It was gazetted on 19 June 1936 in the Extraordinary Gazette No 2362. This Act abolished individual landownership by the native South Africans and created a trust tenure through the South African Development Trust a government body responsible for the purchase of land for black settlement. Section 2(1), transferred certain areas of land to be administered by the Trust, which was land reserved for occupation of natives within areas identified by the Act as per section 6 of the Act.

Section 9,⁸ goes further to state that the Trust created and the funds it has to be used for acquisition and development of land for the advancement of the natives' interests in terms of social wellbeing. This Act also limited the Trust's acquisition capacity to 13% of the land as of 1936. This resulted to the confining of around 80% of the population to this small area.⁹ Section 13 empowered the trustees to expropriate land owned by natives outside the scheduled areas for reasons such as public health, public welfare or public interest. Which one would now be compensated by fair market value of the land plus actual costs of improvement and compensating for inconvenience. Black south Africans could now not live outside the scheduled areas without authorization by relevant authorities.¹⁰

3.1.1.3 Group Areas Act¹¹

This Act was used by the government to forcefully evict black, colored and Indian people from areas that were designated for white settlement. Its aim was to establish control over acquisition of immovable property and occupation of such.¹² Section 2,¹³ identifies various groups of people that is, the native, the colored and the white group. With that the Act went further to establish areas designated for settlement of particular groups of people as per section 3.¹⁴ Section 4,¹⁵ defines persons who are disqualified persons as those who are not of the group designated to occupy that area except where explicit authority is given to do so, such \persons

⁶ HJ Kloppers and GJ Pienaar, *The historical context of land reform in South Africa and early policies*, 6.

⁷ *Native Trust and Land Act*, (Act No. 18 of 1936).

⁸ *Native Trust and Land Act* (Act No. 18 of 1936).

⁹ HJ Kloppers and GJ Pienaar, *The historical context of land reform in South Africa and early policies*, 9.

¹⁰ HJ Kloppers and GJ Pienaar, *The historical context of land reform in South Africa and early policies*, 9-10.

¹¹ *Group Areas Act* (Act No. 41 of 1950.)

¹² HJ Kloppers and GJ Pienaar, *The historical context of land reform in South Africa and early policies*, 10.

¹³ Section 2, *Group Areas Act* (Act No. 41 of 1950).

¹⁴ Section 3, *Group Areas Act* (Act No. 41 of 1950).

¹⁵ Section 4, *Group Areas Act* (Act No. 41 of 1950).

were also not allowed to own immovable property in such areas.

3.1.1.4 Prevention of Illegal Squatting Act 1951

This Act empowered the Minister of Natives Affairs to compel Africans to move off public or privately owned land and authorizing local authorities to establish resettlement camps where squatters could be concentrated.¹⁶It also authorized for demolition of homes without court order.¹⁷

3.1.1.4 Group Areas Act¹⁸

This Act complemented the previous Act, Group Areas Act,¹⁹ its function was to consolidate laws related to the establishment of group areas ,the control of acquisition of immovable property and land.²⁰This Act referred to the Natives as Bantu, or as those who are accepted as a member of the aboriginal race or a tribe in Africa as per section 12(1)(b).Section13, prohibits acquisition of immovable property in a controlled area and section 20 placed restrictions on occupation of land in controlled areas.

Section 17(1) states,²¹ *no person who is a member of any group shall occupy and no person shall allow any such person to occupy any land or premises in a specified area which was not lawfully occupied ... except under the authority of a permit.* It also gave exception for instances where it would not be unlawful for one to occupy a premise in a controlled area where one was an employee or a visitor for more than 90 days or a scholar attending school controlled or aided by the state.²²

Section 23,²³ gave the president power to declare through Government Gazette areas for exclusive occupation or ownership by a particular group of people. Section 26 and 27,²⁴ prohibited ownership or occupation of property by disqualified persons in group areas. Section 43 further empowered the police to enter, without any warrant ,any premises to investigate any offence committed under this Act.²⁵ As from 1960 to 1983, it is estimated that a population of almost 3.5 million people were forcibly evicted in the enactment of this Act.²⁶

3.1.2 Laws abolishing segregation laws and creating land reform

3.1.2.1 Abolition of Racially Based Land Measures Act²⁷

This Act was enacted to bring an end to Lands Acts such as The Natives Land Act 27

¹⁶<https://www.nelsonmandela.org/omalley/index.php/site/q/031v01538/041v01828/051v01829/061v01846.htm>

¹⁷ *Prevention of Illegal Squatting* (Act No. of 1951).

¹⁸ *Group Areas Act* (Act No. 36 of 1966).

¹⁹ *Group Areas Act* (Act No. 41 of 1950).

²⁰ HJ Kloppers and GJ Pienaar, *The historical context of land reform in South Africa and early policies*,10.

²¹ *Group Areas Act* (Act No. 36 of 1966).

²² Section 17(2), *Group Areas Act* (Act No. of 1966).

²³ *Group Areas Act*, Act (No. 36 of 1966).

²⁴ Section 26 and 27, *Group Areas Act*, (Act No. 36 of 1966).

²⁵ Section 43, *Group Areas Act* (Act No. 36 of 1966).

²⁶ Platzky L and Walker C, *The Surplus People: Forced Removals in South Africa*, Ravan Press Johannesburg ,1985,9-12.

²⁷*Abolition of Racially Based Land Measures Act* (Act No.108 of 1991).

of 1913, that brought about segregation.²⁸The long title of the Act states that, it was promulgated to *repeal or amend certain laws so as to abolish certain restrictions based on race or membership of a specific population group on the acquisition and utilization of rights to land; to provide for the rationalization or phasing out of certain racially based institutions and statutory and regulatory systems repealed the majority of discriminatory land laws ...*

Section 12,²⁹ went further to remove the South African Development Trust. Section 1, repealed the Natives Land Act, section 11 repealed the Natives Trust and Land Act while section 48 of the Act was to repeal the Group Areas Act of 1966, thus enabling any race to occupy and own land in any place without any restrictions or fear of prosecution.³⁰

3.1.2.2 Reconstruction and Development Program³¹

Enacted to promote socio-economic reform, reconstruction and redressing the inequalities brought about by enactment of the previous laws.³²This program was designed to address issues of income inequalities and poverty, this included addressing issues as to access to land, housing, safe water and sanitation.³³ And this could be addressed through addressing issues caused by historical injustices that caused forceful eviction and landlessness. This program envisaged a land reform program that was to see transfer of land from inefficient ecologically damaging and white dominated land to those who would produce income through farming, redistribution and restitution to those who lost their land as a result of the laws of apartheid. It identified areas of land reform being restitution, redistribution and tenure reform. And the strengthening of property rights and access to land.³⁴

3.1.2.3 White Paper on Land Policy ,1997

It was published with the purpose of establishing a just, stable and economically correct land policy.³⁵It acknowledged, *Forced removals in support of racial segregation have caused enormous suffering and hardship in South Africa and no settlement of land issues can be reached without addressing such historical injustices.*³⁶

The government adopted a strategy of market assisted or market-led agrarian reform whereby the government would provide resources to finance market led redistribution without it being owned by the government.³⁷ The challenge of implementation is that there were limited financial resources and competing priorities. It however stated that the center of a successful

²⁸ HJ Kloppers and GJ Pienaar, *The historical context of land reform in South Africa and early policies*,13.

²⁹ *Abolition of Racially Based Land Measures Act*, (Act No.108 of 1991)

³⁰ HJ Kloppers and GJ Pienaar, *The historical context of land reform in South Africa and early policies*,13.

³¹ *Reconstruction and Development Programme Policy Framework*, 1994.

³² Aliber M, *Poverty Eradication and Sustainable Development*, HSRCC, Cape Town ,2002,7.

³³ Section 2, *Reconstruction and Development Programme Policy Framework*,1994.

³⁴ HJ Kloppers and GJ Pienaar, *The historical context of land reform in South Africa and early policies*,14.

³⁵ para 2.1, *White Paper on Land Policy*, Department of Land Affairs, 1997 (DLA Pretoria 1997).

³⁶ para 3.17, *White Paper on Land Policy*, Department of Land Affairs, 1997 (DLA Pretoria 1997).

³⁷ HJ Kloppers and GJ Pienaar, *The historical context of land reform in South Africa and early policies*,18-19.

land reform program is, *Viability and sustainability of projects must be ensured by giving attention to: the economic and social viability of intended land use; fiscal sustainability by the local authority; environmental sustainability; proximity and access to markets and employment; availability of water and bulk infrastructure.*³⁸ Stating that the role of restitution is to, restore land and provide other restitution remedies to people dispossessed by racially discriminatory legislation and price, in such a way as to provide support to the vital process of reconciliation, reconstruction and development.³⁹It acknowledges that the procedure of land claims are based on section 25(4) of the Constitution of the Republic of South Africa and the Restitution of Land Rights Act.⁴⁰

3.1.2.4 South African Constitution⁴¹

The drafters of this Constitution saw land as central in defining the rights that had formerly been denied to its citizens.⁴² Its provisions had solutions such as restoration as a means to restore those rights and with them the sovereignty and full citizenship of the African population.⁴³ South Africa has enacted land reform programs based on a constitutional backing, having three main pillars that is restitution, redistribution and tenure security.

Section 25 of the Constitution states that,⁴⁴*A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.*⁴⁵This is the basis of land restitution through cash compensation or alternative land.⁴⁶

Section 25(5) on redistribution states that,⁴⁷ *reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.* This is however not a right but the state should take reasonable measures within its available resources to ensure equitable access to land.⁴⁸the state then adopted a willing buyer willing seller approach for land acquisition for redistribution, for market value.⁴⁹

³⁸ para 4.7.1, *White Paper on Land Policy*, Department of Land Affairs, 1997 (DLA Pretoria 1997).

³⁹ para 4.13, *White Paper on Land Policy*, Department of Land Affairs, 1997 (DLA Pretoria 1997).

⁴⁰ para 2.4.1, *Restitution of Land Rights Act*, (Act No 22 of 1994).

⁴¹ Constitution of the Republic of South Africa, 1996.

⁴² HJ Kloppers and GJ Pienaar, *The historical context of land reform in South Africa and early policies*,20.

⁴³ Ramutsindela M F, “*Compromises and consequences: an analysis of South Africa’s land reform programme*”, *The Arab World Geographer* 1(2), 1998,155-169.

⁴⁴ *Constitution of the Republic of South Africa Act* (Act No. 108 of 1996).

⁴⁵ section 25, *Constitution of the Republic of South Africa* (Act No. 108 of 1996).

⁴⁶ *Constitution of the Republic of South Africa Act* (Act No. 108 of 1996).

⁴⁷ *Constitution of the Republic of South Africa Act* (Act No. 108 of 1996).

⁴⁸ https://www.nelsonmandela.org/uploads/files/Land_law_and_leadership_-_paper_2.pdf

⁴⁹ *White Paper on Land Policy*, Department of Land Affairs, 1997 (DLA Pretoria 1997).

Section 25(6) on tenure security states that,⁵⁰ *a person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress. Section 26 recognizes housing as a fundamental human right thus pushing parliament to adopt new laws to enforce this and the courts to come up with adequate interpretation of such laws governing evictions.*⁵¹

The intention to restore land to its former occupiers thus amounted to a reinstatement of basic civil liberties which had been removed, or denied, in the past: but it was also seen as assuring the rights of such people – and especially the poorest and vulnerable – to secure residence in the future. This article discusses historical and social origins of the “landlessness” attributing it to the racial laws of the apartheid regime.⁵²

3.1.2. 4 Prevention of Illegal Eviction from Unlawful occupation of Land Act⁵³

This Act repealed Prevention of Illegal Squatting Act making squatting a non-criminal offence.⁵⁴ Given authority by section 26(3) of the Constitution, prohibiting eviction without court order and therefore is the primary source of law that governs eviction of unlawful occupiers from their homes. This Act goes against the common law protection of *rei vindication*, which has the effect that owners can not only quickly but also easily reclaim their property from an unlawful occupier.⁵⁵ This Act allows for the court to use a test of justice and equity in coming to its decision in considering whether an eviction is fair and just.⁵⁶ Squatters are protected by this Act in that they can only be removed by means of a court order issued as per provisions of this Act.⁵⁷ The procedure for eviction are such, the owner of the land is to give an eviction notice to the unlawful occupiers for at least two weeks prior. This notice must also be given to the municipality in which the land is situated stating date and time in which the application is to be heard in court, reasons for such application for the reason that the unlawful occupiers also have a right to appear in court to defend their case and are also entitled to get legal aid.⁵⁸ This Act also sets out various considerations to be made by the court in making such

⁵⁰ *Constitution of the Republic of South Africa Act* (Act No. 108 of 1996).

⁵¹ http://www.groundup.org.za/article/what-law-has-say-about-evictions_2185/

⁵² James D, “*The landed and the landless: strategies of territorial integration and dissociation in Africa*” *Determent of Anthropology LSE*, May 2002, 27-29.

⁵³ *Prevention of Illegal Eviction from Unlawful occupation of Land Act*, Act No. 19 of 1998.

⁵⁴ Information Document On How To Deal With Unlawful Occupation Of Land, AGRISA, 2. <http://www.hortgro.co.za/wp-content/uploads/2016/02/INLIGTINGSTUK-OOR-DIE-HANTERING-VAN-DIE-ONREGMATIGE-BESETTING-VAN-GROND-ENGELS2.pdf>

⁵⁵ http://www.groundup.org.za/article/what-law-has-say-about-evictions_2185/

⁵⁶ http://www.groundup.org.za/article/what-law-has-say-about-evictions_2185/

⁵⁷ <http://www.hortgro.co.za/wp-content/uploads/2016/02/INLIGTINGSTUK-OOR-DIE-HANTERING-VAN-DIE-ONREGMATIGE-BESETTING-VAN-GROND-ENGELS2.pdf>

⁵⁸ <http://www.hortgro.co.za/wp-content/uploads/2016/02/INLIGTINGSTUK-OOR-DIE-HANTERING-VAN-DIE-ONREGMATIGE-BESETTING-VAN-GROND-ENGELS2.pdf>

eviction orders these include needs of the elderly, children, disabled persons and households headed by women and where an unlawful occupier had been living there for more than six months an alternative land would be made available to them.⁵⁹

3.1.2.5 Extension of Security of Tenure Act⁶⁰

The purpose of the Act is to ensure long-term security of land tenure, conditions of residence on certain land, conditions as to when such residence can be terminated and eviction of such person.⁶¹The preamble states that, '*it is desirable [to ensure] that the law should promote the achievement of long-term security of tenure for occupiers of land, where possible through the joint efforts of occupiers, land owners, and government bodies; that the law should extend the rights of occupiers, while giving due recognition to the rights, duties and legitimate interests of owners; that the law should regulate the eviction of vulnerable occupiers from land in a fair manner, while recognizing the right of land owners to apply to court for an eviction order in appropriate circumstances; to ensure that occupiers are not further prejudiced*'. Thus, designed to actualize s 25(6) of the Constitution to improve security of tenure for those '*whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices*'.⁶²

3.1.2.6 The Land Reform (Labor Tenants) Act⁶³

The conditions of eviction as per this act include considerations such as the age of the person, that the person shall not be older than 65 of disabled persons who have nominated a successor or where the person is in the process of application to acquire rights in land .⁶⁴As per this Act there are various legal procedures for labor tenants through the Land Claims Court.⁶⁵Sections 11-17 set out a detailed procedure on eviction such as the notice of eviction (two month written notice) and application and procedures to acquire land, publications in the gazette. And as per the case of *Van Zydham v. Zulu*,⁶⁶ there are various conditions that must be met in order for one to be considered a labor tenant, one whose tenure rights are protected by this Act, that is: they must stay or have a right to stay on the farm, or had cropping or grazing rights on a farm where they must have worked for such owner of land ,must have a parent or grandparent who had cropping or grazing rights and must have worked for such right.

In the case of *Government of the Republic of South Africa vs. Irene Grootboom*,⁶⁷ it was

⁵⁹ http://www.groundup.org.za/article/what-law-has-say-about-evictions_2185/

⁶⁰ *Extension of Security of Tenure Act* (Act No. 62 of 1997)

⁶¹ http://www.saflii.org/za/legis/consol_reg/eosota62o1997rangnr1632807/

⁶² http://www.saflii.org/za/legis/consol_reg/eosota62o1997rangnr1632807/

⁶³ *The Land Reform (Labor Tenants) Act* (Act No. 3 of 1996)

⁶⁴ http://wiredspace.wits.ac.za/bitstream/handle/10539/275/21_chapter9.pdf?sequence=21

⁶⁵ http://wiredspace.wits.ac.za/bitstream/handle/10539/275/21_chapter9.pdf?sequence=21

⁶⁶ *Van Zydham v. Zulu*, LCC Case 27/98.

⁶⁷ 2001 (1) SA, 46.

held that the state had a duty to provide housing for all the citizens irrespective of other legislative obligations and the resources available to the government.⁶⁸ And that Access to land for the purposes of housing is therefore included in the right of access to adequate housing in Section 26 of the South African Constitution.

3.1.2.6 Green Paper on Land Reform

2011, this document contained various statements of principle in areas of tenure system such as leasehold on state land, freehold, implied restrictions on land size and freehold for foreign owners and on communal tenure.⁶⁹

3.1.2.7 Restitution of Land Rights Amendment Act 2014⁷⁰

It opens up land claims up to the year 2019. This however raises concerns as to existing claims such as those by labor tenants who have not yet been settled.⁷¹

3.1.2.8 State Land Lease and Disposal Policy (SLLDP) of 2013

It was enacted to apply on farms that had been acquired through proactive land acquisition strategy such as households that have limited or no access to land, small scale subsidiary farmers, medium scale farmers who practice commercial farming but are faced with restrictions due to insufficient land and large scale farmers disadvantaged due to farm size and location.⁷²

3.1.2.9 Recapitalization and Development Policy Program ('Recap') of 2014

This law was enacted to replace all previous laws on forms of funding for land reform such as the grants for restitution beneficiaries.⁷³

The laws in South Africa have been tailored in a way to distinguish between different actions such as trespass and squatting. And handles them differently through different Acts. Such as in the instance of land invasion where the owner immediately reports the matter to the relevant authority then a complaint for trespass is lodged as per section 1 of the Trespass Act.⁷⁴ Where there has been a period of time before occupation is noted and reported, the land owner must then follow the procedures for application for eviction order as per the Prevention

⁶⁸ *The Government of the Republic of South Africa vs. Irene Grootboom*, 2001 (1) SA, 46.

⁶⁹ https://www.nelsonmandela.org/uploads/files/Land_law_and_leadership_-_paper_2.pdf

⁷⁰ *Restitution of Land Rights Amendment Act*, (Act No. 15 of 2014).

⁷¹ Cousins, B., R. Hall and A. Dubb, 'The Restitution of Land Rights Amendment Act of 2014. What are the real implications of reopening land claims?', PLAAS Policy Brief 34, Cape Town, 2014.

⁷² https://www.nelsonmandela.org/uploads/files/Land_law_and_leadership_-_paper_2.pdf

⁷³ 'Policy for the Recapitalization and Development Programme of the Department of Rural Development and Land Reform', Pretoria, 2013.

⁷⁴ *Trespass Act* (Act No. 6 of 19

Against Illegal Eviction and Unlawful Occupation Act as well as the relevant local police.⁷⁵

3.1.3 Principles for alternative settlement

There are three main principles that have been established by courts in the interpretation of this Act, they include alternative accommodation, meaningful engagement and various roles of the state.⁷⁶

3.1.3.1 Alternative Accommodation⁷⁷

This principle can be seen in the Grootboom case,⁷⁸ where it was held that those “with no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations” should not be evicted and if evicted should be provided with alternative shelter. This was enforced through enactment of the Emergency Housing Program⁷⁹ which is Chapter 12 of the National Housing Code.

In *Beja and Others v Premier of the Western Cape and Others*,⁸⁰ in this case, the City of Cape Town argued that the minimum requirements in terms of the Emergency Housing Program constituted the full obligations of the City to provide permanent sanitation in terms of the Upgrading of Informal Settlements Program. The Western Cape High Court disagreed however, stating that the minimum requirements in terms of the Emergency Housing Program would constitute only the bare minimum and would be inappropriate for more permanent forms of housing. It sets an absolute bare minimum and are supplemented in the court case of *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes*,⁸¹ the Court endorsed relocating the residents to Temporary Residential Units as per Emergency Housing Program terms. The Court set out in detail the nature and specifications of temporary accommodation to be provided in future, as well as a detailed timetable for the relocation, be at least 24m² in size, be accessible by tarred road, be individually numbered for identification, have walls constructed, have galvanized corrugated iron roofs, be supplied with electricity by a prepaid electricity meter, be located within reasonable proximity of communal ablution facilities, make reasonable provision for toilet facilities, which may be communal, with waterborne sewerage, and make reasonable provision for fresh water, which may be communal.⁸²

In the case of City of Johannesburg Metropolitan Municipality v Blue Moonlight

⁷⁵<http://www.hortgro.co.za/wp-content/uploads/2016/02/INLIGTINGSTUK-OOR-DIE-HANTERING-VAN-DIE-ONREGMATIGE-BESETTING-VAN-GROND-ENGELS2.pdf>

⁷⁶ http://www.groundup.org.za/article/what-law-has-say-about-evictions_2185/

⁷⁷ http://www.groundup.org.za/article/what-law-has-say-about-evictions_2185/

⁷⁸ *Government of the Republic of South Africa vs. Irene Grootboom*, 2001 (1) SA, 46.

⁷⁹ https://www.thehda.co.za/uploads/files/HDA_Implementing_Emergency_Housing_Guidelines.pdf

⁸⁰ 2011 (10) BCLR 1077 (WCC) para 115.

⁸¹ 2010 (3) SA 454 (CC).

⁸² *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes*, 2010 (3) SA 454 (CC).

Properties 39 (Pty) Ltd and Another,⁸³ it was held that local authorities are obliged to plan and budget for emergencies and ensure alternative housing for those facing homelessness. Where they cannot finance such, they are to apply to the provinces as per Chapter 12 of National Housing Code, 2010. Such emergencies are where the government or a private land owner evicts an unlawful occupier. Alternative accommodation should be provided as close as possible to the property from which the occupiers were evicted. Proximity should also be near schools public amenities and evictees' place of employment or access to employment opportunities.⁸⁴

In *Baartman, Baartman v Port Elizabeth Municipality*,⁸⁵ in this case it was held that such provision should entail a measure of tenure security and thus set aside an eviction order as it would be contrary to public interest to evict occupiers to a location where they would be subject to eviction once more. These principles are however not as clear and thus leaving a lot of discretion as to what alternative accommodation should be to municipalities.⁸⁶ In *Dladla v City of Johannesburg*,⁸⁷ in this case, there were various human rights violations and it was held that the action by the City of Johannesburg to outsource temporary alternative accommodation for evicted inner city residents were unconstitutional including the act of segregation of married couples and the lock out rules for residents as violating various constitutional rights such as right to human dignity, privacy and security of the person. Thus bringing uncertainty as to the nature and standard of alternative accommodation and the process to achieve permanent housing.

In another case *Jabulani Zulu and 389 Others v eThekweni Municipality and Others*⁸⁸ in the Constitutional Court of South Africa, appellants being residents of Madlala Village in Durban where an order for eviction was declared to be inevitably unlawful as it went against the provisions of the *Prevention of Illegal Eviction from Unlawful occupation of Land Act*.⁸⁹

3.1.3.2 Meaningful engagement⁹⁰

Those being evicted should be given adequate time to participate in resolution of eviction dispute. As per *Residents of Joe Slovo Community v Thubelisha Homes and Others*,⁹¹ the court approved the eviction of up to 20,000 persons in an informal settlement north of cape

⁸³ (CC) [2011] ZACC 33 ,Accessed from: <http://www.saflii.org/za/cases/ZACC/2011/33.html>

⁸⁴ *In the case of City of Johannesburg Metropolitan Municipality V Blue Moonlight Properties 39 (Pty) Ltd and Another*, [2011] ZACC 33.

⁸⁵ 2004 (1) SA 560 (SCA).

⁸⁶ http://www.groundup.org.za/article/what-law-has-say-about-evictions_2185/

⁸⁷ (403/2015) [2016] ZASCA 66, Accessed from: <http://www.saflii.org/za/cases/ZASCA/2016/66.html>

⁸⁸ [2014] ZACC 17 ,Accessed from: <http://www.saflii.org/za/cases/ZACC/2014/17.html>

⁸⁹ *Prevention of Illegal Eviction from Unlawful occupation of Land Act (Act No. 19 of 1998)*

⁹⁰ http://www.groundup.org.za/article/what-law-has-say-about-evictions_2185/

⁹¹ 2010 (3) SA 454 (CC).

town as a part of redevelopment ‘N2 Gateway Project’. The city and the developer promised that they would return the settlers to the new development and that they acquire new low cost rental housing. This however did not happen, as they were not allocated these houses, and the housing was provided at market rate. It was then concluded that the residents had no ‘legitimate expectation’ to the promised housing because they were unlawful occupants of the territory. The failure of state authorities to adequately communicate with the residents as the project moved forward was noted as the purpose of reporting back to the community was seen as being to pass on information about decisions already taken rather than to involve the residents as partners in the process of decision-making itself. The residents’ core contention was that the length of their occupation combined with the City of Cape Town’s periodic provision of services and efforts to improve the living conditions in the settlement constituted uninterrupted consent for their occupation of the land. It was noted that the community lawfully occupied the land with the knowledge, acquiescence and support of the City Council, but on the understanding that their occupation would be of a temporary nature pending the provision of adequate housing. It was finally held that evictions in such instances would only be constitutional if the process included meaningful engagement with the residents.

3.1.3.3 Role of the state⁹²

Evictions that may lead to homelessness aren’t considered private disputes. In such issues municipalities, must be joined as a necessary party to the legal process of eviction. Reason being that the municipality must investigate and bring before a court the potential impact and the various steps to be taken to ensure alternative accommodation for those who a facing possible homelessness.⁹³

A safeguard put in place is that there can be no eviction without a court order giving it such authority,⁹⁴ and in such instances the judicial officer should ensure they make various considerations such as the effect such eviction causes to vulnerable groups such as children and the disabled, available alternative accommodation and that all this must be considered in light of section 26(3) of the Constitution.⁹⁵

3.2 Case study of Marconi Beam, Cape Town.

Post-apartheid, the city of Cape Town has experienced rapid urbanization and with that an increase in informal settlement and desegregation⁹⁶

⁹² http://www.groundup.org.za/article/what-law-has-say-about-evictions_2185/

⁹³ http://www.groundup.org.za/article/what-law-has-say-about-evictions_2185/

⁹⁴ *Prevention of Illegal Eviction from Unlawful occupation of Land Act* (Act No. 19 of 1998).

⁹⁵ http://www.groundup.org.za/article/what-law-has-say-about-evictions_2185/

⁹⁶ Saff *Claiming a Space in a Changing South Africa: The "Squatters" of Marconi Beam, Cape Town*, *Annals of the Association of American Geographers*, Vol. 86, No. 2, 1996, 235-255.

Changes in urban policy that facilitated this were; the removal of land laws that prescribe land ownership along racial lines and development of policy for urbanization and informal settlement,⁹⁷ thus repeal of all legislation that propagated for ownership of land along racial lines, such as Group Areas Act 1950 and the Land Act 1913. The White Paper, reiterated the state's duty to protect private property and that squatting could not be tolerated, but it also acknowledged that squatting was the cumulative result of discriminatory measures and an inadequate housing policy.⁹⁸ The government committed itself to establishment of sufficient urban land and more less formal settlement. Administration of this policy was given to the provincial administrations.⁹⁹

The government enacted the Less Formal Township Act 1991, to shorten procedures for designation and development of land for informal settlement giving local and provincial administration means to establish informal settlement. ¹⁰⁰It was seen that the central government, lacked the political will and the capacity to carryout openly coercive measures with regard to land occupations.¹⁰¹

The Provincial Administration discouraged forced removal of squatters and thus municipalities were compelled to negotiate with the squatters.¹⁰² The document further advised municipalities to proclaim a squatter area as a transit camp in accordance with section 6(1) of the *Prevention of Illegal Squatting Act* (1951).

Desegregation occurred on a limited scale in formerly segregated suburbs.¹⁰³ Those who settled in the segregated suburbs, now gain access to social amenities.¹⁰⁴ The growth of informal housing in and around the Black townships and in the existing informal settlements increased substantially. Informal settlements expanded onto land adjacent to suburbs previously zoned for occupation by other race groups. They were sites of contentious struggle, as property owners in the adjacent areas bitterly resisted the encroachment and creation of low- income

⁹⁷ *White Paper on Land Policy*, Department of Land Affairs, 1997 (DLA Pretoria 1997),10.

⁹⁸ *White Paper on Land Policy*, Department of Land Affairs, 1997 (DLA Pretoria 1997)10-11.

⁹⁹ Syagga P, *Public land, historical land injustices and the new Constitution*, Society for International Development (SID), Nairobi, 2011,13.

¹⁰⁰South African Institute of Race Relations, *Race Relations Survey 1991/92*, Johannesburg: South African Institute of Race Relations ,335.

¹⁰¹Department of Environmental and Geographical Science, University of Cape Town, *Informal Settlements in Hout Bay: A Brief History and Review of Socio-Demographic Trends (1989- 1991)*, Report10/92/92,10-37.

¹⁰²Saff *Claiming a Space in a Changing South Africa: The "Squatters" of Marconi Beam*, Cape Town,240.

¹⁰³ Cloete F, *Graying and Free Settlement in The Apartheid City in Transition*, Oxford University Press,1991,91-107. 91-107.

¹⁰⁴Staff G, *Apartheid "South Africa: What can be Learned from the United States Experience"*, Residential Segregation Inn Post, Urban Affairs Review 30,1995,782-808.

informal settlements on their boundaries.¹⁰⁵

Informal settlements as at 1991, established within upmarket white suburbs were - Imizamo Yethu (Hout Bay), Inthabeni/Site5 (Noordhoek), and Marconi Beam Site (Milnerton)- then proclaimed as transit areas in terms of the *Prevention of Illegal Squatting Act* of 1951.¹⁰⁶

Marconi Beam settlement:

Marconi Beam Transit Area, was owned by the Department of Posts and Telecommunications (Telkom). It adjoins the suburbs of Tygerhof and Sandrift which are part of the Cape Town Municipality.¹⁰⁷

The increase of population in the settlement was contributed by the immigration of refugees from the political and criminal violence in other informal settlements.¹⁰⁸

In August 1990, the Milnerton Town Council served notice to Telkom(the landowner)as per the *Prevention of Illegal Squatting Act* (1951),requiring them to remove any unauthorized structures on their land.¹⁰⁹ Demolition of the shacks had began before a court order was obtained to stop it. The Milnerton Town Council did not regard the forced removal of the squatters from Marconi Beam as a serious and viable option.¹¹⁰

Political interaction between the municipal council and town council and the Marconi beam squatters:

The Town Council Authority, defended the interests of the residents who had vested interests in their properties. The municipal authority, was now against the forceful eviction of the squatters, negotiating for them against demolitions by Telkom. The squatters had secured legal representation by the Surplus Peoples Project, a non- governmental organization aiding the victims of forced removals.¹¹¹

A request by the Milnerton Town Council amidst the objections of the white Milnerton Ratepayers Association and residents, the Cape Provincial Administration declared an 8.02-hectare portion on the northern end off Marconi Beam as a transit area as per Section 6(1) of the *Prevention of Illegal Squatting Act*, 1951. The Cape Provincial Administration were to bear all infrastructural costs. Telkom would fence off the remaining portion of Marconi Beam to

¹⁰⁵ Dixon, John A, Foster Don. H, Durrhei, *Discourse and the Politics of Space in South Africa: The "Squatter Crisis."*,277-296.

¹⁰⁶Saff Claiming a Space in a Changing South Africa: The "Squatters" of Marconi Beam, Cape Town,250.

¹⁰⁷ Saff Claiming a Space in a Changing South Africa: The "Squatters" of Marconi Beam, Cape Town,243-247.

¹⁰⁸ Saff Claiming a Space in a Changing South Africa: The "Squatters" of Marconi Beam, Cape Town,237-239.

¹⁰⁹ Rollins L, "*Seizing the Gap*": *The Potential Feasibility of Utilizing Open Urban Spaces for Informal Housing-A Case Study of Milnerton*, Unpublished honors thesis, Department Ent of Environmental and Geographical Science, University of Cape Town,1991,40.

¹¹⁰ Saff Claiming a Space in a Changing South Africa: The "Squatters" of Marconi Beam, Cape Town,245.

¹¹¹ Saff Claiming a Space in a Changing South Africa: The "Squatters" of Marconi Beam, Cape Town,249.

prevent further squatting. Marconi Beam residents would then enter into formal lease agreement for their sites with the Municipality and would pay a service charge to cover the costs of clean, water and for refuse removal as per the agreement of the town council and their legal representative.¹¹²

3.4 Challenges in effecting land reform in South Africa:

- Restitution was made into a long court process that eventually led to few land claims being settled.¹¹³
- The Land Claims Commission had challenges providing effective post-settlement support.¹¹⁴
- Communal tenure, was highly politicized as a result of the lobbying power of chiefs, and progress in developing a policy framework was slow and incomplete.¹¹⁵
- The *Land Reform (Labor Tenants) Act*, excluded various persons from such protection this is because of the very narrow description of who would be considered a labor tenant in the case of *Mahlangu vs. De Jager*,¹¹⁶ which emphasized that for one to qualify as a tenant they had to have strictly met conditions such as ,they must stay or have a right to stay on the farm, or had cropping or grazing rights on a farm where they must have worked for such owner of land ,must have a parent or grandparent who had cropping or grazing rights and must have worked for such right and that *These requirements must have been met on June 2, 1995 such that those who lost their labor tenancy before this date were not covered by such protections in the act.*
- *Settling of cases* has been slow due to issues such as limited and or lack of capacity within the Department of Land Affairs and administrative and financial burden.¹¹⁷
- Circumvent legislation and exploitation of loopholes in legislations.¹¹⁸
- Lack of promulgation of various legislations and thus the lack of knowledge of various actions that can be taken by a squatter to protect their rights.¹¹⁹

3.5 Milestones achieved by South African land laws:

- Laws tailored to secure land rights such as Land Reform (Labor Tenants) Act for the

¹¹² Brooke, D.J, *Notes on an Urbanization Experience in Milnerton*, Town Engineer, MilnertonMunicipality,1992.

¹¹³ https://www.nelsonmandela.org/uploads/files/Land_law_and_leadership_-_paper_2.pdf

¹¹⁴ Walker Landmarked *Land Claims and Land Restitution in South Africa Report*,2008.

¹¹⁵ Ntsebeza, L, *Democracy compromised: Chiefs and the politics of land in South Africa*, Cape Town, 2006.

¹¹⁶ *Mahlangu vs. De Jager*, LCC SA235, 1996.

¹¹⁷ http://wiredspace.wits.ac.za/bitstream/handle/10539/275/21_chapter9.pdf?sequence=21

¹¹⁸ http://wiredspace.wits.ac.za/bitstream/handle/10539/275/21_chapter9.pdf?sequence=21

¹¹⁹ http://wiredspace.wits.ac.za/bitstream/handle/10539/275/21_chapter9.pdf?sequence=21

persons specified in the Act and also for squatters as per the *Prevention of Illegal Squatting Act of 1951*.

- Settling of squatters has now included not only access to land but also access to other services such as sanitation.
- The decentralization has enabled faster and efficient settlement of persons as seen in the case of the Marcon Beam Settlement.

Chapter Four

Best Practice on squatter settlement from South Africa

4.0 Introduction

This chapter deals with the identification of the laws and practices in South Africa and Kenya, the similarities and differences and what we can learn from best practice. Identifying both the weaknesses in the Kenyan regulatory framework and highlighting the impact of political interferences in settling squatters.

4.1 Similarities in laws and practices in South Africa and Kenya

Kenya and South Africa share a similarity in background given that they both were subject to colonialism,¹ and with that came the enactment of laws that left the natives of both these countries landless.

Some of the laws that were enacted to effect protection of land interests of the colonialists in South Africa include, *The Natives Land Act 27 of 1913*, which was enacted to limit black land ownership,² one of the cornerstones of apartheid.³ Another Act is *Native Trust and Land Act*,⁴ which abolished individual landownership by the native South Africans and created a trust tenure through the South African Development Trust a government body responsible for the purchase of land for black settlement. *Group Areas Act*,⁵ was enacted to forcefully evict black, colored and Indian people from areas that were designated for white settlement, thus establish control over acquisition of immovable property and occupation of such.⁶ *Prevention of Illegal Squatting Act, 1951*, this Act came into force to compel Africans to move off public or privately owned land and authorizing local authorities to establish resettlement camps where squatters could be concentrated.⁷ *Group Areas Act*,⁸ as per section 23,⁹ gave the president power to declare through Government Gazette areas for exclusive occupation or ownership by a particular group of people. And section 43 further empowered the police to enter, without any warrant, any premises to investigate any offence committed under this Act.¹⁰

¹ http://www.bbc.co.uk/worldservice/africa/features/storyofafrica/index_section11.shtml

² Robinson L, "Rationales for rural land redistribution in South Africa", Brooklyn J Int'l L, 1997, 472.

³ Fenyes T, Van Rooyen C and Vink N, "Reassessment of the Land Acts of 1913 and 1936", *Development Southern Africa*, 1990, 583.

⁴ *Native Trust and Land Act*, (Act No. 18 of 1936.)

⁵ *Group Areas Act* (Act No. 41 of 1950).

⁶ HJ Kloppers and GJ Pienaar, *The historical context of land reform in South Africa and early policies*, 10.

⁷ <https://www.nelsonmandela.org/omalley/index.php/site/q/03lv01538/04lv01828/05lv01829/06lv01846.htm>

⁸ *Group Areas Act* (Act No. 36 of 1966).

⁹ *Group Areas Act*, Act (No. 36 of 1966).

¹⁰ Section 43, *Group Areas Act* (Act No. 36 of 1966).

Laws which were enacted in Kenya to protect the interests of the colonial government include, the *1897 East African Land Regulations (repealed)*, that gave the Commissioner power to sell freehold in land within the Sultan's dominion. And was enacted for the purpose of securing land for settlers, drawing differences between land in the sultan's dominion and that under the protectorate. The *Crowns Lands Ordinance of 1902* and later the *Crowns Lands Ordinance of 1915 (Repealed)*, which was enacted to give effect to the 1901 Order in Council empowering the commissioner to sell freehold land and land that was under Africans without the consent of tribal chiefs referred to as 'waste and unoccupied land'.¹¹ This law forced people to forfeit any land not developed or occupied, it could then be sold or leased disregarding any claims to ownership by Africans. The *1915 Registration of Documents Ordinance (Cap 285) (Repealed)*, was the first registration statute in Kenya, enacted together with *Crown Land Ordinances of 1915 amending the 1902 legislation*. This law redefined Crown land to mean land that was also under occupation by the natives and therefore no more community land. It led to establishment of Native reserves exclusively for Africans. Securing the lands held by the white settlers, leaving the natives with limited rights to commodity production within the precincts reserved for them.¹² The *Government Lands Act (Cap 280 Laws of Kenya)*¹³ Replaced the *Crown Lands Ordinance 1902 and 1915* having better provisions for the regulation of leases, dispositions of Government Land and other such issues.¹⁴ It had superficial changes to the Crown Ordinances allowing the President to act as the 'Crown' and perpetuate powers to alienate and allocate land.

At the dawn of independence in both these countries, the independence government enacted laws that were to repeal all the previous Acts that led to dispossession of land by the natives of these countries.

In South Africa, *Abolition of Racially Based Land Measures Act*,¹⁵ was enacted its purpose being to repeal the *Natives Land Act 27* of 1913, that brought about segregation.¹⁶ The long title of the Act states that, it was promulgated to *repeal or amend certain laws so as to abolish certain restrictions based on race or membership of a specific population group on the acquisition and utilization of rights to land; to provide for the rationalization or phasing out of certain racially based institutions and statutory and regulatory systems repealed the*

¹¹ Wakoko V, *The Evolution of Land law in Kenya*.

¹² Ogendo O, 'Tenants of the Crown: Evolution of Agrarian Law and Institutions in Kenya', Kenya Africa Centre for Technology studies (ACTS). Nairobi, 1991, 49.

¹³ *(Repealed)*.

¹⁴ Wakoko V, *The Evolution of Land law in Kenya*.

¹⁵ *Abolition of Racially Based Land Measures Act* (Act No. 108 of 1991).

¹⁶ HJ Kloppers and GJ Pienaar, *The historical context of land reform in South Africa and early policies*, 13.

majority of discriminatory land laws ...

In Kenya, there were various land Acts that were put in place to repeal the effects of the laws used by the colonial government to protect their interests such as the *Government Lands Act (Cap 280 Laws of Kenya)*¹⁷ Replaced the *Crown Lands Ordinance 1902 and 1915* having better provisions for the regulation of leases, dispositions of Government Land and other such issues.¹⁸ In 1963 *The Registered Land Act (Cap 300 Laws of Kenya)*¹⁹ The main objectives of this Act were, to enable land owned by Africans to be registered in law and simplification and unification of the registration process. It converted the registration under any other statute to registration under this statute.²⁰ Then came the Constitution of Kenya 2010, which acknowledges the right of individuals to own property as individuals and as a community and provides protection of such tenure as per article 40. Articles 62,63 and 64 states the different categories of land public, community and private land. It creates the *National Land Commission* established by the article 67.²¹ The Commission is mandated to carry out investigations on its own motion on historical land injustices and make recommendations for appropriate redress ,to recommend a National Land Policy a registration program for titles in Kenya. Kenya has progressively enacted Acts to counter the effects of the Acts enacted by the colonial powers.

Another underlying similarity is the fact that the laws in both these countries reflect various principles of land administration such as redistribution, restitution and resettlement and tenure security. In South Africa, these principles are enshrined in section 25 of the Constitution of the Republic of South Africa.²² Section 25, focused on restitution of property to those that were dispossessed of after 19th June 1913 as a result of discriminatory laws. Section 25(5) focused on redistribution, so as to ensure that all citizens access land on an equitable basis. Section 25(6) focused on tenure security, that a person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled to tenure which is legally secure or to comparable redress. And in Kenya through the *National Land Policy 2009*²³ contained various recommendations on resolving the squatter problem such as addressing land issues through various principles of redistribution, restitution and resettlement in order to facilitate access to land and utilization of land based resources.²⁴ With the vision to

¹⁷ (Repealed).

¹⁸ Wakoko V, *The Evolution of Land law in Kenya*.

¹⁹ (Repealed).

²⁰ Ojienda, *Principles of Conveyancing in Kenya*,53.

²¹ Constitution of Kenya 2010.

²² *Constitution of the Republic of South Africa Act* (Act No. 108 of 1996).

²³ Sessional Paper No. 3 of 2009 on National Land Policy.

²⁴ Sessional Paper No. 3 of 2009, on Kenya National Land Policy, section 3.61.

ensure equitable access to land by all through redistribution,²⁵ to restore land rights to those who have been unjustly deprived of such as through historic land injustices stating that the government should come up with a legal and institutional framework to handle restitution²⁶ and come up with procedures for determination of those who qualify to benefit from resettlement programs ensuring transparency and accountability in the process.²⁷

The government of South Africa has also enacted legislations to ensure that procedures to establish informal settlements is short and efficient by giving such task to local and provincial administration, such as the *Less Formal Township Act*, 1991. The Prevention of Illegal Squatting Act, 1951 which legalizes areas where the landless have made certain areas a settlement are then given security of tenure and freed from the uncertainty of ejection by provisions in this Act that allows such areas to be declared transit areas. The *Extension of Security of Tenure Act*,²⁸ was enacted to ensure long term security of land tenure and *The Land Reform (Labor Tenants) Act*²⁹, also enacted to provide for tenure security for laborers who satisfy the conditions listed in *Van Zydum v. Zulu*³⁰ that is : they must stay or have a right to stay on the farm, or had cropping or grazing rights on a farm where they must have worked for such owner of land ,must have a parent or grandparent who had cropping or grazing rights and must have worked for such right. These Acts bring forth one main purpose, and that is to ensure tenure security.

In Kenya, the *Land Act*,³¹ this Act makes provisions that settlement programs shall be implemented by National Government, to provide access to land shelter and livelihood to squatters and persons displaced by natural causes or internal conflicts as per section 134. Section 135 of the Act establishes a Land Settlement Fund is to be used for making land accessible to squatters and in the purchase of private land to enable settlement. Section 160 gives power to the Cabinet Secretary or the National Land Commission to make rules in carrying out the provisions of the Act and as regards squatters, they are empowered to facilitate negotiation between private owners and squatters where squatter settlements are found on private land. Thus, Act however limits rights of squatters who would have deserved restitution instead of resettlement through schemes.³² *Land Laws Amendment Act*³³, section 89 of this Act

²⁵ Sessional Paper No. 3 of 2009, on Kenya National Land Policy, section 3.61.1.

²⁶ Sessional Paper No. 3 of 2009 on National Land Policy, section 3.6.1.2.

²⁷ Sessional Paper No. 3 of 2009 on National Land Policy, section 3.6.1.3.

²⁸ (Act No. 62 of 1997).

²⁹ *The Land Reform (Labor Tenants) Act* (Act No. 3 of 1996).

³⁰ *Van Zydum v. Zulu*, LCC Case 27/98.

³¹ No 6 of 2012, Revised Edition 2016 [2012].

³² Njoroge S C, *Limitations of The Current Land Laws in Addressing the Squatter Land Problem in Kenya*. 2013,67.

³³ Cap 28 of 2016.

states that the National Government is tasked to implement settlement programs , and to administer the settlement programs in consultation with the Commission and the respective county governments.

4.2 Differences in laws and practices in South Africa and Kenya

In South Africa besides the adaptation of laws that repealed the segregation laws that caused dispossession of property and landlessness. They also decentralized administration of settlement schemes to provincial and local authorities due to lack of political goodwill by the central government.³⁴The courts have also played an active role in the interpretation of various provisions of the legislature thus a vital role in ensuring tenure security for the landless. This has been seen in various pronouncements by the courts such as *in the case of City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another*,³⁵;it was held that local authorities are obliged to plan and budget for emergencies and ensure alternative housing for those facing homelessness.

In Kenya, there are two land administration bodies, the National land commission and the Ministry of Lands and Housing and Urban Development established by The Constitution of Kenya 2010 with different mandates. The National Land Commission established by article 67, and among its functions management of public land on behalf of the National and County Governments and to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress. The mandate of the Ministry of Lands is that of land registration as per the *Advisory Opinion ref 2 of 2014*,³⁶on the Role of the National Land Commission and the Ministry of Lands. Both these bodies are national bodies charged with the function of administering land. The Ministry of Land ,being part of the central government while the National Land Commission being one of the commissions established under article 248 of The Constitution ,as independent from other arms of government and are equally supposed to be administratively and financially delinked from the central government either the judiciary, parliament or the executive.³⁷

4.3 Role of the Court

The courts in South Africa have played a major role giving key interpretations to issues that were not clear in the statute, ensuring the human rights of the squatters are observed and also that evictions are carried in accordance to the law in all fairness and in an inclusive manner

³⁴ HJ Kloppers and GJ Pienaar, The historical context of land reform in South Africa and early policies,2014 volume 17 no 2.

³⁵ (CC) [2011] ZACC 33 ,Accessed from: <http://www.saflii.org/za/cases/ZACC/2011/33.html>

³⁶ In the Matter of the National Land Commission [2015] eKLR.

³⁷ Ben Sihanya, “*The Presidency and public authority in Kenya’s new constitutional order*”, Constitutional Working Paper No.2, Society for International Development (SID) ,2011,23.

this can be seen in various decided cases such as *Van Zydum v. Zulu*,³⁸ where in this case the court gave the conditions that qualified one as a labor tenant and enjoying the protection of the *Land Reform (Labor Tenants) Act*.³⁹ And in *Government of the Republic of South Africa vs. Irene Grootboom*,⁴⁰ the scope of those entitled to tenure security covered all citizens as it was held that it was the state had a duty to provide housing for all the citizens, access to land here going hand in hand with access to land. In another case, the court set out to determine what exactly was meant as temporary residential unit, in *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes*,⁴¹ and was determined to have various characteristics such as have walls constructed, have galvanized corrugated iron roofs, be supplied with electricity by a prepaid electricity meter, be located within reasonable proximity of communal ablution facilities, make reasonable provision for toilet facilities, which may be communal, with waterborne sewerage, and make reasonable provision for fresh water, which may be communal.⁴² In another case it was determined that it was the duty of the local authorities to plan and make budgets for emergencies in ensuring alternative housing for evictees.⁴³ In *Residents of Joe Slovo Community v Thubelisha Homes and Others*,⁴⁴ the importance of participation by all persons affected by development and eviction was highlighted and also the fact that an eviction order could only be made by the court. With those cases, it is quite evident that the courts have made active steps to accomplish the vision of the drafters of the Constitution of South Africa.

In Kenya, the court has also taken steps to help in the interpretation of the various land laws in Kenya such as the *Advisory Opinion ref 2 of 2014*,⁴⁵ which made a distinction between the role to be played by the National Land Commission and that of the Ministry of Lands, where the commission's role is to give recommendations and provide oversight on the actions taken by the Ministry in execution of their mandate. It clarified the fact the matter of issuing title deeds is a mandate of the government. This helped to reduce the political wrangles between the heads of the National Land commission and the Ministry of Lands, which had stalled land reform processes. In another case *Kuria Greens v The Registrar and Another*⁴⁶ the Registrar of Titles published a notice in the Kenya Gazette revoking 14 titles in Limuru, stating that the

³⁸ *Van Zydum v. Zulu*, LCC Case 27/98.

³⁹ *The Land Reform (Labor Tenants) Act* (Act No. 3 of 1996).

⁴⁰ 2001 (1) SA, 46.

⁴¹ 2010 (3) SA 454 (CC).

⁴² *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes*, 2010 (3) SA 454 (CC).

⁴³ *case of City of Johannesburg Metropolitan Municipality V Blue Moonlight Properties 39 (Pty) Ltd and Another* (CC) [2011] ZACC 33.

⁴⁴ 2010 (3) SA 454 (CC).

⁴⁵ In the Matter of the National Land Commission [2015] eKLR.

⁴⁶ Petition No 107 of 2010 Nairobi (eKLR).

land had been reserved for Agricultural Research Institute and the titles had been allocated to private developers. It was held that such act was *ultra vires* as cancellation can only be done by the court where it is established that title was obtained through fraud or mistake during first registration upholding section 23 of the repealed *Registration of Titles Act*. That gives absolute ownership of land to owner of property and also provides it with protection as per article 40 of the Constitution of Kenya 2010. Such protection however does not extend to any property that has been found to be unlawfully acquired. This results to legal complexities that hinders settlement of squatters and addressing of historical injustices as there is still a grey area interpretation of the *Land Registration Act*.⁴⁷

4.4 Best Practice

South Africa has decentralized land administration to ensure short and efficient settlement of landless persons by giving such task to provincial and local authorities which also makes the process less politicized and fair which is a practice that Kenya can borrow to avoid the illegal allocation and misappropriation that has been witnessed over the years. Functions of the Ministry of Land should not be done by any other arm of government such as was done by the negotiation and awarding of titles that was done for the Waitiki land.⁴⁸

In the settlement of squatters, courts in South Africa have set out various requirements for the temporary accommodation as per *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes*,⁴⁹ that stated the physical requirements for such accommodation. And on observation of other rights such as right to clean environment which are tied in with the right of access to land to be guaranteed by the government as per *Government of the Republic of South Africa vs. Irene Grootboom*.⁵⁰ And that the state had a duty to provide housing for all the citizens irrespective of other legislative obligations and the resources available to the government.⁵¹ Stating that housing is more than just a building itself but also includes provision of services such as water removal of sewage. And the importance of public participation being observed in any eviction process as per *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes*,⁵² where an eviction was quashed on the basis of it failing to be inclusive and thus illegal on that basis. This should be adopted by the Kenyan Courts to provide clear interpretation of various Acts and legislations and thus provide certainty in administration of

⁴⁷ A commentary by P. Mwaura, *Title Deed Makes one Indefeasible Owner of Land despite Historical Injustices* Daily Nation nd 2 February 2013, 14.

⁴⁸ <http://www.standardmedia.co.ke/mobile/article/2000091094/test-for-uhuru-kenyatta-as-coast-squatters-landowners-await-fair-verdict?pageNo=2>

⁴⁹ 2010 (3) SA 454 (CC).

⁵⁰ 2001 (1) SA, 46.

⁵¹ *The Government of the Republic of South Africa vs. Irene Grootboom* 2001 (1) SA, 46.

⁵² 2010 (3) SA 454 (CC).

land and ensure that human rights are observed where the process of eviction is legal. This is because most of these settlement schemes are established in areas that are least habitable or have harsh environmental conditions such as was done for the Magarini settlement.⁵³

⁵³ Weekly Review, *The Weekly Review*, Nairobi, 4 May ,1984.

Chapter Five

Findings, Recommendations and Conclusion

5.0 Introduction

This chapter will contain a summary of the findings from the study making relevant recommendations to inform policy and legislation making in Kenya.

5.1 Findings

From Chapter Two, issues around settling of squatters have not been conclusively solved even with the enactment of legislations such as the National Land Policy 2009¹ and the Land Act.² Given the recent cases on squatter settlement such as the *Ahmed Abdulla Mohamed & 3 Others v Attorney General case*, where the Mazrui family claimed ownership of 3000 acre land whose title was cancelled by the government leading to a 21 year legal battle from 1989. In a judgment delivered in 2012,³ the Mazrui family were declared the lawful owners within the meaning contained in the said Act, and to the exclusion of all other persons.

In another instance the executive got involved in the issuing of title deeds in the *Waitiki case*. An area in contention it is an Area in Likoni, Mombasa is private land, invaded by squatters. Of about 960 acres with more than 100,000 squatters and has permanent structures.⁴ This was not their mandate but that of the Ministry of Lands. In another instance the *Mombasa Republican Council (MRC)*, attributes its 'Pwani si Kenya' problem to the 1895 and 1963 agreements transferring the 10-mile coastal strip to the Kenyan government. MRC states that these agreements are invalid as they did not involve Coastal Stakeholders and that the government did not do anything to protect the coastal population.⁵

The politicizing of land administration has also made the achievement of land reform measures hard to realize as was seen before issuing of the *Advisory Opinion ref 2 of 2014*,⁶ which set clearly the roles of the National Land Commission and the Ministry of Lands. As per the *Land Act*,⁷ settlement programs shall be implemented by National Government, to provide access to land shelter and livelihood to squatters and persons displaced by natural causes or internal conflicts as per section 134. Section 135 of the Act establishes a Land Settlement Fund is to be used for making land accessible to squatters and in the purchase of private land to

¹ Sessional Paper No. 3 of 2009 on National Land Policy.

² Land Act (Act No.6 of 2012).

³ *Ahmed Abdulla Mohamed & 3 Others V Attorney General* [2012] eKLR.

⁴ Accessed at: http://www.kecosce.org/downloads/land_status_coast.pdf

⁵ Report based on Research Commissioned by Kenya Civil Society Strengthening Programme, Paul Goldsmith, The *Mombasa Republican Council, Conflict Assessment: Threats and Opportunities for Engagement*, A, November 2011,8.

⁶ In the Matter of the National Land Commission [2015] eKLR.

⁷ No 6 of 2012, Revised Edition 2016 [2012].

enable settlement. All these are changes that have been brought forth with the *Land Laws Amendment Act*⁸ which has also placed the mandate of settlement of squatters to the Ministry of Lands.

And therefore, no conclusive solution to the squatter problem despite all the laws that have been made to address this issue.

In Chapter Three, deals with the analysis of the legal framework drafted to deal with settling of the landless in South Africa. And just like in Kenya, it has not achieved its perfection in solving the squatter problem. This can be seen in the various issues that have arisen after eviction and resettlement where commissions such as the land Claims Commission has had challenges in providing effective post-settlement support,⁹ some of the legislations have also excluded other persons from the protections offered under such Act such as *Land Reform (Labor Tenants) Act* where the court narrowed the description of who exactly a labor tenant as per the *Mahlangu vs. De Jager*,¹⁰ case thus locking out many people who would have qualified for protection under this Act. South Africa also faces issues caused by the lack of capacity within the Department of Land Affairs administrative and financial and circumvention of legislation and exploitation of loopholes in legislation that have resulted to serious unlawful evictions.

South Africa has however achieved a lot in correct use and application of the legislation on settling of squatters this has been achieved with the very important role of the court in interpretation of statute being observed. The courts have been able to correctly apply the laws and provide for a fair and just way to handle the squatter problem. It has also protected various human rights of the landless that are either tied to the right of access to land or other civil rights such as right to public participation in the transparent administration of land. It is therefore evident that the laws in Kenya are inadequate in terms to protection of socio-economic rights as well as human rights that are attached to the right of access to land and that the Kenyan courts have fallen short in the protection of squatter rights as was seen in the instance where the Endorosi Community had to seek redress for violation of their rights from the African Commission on Human and People's Rights where indigenous people's rights over traditionally owned land were upheld.¹¹

⁸ Cap 28 of 2016.

⁹ Walker Landmarked *Land Claims and Land Restitution in South Africa Report*, 2008.

¹⁰ *Mahlangu vs. De Jager*, LCC SA235, 1996.

¹¹ Center for Minority Rights Development(Kenya) and Minority Rights Group International on behalf of Endorosi Welfare Council v Kenya, 276/2003.

5.2 Recommendations

1. Ensure that the mandate of issuing titles remains only with one institution, the Ministry of Lands, so as to ensure that oversight is effective. And to ensure that the office of the president is not involved in issuing titles so as to ensure certainty in the procedure of the issuing of titles.
2. In effecting settlement, various conditions must be met to qualify an area as a settlement area, such as proximity to employment, that the area is a clean environment and have a specific department charged with the duty of checking the habitability of areas before they are declared settlement schemes.
3. In eviction of squatter's proper procedure should be followed and where it is not the courts should come in and protect their rights. And therefore, a need to enact into force *The Evictions Resettlement Bill, 2014*.
4. Ensure local administration plays a major role in the settlement of squatters especially in the authentication of the squatters and ensure that settlement efforts are not quashed by political influence and lack of good will.
5. Engage the court in order to find accurate interpretation of the law and put into effect the intention of the law makers.

5.3 Conclusion

That the legal framework is not adequate in the settling of squatters and that it has now taken a turn back to the older days where the *Land Laws Amendment Act* give back the mandate of settling squatters to the Ministry of Land which has not had the best track record in settling and compensation of landless persons. The only way forward is if a Task force is created to solely deal with this matter once and for all as it is continuing what is now termed as historical injustices to continue affecting many of the generations of those still living as squatters with no tenure security but face the continued risk that their situation would not change.

The study was set out to fulfil the following objectives:

1. To examine the legal framework meant to address the squatter problem in Kenya.
2. To highlight the challenges in addressing the squatter problem in Kenya.
3. To come up with necessary reforms and recommendations in realization of the mandate of the National Land Commission in curbing the squatter problem brought by historical injustices in the coast.

The hypothesis of this study is that existing land laws are not adequate in addressing the squatter problem in Kenya.

Objective 1

This study revealed the gaps and overlaps in legislations to solve the squatter problem in Kenya. It has detailed how the Court had to come in through the *Advisory Opinion ref 2 of 2014*,¹² to clarify the roles of the various land administration bodies and other legislation in Chapter Three.

Objective 2

This study also revealed various challenges in addressing the squatter problem in Kenya. It highlights these problems in Chapter Three involving the illegal and irregular allocation of land that led to further landlessness and also the slowness in settling of squatters attributed to the politicizing of land administration among other reasons.

Objective 3

This study concludes by providing recommendations in Chapter Five, acknowledging the changes that have been made by the enactment of the Land Laws Amendment Act which takes back the responsibility of settling squatters from the National Land Commission to the Ministry of Lands and highlights the dangers of taking it back to the Executive arm of government thus a risk of politicizing the issue of settling squatters.

Hypothesis

This study has proven that the laws are not adequate in the protection in the whole rounded protection, settling and accommodation of squatters in Kenya.

¹² In the Matter of the National Land Commission [2015] eKLR.

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