THE ROLE OF COMMUNITY JUSTICE SYSTEMS IN BALANCING COMPETING INTERESTS IN LAND BETWEEN RANCHERS AND PASTORALISTS IN LAIKIPIA, KENYA

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DECLARATION

I, LEKORERE DAISY SANTANA, 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: .....

Supervisor's name: …….

LIST OF ABBREVIATIONS

1. ACmHPR - African Commission on Human and Peoples' Rights
2. ADR – Alternative Dispute Resolution
3. CJS – Community Justice Systems
4. KNCHR - The Kenya National Commission on Human Rights
5. NCIA - Nairobi Centre for International Arbitration
6. SJT - Sustaining Judiciary Transformation
7. TJRC -Truth, Justice and Reconciliation Commission

LIST OF CASES

1) *Isaka Wainaina v Murito* [1923] (2) KLR
2) *Joseph Letuya & 21 others v Attorney General & 5 others* [2014] eKLR
3) *Ole Njogo & Others v. The Attorney General & Others*, Civil Case No. 91 of 1912
4) *Parkire Stephen Munkasio and 14 others v Kedong Ranch Limited & 8 others* [2014] eKLR

LIST OF LEGAL INSTRUMENTS

1. The Community Land Act (No. 27 of 2016)
2. The Constitution of Kenya (2010)
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8. The Land (Group Representatives) Act (Chapter 287, Laws of Kenya) (Repealed)
9. The Land Laws (Amendment) Act (Act No. 28 of 2016)
10. The National Land Commission Act (Act No. 5 of 2012)
11. The Native Land Trust Ordinance (No. 28 of 1938)
12. Trust Land Act (Chapter 288, Laws of Kenya) (Repealed)
13. Repealed Constitution of Kenya

ABSTRACT

This study begins with the statement of problem, namely, the competing interests over the same parcels of land by both pastoralists and ranchers in Laikipia, Kenya. In the second chapter, the study looks into the legal framework of the property rights of pastoralists and ranchers in Laikipia. The chapter begins by delving into a discussion of the historical account of colonialism and the effect of the colonial laws on the communal land holding tenure of the pastoralists. It brings out the legal instruments that granted ranchers land and alienated land from Africans. It also discusses legal documents and provisions of the law that recognize customary law and communal land tenure among pastoralists.

The third chapter discusses the efforts employed by the state to try resolve the land issue in Laikipia. This chapter brings to light the fact that both the colonial and post-colonial governments attempted to address the issues raised by Africans regarding land. Passing legislation to repeal discriminatory laws and laws that disadvantaged Africans, enacting new laws on African specific issues such as recognition of customary law and community land, formation of commissions to investigate historical land injustices, formation of trust lands and settlement schemes were all efforts geared towards vesting community land in communities and reversing the long standing history of land alienation. However, government officials and their cronies benefitted from the various initiatives meant to benefit landless locals. They therefore ended up being unsuccessful.

Chapter Four is a comparative study of courts and community justice systems in resolving land disputes especially among African communities. It sets out the legal framework of resolution of land disputes using the formal justice system. It discusses the Environment and Land Court, its formation, jurisdiction and limitations to its jurisdiction. Further, past cases have been discussed to reveal how courts have dealt with the issue of land disputes among indigenous and marginalized communities. The second part of the chapter focuses on community justice systems and why they are suitable for resolution of land disputes between pastoralists and ranchers in Laikipia, Kenya.

This study concludes in Chapter Five with findings drawn from the study and the recommendations proposed by the study as the best way to resolve the land issue between ranchers and pastoralists in Laikipia, Kenya. The findings drawn from the study are that the laws enacted during the colonial period dispossessed pastoralists of their land. The land was however vested in the ranchers who bought the land pursuant to the willing buyer, willing seller land policy. As such, the study affirms that the title in law rightly vests in the ranchers but recommends that the government, ranchers and pastoralists employ community justice systems to resolve the land feuds to find a position that will benefit both groups.

CHAPTER ONE: INTRODUCTION TO THE STUDY

1.0 Background to the problem

Change in land tenure and related policies and practices dispossessed the pastoralists of their land during the colonial and post-colonial era in Kenya. Some of the pastoralists who are resident in Laikipia come from the Maasai community. A historical reflection on how they lost their land explains the reasons for the struggle over land with ranchers. A Commission constituted to look into the dispossession of the Maasai of their land, among other functions, reported as follows,

> "In 1904, Maasai elders, known locally as *laibons*, through Lenana, their leader, entered into the first "agreement" with the British administrators in which they purportedly agreed to surrender their prime grazing lands in Suswa, Ol-Joro Orok and Ol-Kalou areas and move to Laikipia."[1]

The British who signed the agreement on behalf of the colonial administration considered it binding.[2] However, the Maasai elders who signed the agreement on behalf of the whole community did not understand the substance, as regards land tenure and use, and implication of the agreement. The British Secretary of State for the Colonies reported in the London House of Commons on 20th July, 1911 that the treaties had been translated, explained to the Maasai chiefs, signed by eighteen of them and attested by ten European witnesses who were present.[3] Shortly after, the Maasai were driven out of Laikipia by another agreement of 1911. This is well encapsulated by the Truth, Justice and Reconciliation Commission in its report that affirms as follows,

> "When the land in Laikipia became attractive to settlers, Maasai elders purportedly signed a second agreement with the British in 1911 in which the Maasai gave away the land in Laikipia and, purportedly, agreed to move many miles away to the more arid terrain of the southern Rift Valley in the current Narok and Kajiado districts."[4]

The long journey, dry weather conditions, scarcity of pasture and water, prevalence of livestock diseases and presence of wildlife caused them to lose many of their cattle. Since the conditions

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[1] Truth, Justice and Reconciliation Commission, *Final report*, Volume IIB (3 May 2013 Version), 59.
[2] Truth, Justice and Reconciliation Commission, *Final report*, Volume IIB (3 May 2013 Version), 60.
[3] https://hansard.parliament.uk/commons/1911-07-20/debates/ae1556ad-ec2c-446a-aac6-c429c1053948/ColonialOffice(Class2) on 9 October 2019.
[4] Truth, Justice and Reconciliation Commission, *Final report*, Volume IIB (3 May 2013 Version), 61.

could not sustain their livelihood, and owing to the fact that they could not stage a battle against the British and win, the Maasai moved to court in 1913 to challenge the two agreements in a civil suit.[5] They sought to return to the Northern Highlands and receive compensation for the loss of their livestock. British activists and lawyers representing the Maasai argued that the Maasai elders who purportedly signed the agreements were illiterate and thus lacked the capacity to enter a valid agreement. The case was dismissed. Put otherwise, the Maasai lost their case. The agreements were not viewed as legal contracts between the protectorate government and the Maasai signatories, but rather, as treaties between the Crown and the representatives of the Maasai, a foreign tribe living under its protection.[6]

The court found in favour of the British administration by terming the signing of the agreements as 'acts of state' thus lacking jurisdiction in a municipal court. On appeal, the Court of Appeal upheld the decision of the lower court. In 1915, the Crown Lands Ordinance Act was enacted. The Ordinance vested all land in the Crown, including reserve land occupied by indigenous ethnic communities.[7]

The independence government, in a bid to resettle and compensate the Maasai, among other communities that were dispossessed of their land unfairly, adopted an unjust scheme. Africans were rendered landless or were entitled to very little portions of land as a result of land alienation during colonialism. The independence government attempted to resettle Africans. However, the Kenyatta administration reserved large former settler farms and adopted the 'willing-buyer, willing seller' policy as the only practical approach to deal in land in the white highlands.[8] This scheme failed to achieve the alleged aim of resettlement and justice to the affected communities. It favored those with the ability to purchase the land.

Both pastoralists and ranchers, most of whom are of British origin, resident in Laikipia have interests in the vast acres of ranches found in the region. This has resulted in feuds.

> "Ranch owners in Kenya's Laikipia County, a plateau and home to some of the largest ranches and conservancies in the country, are living in constant fear following several attacks by armed

[5] *Ole Njogo & Others v. The Attorney General & Others*, Civil Case No. 91 of 1912.
[6] Felix Mukwiza Ndahinda, *Indigenousness in Africa: A Contested Legal Framework for Empowerment of "Marginalized" Communities* (2011) at 274.
[7] Truth, Justice and Reconciliation Commission, *Final report*, Volume IIB (3 May 2013 Version), 65.
[8] Truth, Justice and Reconciliation Commission, *Final report*, Volume IIB (3 May 2013 Version), 181.

> pastoralists. According to witnesses, cattle herders equipped with AK-47 rifles, spears and poisoned arrows have been moving around the county, targeting fenced-in properties. The attackers have destroyed homes, maimed animals and burned lodges."[9]

Not only have pastoralists in Laikipia destroyed property, they have also brought injury and death to a couple of people. Among them is the former owner of the Sosian Ranch, Mr. Tristan Voorspuy. Tristan was shot dead while inspecting the tourist cottages that pastoralists, who invaded the ranch, had burnt down.[10] Kuki Gallmann is yet another victim of these attacks. She is a renowned conservationist, who owns Ol Ari Nyiro ranch in Laikipia, and author who was shot and injured by herders who invaded her Gallmann Africa Conservancy in Laikipia.[11]

Article 63 (1) of the Constitution of Kenya vests community land in communities identified on an ethnicity, cultural or similarity of interest basis. Based on the historical injustices that resulted in indigenous communities losing their land to the colonial government, the feuds in Laikipia can be attributed to the fact that these pastoralist communities believe that the land to which the community has claims was misappropriated. This factor contributing to the fights over land in Kenya is enounced by the National Land Commission in the foreword of their Frequently Asked Questions on Land Matter booklet where it is stated that,

> "Land was the major factor that drove the fight for independence from the British colonial power. But even after independence, discontentment over land ownership has remained the most notable source of frequent conflicts and tribal clashes between Kenyan communities."[12]

1.1 Statement of problem

Article 40 of the Constitution of Kenya (2010) essentially provides for the acquisition and protection of rights to property. Despite this justification for ownership of the ranches anchored in law, pastoralists trespass the land to graze their livestock and use force to retaliate when evicted. This study proposes the employment of community justice systems in dealing with the competing interests of ranchers and pastoralists over the same parcels of land.

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[9] https://www.voanews.com/a/attacks-on-pastoralists-kenya/3767444.html on 22 February 2018.
[10] https://www.nation.co.ke/news/Sosian-ranch-boss-Tristan-Voorspuy-shot-dead/1056-3838308-l3lpf1/index.html on 27 March 2018.
[11] https://www.nation.co.ke/news/Kuki-Gallman-shot-and-injured/1056-3900476-2jo62v/ on 22 February 2018.
[12] National Land Commission, *Frequently Asked Questions On Land Matter Booklet*, 2017, Foreword.

1.2 Statement of Objectives

i) To examine the legal framework on the property rights of ranchers and pastoralists in Laikipia, Kenya.

ii) To assess the extent to which the disputes between pastoralists and ranchers can be resolved using Community Justice Systems.

iii) To make recommendations on how to balance the competing interests in land between pastoralists and ranchers in Laikipia, Kenya.

1.3 Hypothesis

a) Formal government intervention has been unsuccessful in resolving the land disputes between ranchers and pastoralists in Laikipia, Kenya.

b) Community Justice Systems- an informal means of dispute resolution between people who have conflicting interests in a similar object within a community- can be effective in providing a solution to the land problem involving ranchers and pastoralists in Laikipia, Kenya.

1.4 Justification

This research is significant because the land issue causing feuds in Laikipia is unresolved. Furthermore, the development and economic prosperity of Laikipia County may stall due to the state of insecurity. Investors shun insecure areas. Therefore, if the land issue remains unresolved, more destruction of property will occur and more lives will be lost. Consequently, this will hamper economic development. True to this, lawyers of credible opinions have attested that, 'Development is not feasible in a conflict situation. All conflicts and disputes must be managed effectively and expeditiously for development to take place.'[13]

The study is also important as it reiterates, constantly throughout the paper, the essence of Article 159 (2) (c) of the Constitution of Kenya. The provision states that,

[13] Kariuki M & Kariuki F, ADR, Access to Justice and Development in Kenya, 1.

> "In exercising judicial authority, the courts and tribunals shall be guided by the following principles_alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3)."

The main proposition in this study is the resolution of the feuds over land and the underlying issues by resorting to a form of dispute resolution that is alternative to the formal justice system.

The law intends that Traditional Dispute Resolution Mechanisms be used in a way that does not contravene the Bill of Rights[14], is not repugnant to justice and morality or results in outcomes that are repugnant to justice or morality[15] and in a manner that is consistent with the Constitution and written laws[16]. To this end, the former Chief Justice Willy Mutunga launched the 'Isiolo Law Courts Court-Annexed Alternative Justice System and the task force on Alternative Justice System'.[17] In essence, the launched programs are to serve as Pilot Schemes to enable the members of the taskforce to identify policies that would be ideal to ensure the Traditional Justice System Mechanisms function alongside the formal justice system. This study proposes that Community Justice Systems might have a lasting solution to the issue of competing interests over land in Laikipia.

1.5 Theoretical Framework

Theories of property justify how legal claims to a specific thing or any other subject of ownership are acquired and the granting of property rights.[18] The two groups this study discusses justify their interests in the land using different arguments. This section therefore sets out the different theories that explain the claims made by pastoralists and ranchers. Different theories are used as no particular theory can fully justify the appropriation of property. The approach adopted in this section is to juxtapose the African Commons theory to the ones supporting the institution of private property.

The African Commons is a property system that existed among the Africans prior to the colonization era. The term 'Commons' in this context is used to identify ontologically organized

[14] Article 159 (3) (a), *Constitution of Kenya* (2010).
[15] Article 159 (3) (b), *Constitution of Kenya* (2010).
[16] Article 159 (3) (c), *Constitution of Kenya* (2010).
[17] http://www.judiciary.go.ke/portal/assets/filemanager_uploads/CJ%20Speeches/CJ%20Remarks%20-%20AJS%20Launch.pdf on 28 February 2018.
[18] Kariuki F, Ouma S & Ng'etich R, *Property Law*, 23.

land and associated resources available exclusively to specific communities, lineages or families operating as corporate entities.[19] The phrase 'available exclusively' meant that to access the resources to the land belonging to the Commons, one had to be a member of the particular community. Once that requirement had been fulfilled, the resources were available to the member of that community. African communities exercised control over communal property for a specific use. This was and still is the system of land use among the indigenous communities in Laikipia. This explains why pastoralist communities in Laikipia claim access rights to the ranches.

The land tenure of ranch owners is grounded on theories namely the labour theory, the legal theory, the economic theory of property, the social utility theory and the utilitarianism-traditional theory. The labour theory essentially proposes that to that which one exerts his labour, to him it therefore belongs. John Locke, the main proponent of this theory, asserted that, "As much land as a man tills, plants, improves, cultivates, and can use the product of, so much is his property. He by his labour does, as it were, enclose it from the common."[20] The owners of ranches use their land, among other uses, as research centers, to keep and breed cattle and as conservancies. As such, the fact that they use their labour to improve the land and its produce justifies their interests in the land.

Under the legal theory, the law defines what property is, as in Article 260 of the Constitution of Kenya (2010), and the registration of title to property confers proprietary rights to an owner. Jeremy Bentham stated that, "Property and law are born together, and die together. Before laws were made there was no property; take away laws and property ceases."[21] Since these ranchers are landowners and hold title to their ranches, this theory justifies their ownership.

Private property rights are granted and in so doing, there are benefits to the social welfare. This, in essence, is what the social utility theory propounds. Vesting proprietary rights on an individual not only benefits the individual but the society as well. In the case of land, for example, the vesting of rights to a person is meant to ensure that there is optimal exploitation of

[19] Okoth-Ogendo H, *The Tragic African Commons*, Programme for Land and Agrarian Studies, School of Government, University of the Western Cape, 2002 at 107.
[20] Tully J, *A Discourse on Property*, Cambridge University Press, 1980, 119.
[21] Bentham J, *The Theory of Legislation*, Oceana Publications, New York, 1975, 69.

the resource for the benefit of all the members of the community.[22] By using ranches as conservancies, ranchers benefit the community as a whole by preserving species of plants and wildlife too. Conservation sustains land and protects it from over-use and degradation.

The utilitarian theory proposes that private property exists to maximize the overall happiness or utility of all. For Bentham, the role of the legislator drafting a property law framework is to do 'what is essential to the happiness of society; when he disturbs it, he always produces a proportionate sum of evil.'[23] Using ranches as conservancies benefits Laikipia as a whole because when tourists visit the conservancies, they purchase *'curio'* from the locals, among other benefits.

According to the economic theory of property, private property exists to maximize the overall wealth of society.[24] Richard Posner refers to property as rights to the exclusive use of valuable resources. In this sense, an efficient allocation of resources is one in which 'value', defined as one's willingness to pay, is maximized.[25] According to the Coase Theorem, property will eventually be devoted to its highest value use, regardless of how property rights are initially allocated, if no transaction costs exist.[26] Consequently, this leads to a situation where an individual with a high bargaining power and the resources to acquire property eventually buys and owns property. The 'willing buyer, willing seller' policy enabled the current ranch owners to acquire the land during the post-colonial era. As regards wealth of society, the County Government of Laikipia taxes the proceeds from tourism. Trade development and regulation of local tourism is a function of county governments.[27]

This research intends to study the effectiveness of the theories in justifying property rights, the criticisms and a redefinition of such justification. The African Commons theory focuses on internalization whereas the private property theories advocate for exclusion. Both private property rights and communal property rights are protected in the Constitution of Kenya, 2010.

[22] Kariuki F, Ouma S & Ng'etich R, *Property Law*, 38.
[23] Bentham J, *The Theory of Legislation*, 69.
[24] Sprankling J, *Understanding Property Law*, 17.
[25] Kariuki F, Ouma S & Ng'etich R, *Property Law*, 41.
[26] Coase RH, 'The problem of social cost' 3 *Journal of Law and Economics* (1960), 1.
[27] Fourth Schedule, Part 2 (7) (d), *Constitution of Kenya* (2010.

Thus, this study seeks to indicate who, of the two groups under study, should rightfully own the land being fought over and the responsibility they owe towards the welfare of the other group.

1.6 Literature review

This literature review adopts a theoretical approach.

1.6.1 Community Land Rights versus Private Land Rights

Okoth-Ogendo's 'The Tragic African Commons' essentially explains the origin of The African Commons system of property and provides an insight on how the regime works. By virtue of the definition of community land and what comprises community land in Article 63 (1) and (2) of the Constitution of Kenya, the land tenure system among the pastoralists in Laikipia qualifies as African Commons system of property. Okoth-Ogendo defines the communally owned property as *terra nullus* or open access resources.[28] This study, in addition to describing the nature of the African Commons and the resilience of the African Commons Property System, as Okoth-Ogendo does in 'The Tragic African Commons', goes a step further to discuss whether the African Commons property system is sustainable in the current economic era.

Essential to the discussion on the theories in support of private property is John G. Sprankling's 'Understanding Property Law' and Property Law by Francis Kariuki, Smith Ouma and Raphael Ng'etich. The authors of these two books discuss property theories in depth and include the criticism as well. This study adds a different dimension not offered in Laikipia, Kenya where there are conflicting claims in the same land. It poses the scenario in Laikipia where both pastoralists and ranchers base their claims to the same parcels of land on different justifications of property ownership. The clash, therefore, is what makes this study unique regarding the issue of justifying property rights. The justifications to property ownership laid down in theory explain the ideal situations where the theories prevail in justifying people's ownership to different properties. This study raises the issue of what is to prevail if more than one theories are used by different people to justify claims to the same property.

[28] Okoth-Ogendo H, *The Tragic African Commons*, Programme for Land and Agrarian Studies, School of Government, University of the Western Cape, 2002 at 109.

Part III of 'Breaking the mould' contains an article[29] titled 'Kasighau: Will Constitutional Recognition of Community Land Rights Reverse a History of Extraction and Marginalization?', authored by Mborio Mashengu wa Mwachofi, Celestine Musembi, Mwambi Mwasaru & Mwasawau Mwandigha, is of interest in this study. The introductory part of the article explains how the Wakasighau, a community resident in Taita Taveta County, were dispossessed of their land by the colonial government. British colonizing troops raided the villages in an operation they referred to as the Taita Pacification[30], targeted the Kasighau for reprisals during the First World War claiming they were collaborating with their German enemies seeing as Kasighau is close to the border with Tanzania[31] and in 1927, forcefully evicted them from their land to make way for sisal estates[32]. The similarity this historical context bears with that of Laikipia is the dispossession of marginalized communities of their communal land.

In 1948, during the post-independence era, Tsavo National Park, which took up 62 percent of the land mass in Taita Taveta was established, based on an alleged agreement of boundaries between community leaders and David Sheldrick after failed government attempts to create settlement schemes for displaced communities.[33] Dispossession continued during the post-colonial era through the formal individual titling program whereby the government ignored the local *maranu* system of collectively setting up cattle bomas and taking shifts to herd the cattle as whole as the others tilled the farms.[34] Private ranch ownership and land set aside as game parks are categories of land present in both Taita Taveta and Laikipia counties. This study will add onto the 'Proposed Pattern of Control of Land and Natural Resources in Taita-Taveta

[29] Odote C., Kameri-Mbote P., 'Kasighau: Will Constitutional Recognition of Community Land Rights Reverse a History of Extraction and Marginalization?' in Mwachofi wa Mashengu M., MusembiC., Mwasaru M., Mwandigha M., *Breaking the Mould; Lessons for Implementing Community Land Rights in Kenya*, Strathmore University Press, 2016 at 27.
[30] Odote C., Kameri-Mbote P., 'Kasighau: Will Constitutional Recognition of Community Land Rights Reverse a History of Extraction and Marginalization?' at 28.
[31] Odote C., Kameri-Mbote P., 'Kasighau: Will Constitutional Recognition of Community Land Rights Reverse a H[31] Odote C., Kameri-Mbote P., 'Kasighau: Will Constitutional Recognition of Community Land Rights Reverse a History of Extraction and Marginalization?' at 34.
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[32] Odote C., Kameri-Mbote P., 'Kasighau: Will Constitutional Recognition of Community Land Rights Reverse a History of Extraction and Marginalization?' at 28.
[33] Odote C., Kameri-Mbote P., 'Kasighau: Will Constitutional Recognition of Community Land Rights Reverse a History of Extraction and Marginalization?' at 34.
[34] Odote C., Kameri-Mbote P., 'Kasighau: Will Constitutional Recognition of Community Land Rights Reverse a History of Extraction and Marginalization?' at 35.

County in line with the 2010 Constitution'[35] by proposing a system that will solve the issue of forceful attacks on ranchers that is a problem in Laikipia as opposed to Taita Taveta. The proposed solution for Laikipia County will aim at balancing the interests of the community and the private ranchers.

'Ours by Right: Law, Politics and Realities of Community Property in Kenya' contains a section on giving meaning to community rights. The authors of the book propose the stand that there is a need for innovation as it is impossible to have one community rights model to fit all.[36] This study will further this stand by proposing the use of community justice systems to innovate a land management and use structure that will be beneficial for the local communities resident in Laikipia and the private land owners too.

1.6.2 Community Justice Systems

Yet another salient chapter of this study will be the proposition to use Community Justice Systems to resolve the conflicts between pastoralists and ranchers. Of importance to this section, will be The Constitution of Kenya (2010). Article 159 (3) of the Constitution of Kenya (2010) permits the use of Traditional Dispute Resolution Mechanisms subject to its conformity to justice and morality. This study will aim at breathing life to this provision of the Constitution by specifically proposing a community justice system to resolve the highlighted land issue.

Raphael Ng'etich, author of 'The Rejected Stone May Be the Cornerstone: A Case for the Retention of Traditional Justice Systems as the Best Fora for Community Land Disputes in Kenya' affirmed that conflict resolution mechanisms in a communal society are determined by the shared communal values.[37] However, one of the challenges the author attributes to the use of traditional justices systems in resolving community land disputes is the lack of legislation in community land law. This study will be different in that it will be conducted under the current legal regime characterized by the enactment of the Community Land Act in 2016.

'The Judiciary's Transformation Framework 2012-2016, Sustaining Judiciary Transformation (SJT); A Service Delivery Agenda (2017-2021)', 'ADR, the Judiciary and Justice: Coming to

[35] Odote C., Kameri-Mbote P., 'Kasighau: Will Constitutional Recognition of Community Land Rights Reverse a History of Extraction and Marginalization?', Table 6, at 45.
[36] Kameri-Mbote P., Odote C., Musembi C., Kamande M., Ours by Right: Law, Politics and Realities of Community Property in Kenya, Strathmore University Press, 2013, 157.
[37] Ng'etich R., 'The Rejected Stone May Be the Cornerstone: A Case for the Retention of Traditional Justice Systems as the Best Fora for Community Land Disputes in Kenya', *Strathmore Law Review*, 2016, 144.

Terms with the Alternatives' by Erin Ryan and 'Customary Law Jurisprudence from Kenyan Courts: Implications for Traditional Justice Systems' by Francis Kariuki are authority in the use of Alternative Forms of Dispute Resolution as a means to solve disputes in Kenya. This study will be distinct from these already existing materials on Alternative Forms of Dispute Resolution in that it focuses specifically on Community Justice Systems in resolving land disputes in Laikipia, Kenya.

1.7 Research Design

1.7.1 Research design and methodology

This study is a desktop research because of the nature of data that is used, namely qualitative data. The qualitative data utilizes primary sources of data which include the Constitution of Kenya (2010), relevant statutes and case law on land laws. These will be accessed mostly from the Kenya Law Resources online portal. The secondary sources of law employed comprise writings of key scholars, books, reports on historical land injustices by various commissions, newspaper articles, working papers and journal articles among other relevant references. These are accessed either physically from the library or from the internet sources such as JSTOR and HEINONLINE.

1.7.2 Data Analysis

The qualitative data obtained from the primary and secondary sources of data is critically evaluated in light of the stated objectives, problem and hypotheses.

1.7.3 Limitations

Documented evidence of successful outcomes of Community Justice Systems is scarce. As such, finding material on previously used Community Justice Systems practically, as opposed to that in theory only, is a challenge.

1.8 Chapter breakdown

Chapter 1: Introduction to the study

Chapter one contains the structure and contents of the research proposal. It contains the historical background to the land issue in Laikipia, statement of problem, objectives,

hypotheses, literature review, theoretical and conceptual framework as well as methodology of the study and chapter breakdown.

Chapter 2: Legal framework for pastoral and private land rights in Laikipia

This chapter uses` theories of property put forward by various proponents to support the claims of both pastoralists and ranchers as regards their interest in the ranches in Laikipia. This chapter also discusses the weaknesses or criticisms advanced towards the theories to show whether the claims supported by such theories hold water. In conclusion, the chapter gauges who, on a balance, ought to have title to the ranches and the benefits that can be enjoyed by the other group.

Chapter 3: The extent to which State led efforts have succeeded in resolving the land issue in Laikipia

This chapter examines the cases relating to the land issue in Laikipia that have been instituted in courts or other quasi-judicial bodies to find the outcome and consequent effect on the affected parties. Furthermore, it scrutinizes the efforts by the government in resolving such issues and their success.

Chapter 4: A qualitative comparison of courts and Community Justice Systems and the role of Community Justice Systems in striking a balance between the competing interests

By nature, courts have an individualistic nature. Community Justice Systems, in contrast, are a form of Alternative Dispute Resolution Mechanism that focus on solving not only the dispute at hand, but the underlying issues as well. A juxtaposition of these two justice systems elaborates the reasons why this study proposes community justice systems as more efficient in the land situation in Laikipia. An analysis of the use of Community Justice Systems in various communities and other jurisdictions has been conducted to suggest and show its efficiency and success in resolving land disputes.

Chapter 5: Conclusion and recommendations

This chapter gives a summary of the findings on the land issue focused on, the proposed solutions and the justification for the proposed solutions. Furthermore, it outlines the recommendations considered most effective in resolving the land disputes between pastoralists

and ranchers in Kenya. This section also includes a bibliography and appendices of the reference materials used.

1.9 Time line/duration

This study has been conducted throughout the first semester of fourth year that begun in July 2019 and ends in October 2019.

CHAPTER TWO: THE LEGAL FRAMEWORK OF PASTORAL AND PRIVATE LAND RIGHTS IN LAIKIPIA

2.0 Introduction

The objectives of this chapter are to give a historical account of the land issues in Laikipia, the effect of laws imposed by the colonial government on the land rights of ranchers and pastoralists and the protection of the rights of the two groups in the current legal regime. This chapter begins by discussing the relevance of the protection of property in law. The discussion of the legal framework is divided into two main parts, the first being that of the ranchers in Laikipia and the second being the land rights of pastoralists. The legal framework of a country comprises the constitutional, legislative, regulatory and jurisprudential laws and policies that form the basis upon which the affairs of the country are governed. This chapter therefore contains the provisions of the Constitution of Kenya (2010), relevant statutes on land law and various decided cases regarding the land rights of pastoral communities and ranchers.

Laws on the protection of property are of great relevance to an owner of land for various reasons, namely: the ability of an owner to have a claim in a land matter, definition of interest in the property, the rights bestowed on an owner and the consequent duties that arise owing to the right, explanation of property in a social and cultural state, the contextualization of property in various aspects, the numerous attributes of security of tenure, transferability, exclusivity and permanence given to property and the addressing of the land question of tenure.

Jeremy Bentham, the proponent of the legal positivism theory of property, stated that, "Property and law are born together and die together. Before laws were made there was no property; take away laws and property ceases."[38] This theory supports the position that proprietary rights are granted in law. The law essentially dictates what qualifies as property and to whom the property belongs. Land laws serve to confer ownership on a person or on a group of people, such as a community of persons with a similar interest in land. Laws also provides property owners with mechanisms for enforcing their property rights.[39]

Yet another importance attached to laws on the protection of land as property is the ability to have a claim as against others. Property rights backed by law give rise the expectation to an

[38] Bentham J, *The Theory of Legislation*, Oceana Publications, New York, 1975, 69.
[39] Kariuki F, Ouma S & Ng'etich R, *Property Law*, 37.

owner that everyone else has the duty to uphold his rights. Failure to this, claims regarding infringement of property rights of various nature arise. These claims exist as against any other person, and are *in rem*, as against the whole world.[40]

Property can be viewed as a thing, as rights, as a bundle of sticks or as a web of relationships based on how the law in a certain jurisdiction provides. In the instance that property is viewed as a thing, the property owner has control over it. Property, therefore, consists of a package of legally recognized rights held by one person in relationship to others with respect to some thing or other object, and the state enforces those rights.[41] Property as a bundle of rights flows from the English Common Law that conceived property as a bundle of rights conferring powers on owners and implying obligations and liabilities on others.[42] Honore, a legal scholar, came up with a number of rights that seeks to distinguish property from other legal concepts and stated as follows,

> "Ownership comprises the right to possess, the right to use, the right to manage, the right to the income of the thing, the right to the capital, the right to security, the rights or incidents of transmissibility and absence of term, the prohibition of harmful use, liability to execution, and the incident of residuarity."[43]

Property as a web of relationships is a concept in law elaborated by Wesley Hohfeld who developed a framework that constitutes jural correlatives, namely: right-duty; privilege-no right; power-liability; and immunity-disability.[44] These relationships guide how people relate in a society with specific regard to property matters. Lastly, property as a basis of expectation is an argument sustained by Jeremy Bentham by stating that, "Property is nothing but a basis of expectation is respect to things."[45] Laws that confer the Hohfeldian entitlements on property owners giving them the expectation that others will act accordingly by performing required

[40] Hohfeld W, 'Fundamental legal conceptions as applied in judicial reasoning' 27 *The Yale Law Journal* (1917), 710-770.
[41] Waldron J, 'Property law' in Patterson D (ed), *A companion to philosophy of law and legal theory*, 2 ed, Blackwell Publishing , Oxford, 2010, 9.
[42] Okoth-Ogendo HWO, *Teaching manuals on the law of property*, University of Nairobi (83/84 1982).
[43] Honore A, 'Ownership' in Coleman J (ed), *Readings in the philosophy of law*, Garland Publishing, New York, 1999, 563-574.
[44] Hohfeld, 'Some fundamental legal conceptions as applied in judicial reasoning', 45-52.
[45] Ogden C (ed), *Jeremy Bentham: The theory of legislation*, Routledge & Kegan Paul, London, 1931, 111.

actions such as respecting one's indeterminate length of ownership rights and avoiding prohibited actions such as trespass.

2.1 The legal regime that supports private property rights of ranchers in Laikipia Kenya

2.1.1 A historical account of changes in the land tenure system from pre-colonial to post-colonial era in Kenya

Prior to Kenya becoming a British Protectorate in 1895, the communities living in Kenya used land and other natural resources communally for various activities such as hunting-gathering, fishing, subsistence farming and livestock rearing.[46] The concept of private ownership of land or holding absolute title to a piece of land was foreign to Kenyan communities during the pre-colonial period. Following the pronunciation of the presently recognized as Kenya and Uganda as the East African Protectorate, a survey by Lord Delamare reveals that Europeans and European-descended settlement took root from 1895 up until the beginning of the World War I that took place between 1914 to 1918.[47] Initially, the British set the headquarters of the Protectorate in Mombasa and owing to the vastness of the area they were to exert control, they set up the Kenya-Uganda railway from Mombasa to Lake Victoria railway to connect the coast to the hinterland.[48]

This railway caused a ripple effect in the Kenyan region, among them a revolutionized transport system and an influx of white settlers who alienated for themselves the most fertile and prime land with the approval of the protectorate administration.[49] This was the first introduction of the regime of private property in Kenya. Following the completion of the railway, the colonial government incentivized European settlement into the country by issuing leases on huge tracks of fertile land in Central highlands and Rift Valley.[50] This settler occupation, consequently, caused another ripple effect, leading to the displacement of Africans in a bid to create land for farmers of white origin.

The agitation due to being confined to African reserves caused Kenyans to attempt peaceful negotiations for resettlement to their land. The late Jomo Kenyatta, in this accord, spent much

[46] https://meac.go.ke/history-of-kenya/ on 7 October 2019.
[47] https://thecommonwealth.org/our-member-countries/kenya/history on 7 October 2019.
[48] https://meac.go.ke/history-of-kenya/ on 7 October 2019.
[49] https://meac.go.ke/history-of-kenya/ on 7 October 2019.
[50] https://meac.go.ke/history-of-kenya/ on 7 October 2019.

of his 1930s and 1940s in Europe advocating for territorial, economic and political rights for Africans.[51] Peaceful negotiations failed and caused Africans to acrimoniously wage a war against the British administration and, thus, led to the rise of the *Mau Mau* rebellion. The *Mau Mau* fought against not only the British Administration, but also the white settler community.[52] In Laikipia, the area of focus in this study, the communities, especially the Maasai, resisted colonial rule as well.

The British administration orchestrated two moves of the Maasai from Laikipia centering their actions around agreements entered into with leaders of the Maasai.[53] Commissioners and governors in British East Africa kept the Foreign and Colonial Offices based in London in the dark about the real situations in Laikipia and deceived them about the Maasai acquiescence to both moves, in 1904 and 1911.[54] Arthur Collyer's 1910 'Report on the Masai Question' was not sent to London, thus, rendering the contents therein concerning whether or not the Maasai had promised land in the highlands to the European settlers of no use as it was held back for eighteen months.[55] British officials threatened the Maasai leaders, among them a signatory by the name Ole Gilisho, to append their marks of approval to the 1911 Maasai Agreement to surrender their land to the British and be relocated.[56] Illegalities faulted the whole 1911 agreement because it was signed by the deceased Maasai leader's son, a minor of 13 years named Segi.[57] None of the signatories of the 1904 agreement, which the second one was deemed to amend, appended their signatures or marks on the agreement.[58] The signatories signed the agreements under duress and as a consequence, this led them to be dispossessed of their land in Laikipia.

The Secretary of State for the colonies, Mr. Lewis Harcourt, on 20th July, 1911 claimed before the House of Commons as follows regarding the 1911 Maasai Agreement to relocate,

> "It was essential to have one paramount chief, and, as had been mentioned, Mr. Jackson, who was Acting-Governor, in a dispatch in March, 1910, gave a description of a meeting he himself

[51] https://thecommonwealth.org/our-member-countries/kenya/history on 8 October 2019.
[52] Newsinger j, 'Revolt and Repression in Kenya: The "Mau Mau" Rebellion, 1952-1960' 45 *Science and Society* (1981), 159.
[53] Truth, Justice and Reconciliation Commission, *Final report*, Volume IIB (3 May 2013 Version), 59.
[54] Hughes L, *Moving the Maasai: A Colonial Misadventure*, Palgrave Macmillan, 2006, 2.
[55] Hughes L, *Moving the Maasai: A Colonial Misadventure*, 2.
[56] Hughes L, *Moving the Maasai: A Colonial Misadventure*, 3.
[57] Hughes L, *Moving the Maasai: A Colonial Misadventure*, 3.
[58] Hughes L, *Moving the Maasai: A Colonial Misadventure*, 3.

had with the Masai. At that meeting there were also present, Mr. Collier, who had been in charge of the Laikipia Reserve, Lord Delamere, who gave up some of his northern land to help to make that reserve, and Mr. McClure, District Commissioner of the Southern Reserve. According to Mr. Jackson's account, which no one will doubt, the Masai came to a unanimous and even enthusiastic decision to move to the Southern Reserve. I may allude, in passing, to the size of the new Southern Reserve."[59]

After the 1913 court case[60], threats to his life reportedly forced Ole Gilisho to cancel his plans to visit Britain to pursue the legal action before the Privy Council – one of many claims made in oral testimony which do not appear anywhere in the written literature.[61] Furthermore, the Colonial Office vetoed the proposal to place the Maasai reserve in the hands of trustees stating that the Government must remain responsible trustees over the areas the Maasais in Laikipia were relocated to.[62] Consequently, the communal land holding system of the Maasais in Laikipia was altered, their land given out to private white settler farmers and the reserve lands placed under the trusteeship of the British Colonial Government.

Essentially, land vested in European settlers by virtue of the 1904 agreement that stated as follows, "We would, however, ask that the settlement now arrived at shall be enduring so long as the Masai as a race shall exist, and that European or other settlers shall be allowed to take up land in the Settlements".[63] Settlers failed to uphold the 1904 agreement and kept trespassing onto Maasai reserve alluding to its necessity for their occupation. Consequently, the colonial government entered into the 1911 agreement with the Maasai to farther move them to a reserve in Mara so as to allocate the Laikipia land categorized as a reserve in the 1904 to the settlers.[64]

[59] https://hansard.parliament.uk/commons/1911-07-20/debates/ae1556ad-ec2c-446a-aac6-c429c1053948/ColonialOffice(Class2) on 9 October 2019. This alleged acquiescence of the Maasai was stated in a debate on the colonies, 20 July 1911, *Hansard*, Vol. 28, col. 1350.
[60] *Ole Njogo & Others v. The Attorney General & Others*, Civil Case No. 91 of 1912.
[61] Hughes L, *Moving the Maasai: A Colonial Misadventure*, Palgrave Macmillan, 2006, 3.
[62] https://hansard.parliament.uk/commons/1911-07-20/debates/ae1556ad-ec2c-446a-aac6-c429c1053948/ColonialOffice(Class2) on 9 October 2019. From a debate on the colonies, 20 July 1911, *Hansard*, Vol. 28, col. 1350.
[63] Ruto R, 'The Treaties that Rendered the Maasai Landless' Published LL.M Thesis, University of Nairobi, 30th May 2005, 55.
[64] Ruto R, 'The Treaties that Rendered the Maasai Landless' Published LL.M Thesis, University of Nairobi, 30th May 2005, 55.

2.1.2 Legal instruments that fostered individualization of land during the colonial era

The British erred in presuming that the Protectorate status conferred on Kenya in 1895 gave the British Colonial Government rights to the land. Maurice PK Sorrenson, a renowned Professor and author in the realm of European settlement in Kenya, advised as follows,

> "As regards land regulations, the Secretary of State's view is that the acquisition of partial sovereignty in a Protectorate does not carry with it any title to soil. The land is foreign and does not become vested in Her Majesty…it is therefore advisable to avoid making grants or leases or other dispositions purporting to be alienation of land by the British authorities, to whom it does not in fact belong…"[65]

Accordingly, to establish British rule and to grant or acquire rights to land, laws were enacted to that effect. The issuance of private land titles to Europeans have been argued to be for a number of reasons. One of the arguments holds that the aim was to consolidate and register landholdings so as to confer individual freehold titles which provides a means to transfer and dispose of the land.[66] Moreover, it is argued that these laws and ordinances served the purpose of eviction of communities to facilitate the construction of the Kenya-Uganda Railway and the leasing of the potential land to European settlers and multinational corporations for 99 years to the infamous white highlands.[67]

Yet another argument is that such registration of freehold titles to private land had the sole purpose of invalidating any claims of compensation or restitution by Africans with reference to land acquired by the white settlers or the colonial government. The Carter Commission[68] developed principles to guide the Crown while addressing land compensation or restitution claims. The first was as follows,

> "If a tribe has suffered loss though alienation of part of its territory, it is in equity entitled to be compensated. But the compensation might properly be assessed in accordance with the extent of the true loss sustained, that is to say, according to the degree of the use which was made of the

[65] Colonial Office to Foreign Office, *Foreign Office Confidential Print 6861*, 1896, 212.
[66] Munro A, 'The Land Tenure Revolution in Kenya 1954-1959; Legal and political implications' Published LL.M Thesis, Columbia University, 1959, 4.
[67] https://informationcradle.com/kenya/land-alienation-in-kenya/ on 4 November 2019.
[68] According to the hansard of the parliament of the United Kingdom on 4th May 1932, Sir Morris Carter was an ex-Chief Justice of the Tanganyika Territory (presently Tanzania) and had done work in Rhodesia (presently Zimbabwe) very similar to the kind in the British Colony of Kenya which related to the land claims forwarded to the Colonial Administration by the African communities.

land and the purpose which it served, whether at the time of the alienation or as a reasonable reservation for future expansion. We cannot accept the principle that, because a tribe has lost land, it is necessarily and of right entitled to receive equal or equivalent land elsewhere, irrespective of these considerations."[69]

2.1.2.1 The Crown Lands Ordinance (1902)

The 1901 East Africa Order-in-Council defined Crown Land as,

> "All public lands within the East African Protectorate which for the time being are subject to control of His Majesty by virtue of any Treaty, Convention or Agreement, or His Majesty's Protectorate, and all lands which have been or may hereafter be acquired by His Majesty under The Land Acquisition Act, 1894, or otherwise howsoever."[70]

The first Crown Land Ordinance of 1902 provided the settlers with leases that lasted for a period of ninety-nine years and subjected them to the control of the State. This piece of legislation replaced the Ordinance of 1897 that provided for leases that were valid for a period of twenty-one years.[71] Sir Charles Elliot used this Ordinance to evacuate the Maasai from their southern lands which were alienated for settler use.

2.1.2.2 The Crown Lands Ordinance (1915)

The enactment of this Ordinance vested all land, in the territory of Kenya, in the Crown thus leaving natives as mere tenants at the will of the Crown.[72] Barth CJ in *Isaka Wainaina v Murito* [73] explained the full import of this Ordinance by holding that no native private rights were reserved and the Kenya Colony Order-in-Council of 1921 vested land reserved for native tribes in the Crown. In essence, Her Majesty the Queen had the powers of disposing of the land. This statute further increased the term of leases given to white settlers from ninety-nine years to nine hundred and ninety-nine years. Additionally, it declared all 'waste and unoccupied' land in the Protectorate 'Crown Land', classified that land as subject to the Governor's powers of alienation

[69] The Kenya Land Commission (Carter Commission), *The Kenya Land Commission Report*, April 1934, para. 30.
[70] Sorrenson M, *Origins of European Settlement in Kenya*, Oxford University Press, Nairobi, 1968, 53.
[71] https://informationcradle.com/kenya/land-alienation-in-kenya/ on 4 November 2019.
[72] Okoth-Ogendo HWO, *Tenants of the Crown: Evolution of agrarian law and institutions in Kenya*, African Centre for Technology Studies Press, Nairobi, 1991, 11.
[73] *Isaka Wainaina v Murito* [1923] (2) KLR.

and demarcated the land into either 'Scheduled Areas' for European settlement or None Scheduled Areas or African Reserves.[74]

2.1.2.3 The Crown Lands (Amendment) Ordinance (1938)

This legal instrument gave legal effect to the dual policy of European white highlands or high potential areas and African native reserves or marginal lands. This duality supported a legal plurality with African customary law being in force in the African reserves and English law governing matters regarding the white highlands.[75] Upon the enactment of this policy, claims of the natives regarding areas outside of the African reserves were extinguished.[76]

Until 1959, the laws that governed land held by Europeans differed from that which governed Africans.[77]

2.1.3 Constitutional provisions that grant private property rights to ranchers in Laikipia

The Constitution, being the grund-norm, comprises the laws that form the basis upon which statutes and other legal instruments are drafted. The Parliament of Kenya is required by the constitution to steer clear of legislation that leads to the deprivation of the right to property, abuse of security of tenure or discrimination of any kind in matters relating to property. The government has been mandated by the constitution to refrain from using its legislative powers to cause any person to be arbitrarily deprived of property, interest in property or a right over any property of any description.[78] Furthermore, Parliament is mandated to avoid making laws that limit or restrict the upholding of any right in the constitutional article on protection of the right to property on the basis of any of the stipulated grounds of discrimination.[79] Race, ethnic and social origin, colour, culture, language and birth are some of the grounds upon which the State is not allowed to discriminate against any person in property matters.[80]

Private land is one of the three classifications of land in Kenya.[81] Private land consists of registered land held by the owner under any freehold tenure, land held by any person under

[74] https://informationcradle.com/kenya/land-alienation-in-kenya/ on 5 November 2019.
[75] https://informationcradle.com/kenya/land-alienation-in-kenya/ on 5 November 2019.
[76] https://api.parliament.uk/historic-hansard/lords/1932/may/04/kenya-land-commission on 5 November 2019.
[77] Munro A, 'The Land Tenure Revolution in Kenya 1954-1959; Legal and political implications' Published LL.M Thesis, Columbia University, 1959, 1.
[78] Article 40 (2) (a), *Constitution of Kenya* (2010).
[79] Article 40 (2) (b), *Constitution of Kenya* (2010).
[80] Article 27 (4), *Constitution of Kenya* (2010).
[81] Article 61 (2), *Constitution of Kenya* (2010).

leasehold tenure and land declared private under statute.[82] Given the above three further subdivisions, ranches in Laikipia qualify to be classified as private land as its owners either bought it under the 'willing-buyer willing seller' era or were leased the land by the Queen of England when all the land vested in Her Majesty the Queen. The constitution directs that all the land in Kenya belongs to the people of Kenya collectively as a nation, as communities or as individuals.[83] The last limb supports the institution of private property, which in this study, refers to the private ranches in Laikipia.

Freedom of residence is constitutionally guaranteed to every citizen.[84] This entails the right to enter, remain in and reside anywhere in Kenya. Citizenship is acquired in two ways in Kenya, namely by birth[85] and by registration[86]. A person is a citizen by birth if either of the parents is a citizen on the day of the person's birth, regardless of the place of birth.[87] A person is entitled to apply to be registered as a citizen if the person has been married to a Kenyan citizen for a minimum of seven years or if the person has been lawfully resident in Kenya for a continuous period of at least seven years and meets the conditions prescribed by The Kenya Citizenship and Immigration Act (No. 12 of 2011) or any other applicable Act of Parliament.[88] Dual citizenship has also been provided for to enable citizens by birth not to lose their citizenship by acquiring the citizenship of another country.[89] The rationale of delving into the aspect of Kenyan citizenship is to debunk the myth that ranchers of a different race or hold another nationality are not Kenyan citizens. In his own words, Martin Evans, a rancher in Laikipia of British Origin stated as follows in an interview with the Thomas Reuters Foundation, "I was born here," said Evans. "We are home ... I'm a Kenyan as much as anybody else."[90] He stated this after saying that he would willingly sell the Ol Maisor ranch he inherited from his father, who bought it in

[82] Article 64, *Constitution of Kenya* (2010).
[83] Article 61 (1), *Constitution of Kenya* (2010).
[84] Article 39 (3), *Constitution of Kenya* (2010).
[85] Article 14, *Constitution of Kenya* (2010).
[86] Article 15, *Constitution of Kenya* (2010).
[87] Article 14 (1), *Constitution of Kenya* (2010).
[88] Article 15, *Constitution of Kenya* (2010).
[89] Article 16, *Constitution of Kenya* (2010)
[90] https://www.reuters.com/article/us-kenya-landrights-farms/politics-of-death-colonial-scars-and-drought-feed-kenya-land-wars-idUSKBN19E04R on 14 October 2019.

1968, to the government as he is tired of the invasions from pastoralists on the basis that he is an outsider.[91]

Citizens have certain entitlements. Kenyan citizens are entitled to the rights, privileges and benefits of citizenship subject to the constitutional limitations.[92] The right to private ownership of property, the privilege of security of land tenure accorded to owners and the benefits that flow from holding title or a lease to land are entitlements ranchers in Laikipia are granted in law. The second limb of these entitlements is with regard to the right to be issued a Kenyan passport and any document of registration or identification by the State.[93] This then means that ranchers in Laikipia have the right to be issued documents of registration of their land by the Registrar of Titles or, for non-citizens, leases to the land. A title document proves ownership and grants security of tenure.

The rights of a citizen or a Kenyan national can only be limited in accordance with the parameters set out in law and in a manner that is necessary and reasonable.[94] Rights puts an obligation to everyone, not citizens only, to respect the rights. The ranchers in Laikipia, Kenya who are citizens are entitled to rights such as absolute ownership of property and the right to reside in Kenya. No-one, citizen or not, may discriminate against others, or violate the right of others.[95]

Regarding non-citizens, after the promulgation of the Constitution of Kenya on 27th August 2010, there was a reform in the law regarding the term limit of the leases they held. As per the constitution, a person who is not a citizen may hold land on the basis of leasehold tenure only and the maximum time limit of any such lease is ninety-nine years, regardless of the method of issuance.[96] Furthermore, if a provision in an agreement, deed, conveyance or any other relevant document purports to confer on a non-citizen an interest in land, such as a leasehold interest, greater than a ninety-nine year lease, the term will be regarded to be capped at ninety-nine years.[97] The aim of this was to reverse the colonial ill of leases issued for nine hundred and

[91] https://www.reuters.com/article/us-kenya-landrights-farms/politics-of-death-colonial-scars-and-drought-feed-kenya-land-wars-idUSKBN19E04R on 14 October 2019.
[92] Article 12 (1) (a), *Constitution of Kenya* (2010).
[93] Article 12 (1) (b), *Constitution of Kenya* (2010).
[94] Article 24, *The Constitution of Kenya* (2010).
[95] http://www.katibainstitute.org/what-constitution-provides-on-aspects-of-citizenship/ on 25 September 2019.
[96] Article 65 (1), *Constitution of Kenya* (2010).
[97] Article 65 (2), *Constitution of Kenya* (2010).

ninety nine years or in perpetuity. This is evidenced in a publication by the National Land Commission that confirms that,

> 'The 999-year leases were granted by the former colonial government for agricultural farms in government land areas (crown land). Such farms are found in Nairobi and Rift Valley in what was famously known as the White Highlands. The 999-year leases being held by the former colonial farmers were transferred to the Africans who bought or were allocated the farms.'[98]

Furthermore, based on the article on landholding by non-citizens, the constitution states that property held in trust shall be regarded as being held by a citizen only if all of the beneficial interest of the trust is held by persons who are citizens.[99] Northern Rangelands Trust[100], Ol Lentille Trust[101] and Loisaba Community Trust[102] are among some ranches that are categorized as conservancies, and concurrently, as trusts for the communities living around them. The constitution directs that such land held in trust shall be regarded as being held by a citizen if the proceeds are held by Kenyan communities.

2.2 The legal regime that supports the property rights of pastoralists in Laikipia Kenya

2.2.1 African customary law governing land tenure among African communities

Before the introduction of foreign colonial rule, African customary law governed and regulated the matters concerning land in African communities. With the new colonial laws came the resentment of African customary law and its perception as an inferior system of law as compared to the colonial laws. By virtue of these two land regimes existing concurrently in Kenya during the colonial period, a duality of land laws emerged and was evidenced by systems of land tenure based on principles of English property law, on the one hand, and a largely neglected regime of customary property law, on the other hand.[103] The resulting effect of these foreign proprietary laws was the disruption of the already existing communal land regimes among Africans.[104] Land was communally held and radical title vested in the community as a whole, however, individuals

[98] https://www.landcommission.go.ke/article/faqs on 26 September 2019.
[99] Article 65 (3) (b), *Constitution of Kenya* (2010)
[100] https://www.nrt-kenya.org/wildlife on 26 September 2019.
[101] https://www.ol-lentilletrust.org/ on 26 September 2019.
[102] https://loisaba.com/loisaba/ on 26 September 2019.
[103] Republic of Kenya, Ministry of Lands, *Sessional paper no. 3 of 2009 on national land policy, 2009, 23.*
[104] Kariuki F, Ouma S & Ng'etich R, *Property Law*, 202.

and families were entitled to rights of use.[105] This communal land tenure system among African communities still exists in the modern society.

The renowned author of many highly regarded authorities in the area of communal land holding among African countries, HWO Okoth Ogendo, referred to such land holdings as the commons. He defined the commons as the 'term used to identify ontologically organized land and associated resources available exclusively to specific communities, lineages or families operating as corporate entities'.[106] Management of the African commons and decision making are characterized by complexities. Okoth Ogendo asserts that the structural and normative parameters may be visualized in the form of an inverted pyramid with the tip representing the family, the middle the clan and lineage and the community falls at the base.[107] Decision-making levels designed to respond to issues regarding allocation, use and management of resources were formed depending on a number of factors. The location of the radical title always was and remains, in all members of the group; past, present and future. Radical title refers to the proprietary ownership which directs that upon expiry of the term of interest in land vested in any other person other than the true owner, such land is restituted to the true owner. [108]

At the normative level, Okoth Ogendo states that access of resources of the commons is open to individuals and groups who qualify on the basis of socially-defined membership criteria which was reinforced by duties owed to other members of the social hierarchy.[109] More specifically referring to the group focused on in this study, the pastoralists in Laikipia base their access to the common grazing land on common uniting factors such as similar culture and pastoralism as a way of life. This reflects the African conception of property. As a general rule, Okoth Ogendo

[105] Bentsi-Enchill K, 'Do African systems of land tenure require a special terminology?' 9 *Journal of African Law* (1965), 132.
[106] Okoth-Ogendo H, *The Tragic African Commons*, Programme for Land and Agrarian Studies, School of Government, University of the Western Cape, 2002 at 107.
[107] Okoth-Ogendo H, *The Tragic African Commons*, Programme for Land and Agrarian Studies, School of Government, University of the Western Cape, 2002 at 108.
[108] Okoth-Ogendo H, *The Tragic African Commons*, Programme for Land and Agrarian Studies, School of Government, University of the Western Cape, 2002 at 108.
[109] Okoth-Ogendo H, *The Tragic African Commons*, Programme for Land and Agrarian Studies, School of Government, University of the Western Cape, 2002 at 108.

argues that this is the manner in which land, most specifically agrarian land, was and continues to be organized.[110]

2.2.2 Legislation on rights of pastoralists to land

The colonial government insisted of giving title to land owners, especially private land owners of European origin, and refused to formally acknowledge African customary law in land governance. Some factors such as continued land tenure change and unrest among the Kenyan indigenous communities led to the enactment of pieces of legislation that recognized the communal land tenure among African communities. Changes in land tenure and usage were continually receiving informal acknowledgement through both the African Court structure and the British Administrative Offices who were vested with both legislative and judicial government functions.[111] These specific enacted pieces of legislation to some extent were meant to cure the issues arising from the duality of land laws separately governing the European land owners and African communities holding land in a communal manner. In essence, they were a means of the colonial government to manipulate by way of a legal definition, the status of the land occupied by natives, in response to the growing African sensitivity over alienation.[112]

2.2.2.1 The Native Land Trust Ordinance (No. 28 of 1938)

Pursuant to this enactment, all areas that were formerly classified under as 'native reserves' were reclassified to 'native lands' and were removed from the purview of The Crown Lands Ordinance of 1915.[113] This meant that the ownership of land vested in African communities. In this specific case study, it meant that the pastoralists in Laikipia could own land communally pursuant to their status as 'Tenants of the Crown' being lifted. The caveat, however, was that the native lands were now placed in a trust and subject to the sovereignty of the Crown and its general powers of control.[114]

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[110] Okoth-Ogendo H, *The Tragic African Commons*, Programme for Land and Agrarian Studies, School of Government, University of the Western Cape, 2002 at 107.
[111] Munro A, 'The Land Tenure Revolution in Kenya 1954-1959; Legal and political implications' Published LL.M Thesis, Columbia University, 1959, 2.
[112] Munro A, 'The Land Tenure Revolution in Kenya 1954-1959; Legal and political implications' Published LL.M Thesis, Columbia University, 1959, 39.
[113] Kariuki F, Ouma S, Ng'etich R, 'Property Law', 166.
[114] Munro A, 'The Land Tenure Revolution in Kenya 1954-1959; Legal and political implications' Published LL.M Thesis, Columbia University, 1959, 41.

2.2.2.2 The Constitution of Kenya (2010)

The constitution states three classifications of land, namely, public land, community land and private land.[115] The Constitution recognizes a community as a jural person who can own land.[116] The constitution directs that community land shall vest in and be held by communities identified on the basis of ethnicity, in this study the Maasai, Samburu, Turkana, Ndorobo and the other ethnic communities, culture, such as pastoralism, or similar community of interest, for instance making a livelihood from cattle rearing.[117] The constitution provides security of tenure of communities living on community land by prohibiting its disposition and any other use unless specified in law, the nature and extent of the rights of members of each community, in an individual capacity or as a collective.[118]

The constitution further sets out what constitutes community land. Land registered in a lawful manner in the name of group representatives in accordance with provisions of any relevant law is the first of such categories.[119] Land lawfully transferred to a specific community by any process of law qualifies as community land.[120] Declaration in an Act of Parliament of land as community land qualifies it as such.[121] Grazing areas lawfully held, managed or used by specific communities[122], ancestral lands[123] and land lawfully held as trust land by the county government[124] are also regarded as community land in law.

Most importantly, the Constitution of Kenya (2010) came into effect on 27th August, 2010 and replaced the Repealed Constitution of Kenya. The striking feature in this piece of legislation is the lack of recognition of community land and vesting of the rights to such land in the communities residing on it. Upon attainment of independence, native areas became trust lands.[125] With the enactment of the 2010 Constitution, came the recognition of community land

[115] Article 61 (2), *Constitution of Kenya* (2010).
[116] Article 61 (1), *Constitution of Kenya* (2010).
[117] Article 63 (1), *Constitution of Kenya* (2010).
[118] Article 63 (4), *Constitution of Kenya* (2010).
[119] Article 63 (2) (a), *Constitution of Kenya* (2010).
[120] Article 63 (2) (b), *Constitution of Kenya* (2010).
[121] Article 63 (2) (c), *Constitution of Kenya* (2010).
[122] Article 63 (2) (d) (i), *Constitution of Kenya* (2010).
[123] Article 63 (2) (d) (ii), *Constitution of Kenya* (2010).
[124] Article 63 (2) (d) (iii), *Constitution of Kenya* (2010).
[125] Section 3, *Trust Land Act* (Chapter 288, Laws of Kenya) (Repealed) and Section 114, *Repealed Constitution of Kenya.*

in law. Only unregistered community land is to be held in trust by county governments on behalf of the rightful communities.[126]

2.2.2.3 The Community Land Act (No. 27 of 2016)

The Community Land Act replaced the repealed Land Group Representatives Act[127] and Trust Land Act[128] and provides that in accordance with the relevant transition provisions, any person who had a subsisting customary land right before the commencement of the Community Land Act shall continue to hold such a right[129]. It provides for the recognition, protection and registration of community land rights. Regarding ownership and tenure, the Act provides that community land shall vest in the community.[130] Community land ought to held by the community under specific types of tenure systems, namely customary, freehold, leasehold and any other tenure system recognized in law.[131] This Act draws from the constitution by stating that any person has the right, in association with others, to acquire and own property in Kenya.[132] The Act asserts that community land rights shall be recognized, adjudicated for and documented for purposes of registration[133] and community land rights held in common shall have equal force and effect in law with freehold and leasehold rights acquired through allocation, registration or transfer[134].Community land may be held as communal land, as family or clan land, as reserve land and in any other legally recognized category.[135] The Act makes specific reference to grazing rights and provides that the customs and practices of pastoral communities relating to land shall be taken into consideration provided they are consistent with the provisions of the relevant and applicable law.[136]

2.3 Conclusion

The Bill of Rights, specifically in Article 40, provides for the protection of the right to property. Subject to Article 65 of the Constitution of Kenya (2010) regarding the issue of landholding by non-citizens, the Constitution provides that every person has the right, in one's individual

[126] Article 63 (3), *Constitution of Kenya* (2010).
[127] *Land (Group Representatives) Act* (Chapter 287, Laws of Kenya) (Repealed).
[128] *Trust Land Act* (Chapter 288, Laws of Kenya) (Repealed).
[129] Section 5 (5), *Community Land Act* (Act No. 27 of 2016).
[130] Section 4, *Community Land Act* (Act No. 27 of 2016).
[131] Section 4 (3), *Community Land Act* (Act No. 27 of 2016).
[132] Section 5 (1), *Community Land Act* (Act No. 27 of 2016).
[133] Section 5 (2), *Community Land Act* (Act No. 27 of 2016).
[134] Section 5 (3), *Community Land Act* (Act No. 27 of 2016).
[135] Section 12, *Community Land Act* (Act No. 27 of 2016).
[136] Section 28 (1), *Community Land Act* (Act No. 27 of 2016).

capacity or jointly with others, to acquire and own property of any description and in any part of the country.[137] This provision supports the institution of private property by ranchers and that of communal holdings by pastoralists. By specifically classifying property ownership in two broad categories, as an individual or in association with others, the prime legal document of Kenya backs the proprietary rights of private ranch owners and communal pastoralist communities in Laikipia, Kenya. As this is a right guaranteed to both groups of interest in this study, the state has a duty to uphold this right.

The effect of the imposition of western notions of private property rights was the subversion of African communal land tenure. African customary law was treated as a secondary or a periphery system of law. Consequently, the neglection of Africans led to tension between the institution that supported individual land rights and pastoral communities. With time, a solution had to be sought with the most efficient being legislating on pressing matters. As evidenced in the detailed discussion in this chapter, the Constitution recognizes that a lasting solution to the land problem lies in an effective legal and institutional framework.[138]

[137] Article 40 (1), *Constitution of Kenya* (2010).
[138] https://www.landcommission.go.ke/article/faqs on 9 September 2019.

CHAPTER THREE: THE EXTENT TO WHICH STATE LED EFFORTS HAVE SUCCEEDED IN RESOLVING THE LAND ISSUE IN LAIKIPIA

3.0 Introduction

As discussed in the previous chapters, the feuds between pastoralists and private ranch owners have posed a serious problem that has attracted government attention. One salient undertaking by the governments, from the regimes between independence till present, is the various measures put forward to attempt to address the issues that arise. This chapter looks into such government intervention and measures the degree of success, or failure, to solve the land issues between the two groups with competing interests over the same parcels of land in Laikipia.

3.1 Legislating on land rights between pastoralists and ranchers

Laws are enacted to address certain issues in a society. Efforts to address an issue backed by the power of legislation often have a great degree of success. Governments have an arm that deals specifically with enacting Acts of Parliament or other statutes to make provisions on certain issues and empower bodies to carry out certain functions, among other functionalities. Various legal instruments, specifically the ones elaborated in the previous chapter are some of the legislations that governments, from the colonial era to present, have put forward in an attempt to address the land issue in Laikipia, Kenya. Based on statutory interpretation and parliamentary intention, it follows that the Parliament of Kenya has in several instances attempted to clearly demarcate the rights of ranchers to land from that of pastoralists in law. As legal positivism philosophers posit, law is seen as the foundation of property rights.[139]

3.2 Establishment of Trust Lands and Settlement Schemes

Settlement schemes and trust lands were used by the independence government to address the land claims by Africans of the land alienated by the colonial government. At independence, the main undertaking of the government was to settle its landless citizens who had been displaced into native reserves by virtue of the discriminatory colonial land policies of land alienation.[140] The Commission of Inquiry into the Illegal/Irregular Allocation of Public Land after conducting thorough investigations and research reported that,

> "The Government had two options in trying to resettle the displaced people. It could simply have retaken all the land for the resettlement of the landless on the basis of the doctrine of state

[139] Bentham J, *The Theory of Legislation*, Oceana Publications, New York, 1975, 69.
[140] Commission of Inquiry into Illegal/Irregular Allocation of Public Land, *Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land*, 2004 at 122.

> sovereignty. The other option was for the Government to tread the path of a market-based land redistribution strategy. The political realities surrounding the negotiations for independence at the Lancaster House Conferences favoured the second option."[141]

As such, the post-independence government developed the national settlement schemes programme in Kenya. The history, rationale and policies surrounding settlement schemes pointed to them being categorized as public lands.[142] Though created for the purpose of settling the locals in Kenya, the Commission of Inquiry into Illegally/Irregularly Acquired Land found that settlement schemes were treated as conduits of land grabbing.[143]

Drawing from the repealed Constitution, Trust Lands were neither government owned nor County Council owned.[144] They were held by the County Councils in trust for the local communities living in the area and as long as they remained un-adjudicated and un-registered land in the former African Reserves, they belonged to local communities, groups, families and individuals.[145] County Councils and the Commissioner of Lands connived to illegally and irregularly allocate portions of trust lands to individuals.[146] The Commission of Inquiry into the Illegal/Irregular Allocation of Public Land found that large chunks of trust land in Laikipia meant to be holding grounds or livestock routes for the local communities were illegally allocated to individuals by the county councils of the area.[147] In the end, a state effort meant to address landlessness and the inability of African Reserves to sustain the way of life of local communities, such as pastoralism, ended up being abused.

3.3 Formation of institutions with specific powers to deal with the land issue in Laikipia

Several institutions have been formed to look into, investigate and give recommendations on how the government is to deal with illegally acquired land to which communities have a claim

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[141] Commission of Inquiry into Illegal/Irregular Allocation of Public Land, *Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land*, 2004 at 122.
[142] Commission of Inquiry into Illegal/Irregular Allocation of Public Land, *Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land*, 2004 at 124.
[143] Commission of Inquiry into Illegal/Irregular Allocation of Public Land, *Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land*, 2004 at 124.
[144] Article 115 (2), *The Constitution of Kenya* (Repealed).
[145] Commission of Inquiry into Illegal/Irregular Allocation of Public Land, *Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land*, 2004 at 44.
[146] Commission of Inquiry into Illegal/Irregular Allocation of Public Land, *Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land*, 2004 at 140.
[147] Commission of Inquiry into Illegal/Irregular Allocation of Public Land, *Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land*, 2004 at 143.

to. The following are some of the institutions specifically formed to address the plights of indigenous and marginalized communities in Kenya regarding, *inter alia*, historical land injustices.

3.3.1 The Commission of Inquiry into Illegal/Irregular Allocation of Public Land

This Commission was appointed by His Excellency, Hon. Mwai Kibaki in 2003 to inquire generally into the illegal acquisition of lands.[148] The Commission was chaired by Paul Ndiritu Ndung'u and is hereinafter referred to as the 'Ndung'u Land Commission'. Before the promulgation of the 2010 Constitution, the three categories of land were government land, trust land and private land.[149] Under the repealed Constitution and the Trust Land Act, neither the Government of Kenya nor the County Councils owned the Trust Lands.[150] The Ndung'u Land Commission proposed the need for a National Land Commission to administer public lands and to supervise the management and allocation of trust lands.[151] At the time the Ndung'u led Commission rolled out their report in 2004, the country lacked a comprehensive land policy to guide the administration, ownership and use of land. In 2009, the Ministry of Lands officially released the National Land Policy pursuant to the recommendations of the Ndung'u Commission.

The President and the Commissioner of Lands held powers to administer public lands, some Ministers had administrative powers over certain protected areas and County Councils held trust lands on behalf of local communities.[152] Due to the excessive powers held by a few individuals over majority of the land in the country, illegal allocation of land resulted.[153] To this end, the Ndung'u Commission proposed the formation of a centralized and professional body to discharge duties related to land matters in the country.[154] Particularly, the Ndung'u Land

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[148] Commission of Inquiry into Illegal/Irregular Allocation of Public Land, *Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land*, 2004 at xvii.
[149] Commission of Inquiry into Illegal/Irregular Allocation of Public Land, *Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land*, 2004 at 43.
[150] Commission of Inquiry into Illegal/Irregular Allocation of Public Land, *Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land*, 2004 at 44.
[151] Commission of Inquiry into Illegal/Irregular Allocation of Public Land, *Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land*, 2004 at 189.
[152]Commission of Inquiry into Illegal/Irregular Allocation of Public Land, *Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land*, 2004 at 189.
[153] Commission of Inquiry into Illegal/Irregular Allocation of Public Land, *Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land*, 2004 at 189.
[154] Commission of Inquiry into Illegal/Irregular Allocation of Public Land, *Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land*, 2004 at 189.

Commission proposed the formation of the National Land Commission to address the issue of misappropriation of land meant to be held in trust for local communities.

3.3.2 The Truth Justice and Reconciliation Commission

This Commission was established in the aftermath of the grievous events of the 2007/2008 post-election violence in Kenya.[155] It was tasked with inquiring into gross human rights violations and historical injustices that occurred in Kenya between independence on 12th December 1963 and the signing of the Coalition Agreement signed on 28th February 2008.[156] Regarding land and conflict, the Commission found that land related injustices took many forms, including, illegal alienation and acquisition of individual and community land by public and private entities and illegal alienation of public land and trusts.[157] The Truth, Justice and Reconciliation Commission found that the colonial land laws, policies and practices had both immediate and long term effects, the main one being that land remains one of the major causes of inter and intra community conflicts.[158]

The Commission found that the land regime in Kenya, whether trust land, government land, or group ranches, has resulted in de facto discrimination and led to the massive dispossession of ancestral lands of pastoralist communities.[159] The Commission thus recommended that the National Land Commission, in carrying out its mandate, expedites the process of addressing and recovering irregularly and illegally acquired land.[160] It further proposed that measures should be designed by the Ministry of Land to encourage individuals and entities to surrender illegally acquired land.

3.3.3 The National Land Commission

The National Land Policy proposed the establishment of the National Land Commission and its entrenchment in the Constitution.[161] Article 67 (2) of the Constitution establishes the National Land Commission whose functions, among others, are to advise the national government on a comprehensive programme for the registration of title in land throughout Kenya,[162] to initiate

[155] Kituo cha Sheria, *Summary of the Truth, Justice and Reconciliation Commission (TJRC) Report*, 2014, 3.
[156] Kituo cha Sheria, *Summary of the Truth, Justice and Reconciliation Commission (TJRC) Report*, 2014, 3.
[157] Kituo cha Sheria, *Summary of the Truth, Justice and Reconciliation Commission (TJRC) Report*, 2014, 45.
[158] Kituo cha Sheria, *Summary of the Truth, Justice and Reconciliation Commission (TJRC) Report*, 2014, 46.
[159] The Truth, Justice and Reconciliation Commission, *Report of the Truth, Justice and Reconciliation Commission, Volume IV*, 3 May 2013, 46.
[160] Kituo cha Sheria, *Summary of the Truth, Justice and Reconciliation Commission (TJRC) Report*, 2014, 48.
[161] Republic of Kenya, *Sessional Paper no. 3 of 2009 on National Land Policy*, 2009, 11.
[162] Article 67 (2) (c), *Constitution of Kenya* (2010).

investigations, *suo moto* or on the basis of a complaint, into present or historical land injustices and recommend appropriate redress,[163] and to encourage the application of traditional dispute resolution mechanisms in land conflicts[164]. The National Land Act provides additional functions for this commission, one of them being to monitor the registration of all rights and interests in land.[165] This enables the rights of pastoralist communities in Laikipia to be recognized upon the registration of group ranches.

3.3.4 The Kenya National Commission on Human Rights (KNCHR)

This is a Constitutional Commission that is commonly referred to as the Article 59 Commission. It is created by Article 59 of the Constitution of Kenya 2010 and is established through the Kenya National Commission on Human Rights Act, 2011. It has a blanket mandate as the state's lead agency in the promotion and protection of human rights.[166] In pursuit of its mandate, KNCHR has ensured it has continued to engage with indigenous peoples and various duty bearers. It has continued to receive and investigate complaints by indigenous people, some of which are pastoralist communities, on violation of their fundamental human rights and freedoms.[167] KNCHR publishes reports after conducting public hearings from complainants and makes recommendations as to how the government ought to address the issues faced by indigenous peoples and marginalized communities.[168]

3.4 Recognition of customary law and communal land tenure systems

Upon the assertion of the colonial authority in Kenya, western notions of property were introduced thus leading to the expropriation, subversion and destruction of African property systems.[169] Customary land tenure regimes were seen as secondary to the English proprietary systems. As *corpus juris*, customary law was legislated to rank low in comparison to colonial enactments and receive principles of the common law of England, the doctrines of equity and statutes of general application.[170] Most reception clauses guided the High Court and all subordinate courts to only invoke African customary law in civil cases subject to its

[163] Article 67 (2) (e), *Constitution of Kenya* (2010).
[164] Article 67 (2) (f), *Constitution of Kenya* (2010).
[165] Section 5 (2) (b), *National Land Commission Ac*t (Act No. 5 of 2012).
[166] https://www.knchr.org/About-Us/Establishment on 20 November 2019.
[167] https://www.knchr.org/About-Us/Establishment on 20 November 2019.
[168]https://www.knchr.org/About-Us/Establishment on 20 November 2019.
[169] Okoth-Ogendo HWO, *The Tragic African Commons*, Programme for Land and Agrarian Studies, School of Government, University of the Western Cape, 2002 at 107.
[170] Okoth-Ogendo HWO, 'The Tragic African Commons', 111.

applicability, repugnance to justice and morality.[171] This most certainly led to unrest and resistance to colonial laws by Africans as evidenced by the correspondence between the Colonial office stationed in Kenya and officials in England[172] and the debates in the parliament in the United Kingdom[173].

African customary law was recognized in the repealed constitution as the law governing matters in the Trust Lands.[174] Attaching importance to African customary law was meant to quell the resistance from Africans to the newly introduced English law. In the present legal regime, African customary law is identified as a source of law.[175] However, some requirements ought to be met for African customary law to be applied, namely, the case must be of a civil nature, one or more parties has to be subject to it or affected by it, it must not repugnant to justice and morality and it ought not be inconsistent with any written law.[176] Legal recognition of African customary law is a state effort that is seen to address the issues associated with governing land in accordance to English law only.

Communal land tenure was recognized in law by the post-independence government in the form of Trust Lands. Trust Lands, though held by County Councils, were for the benefit of local communities.[177] The present constitutional dispensation expressly recognizes a community as a jural person capable of owning land.[178] The 2010 Constitution states that community land vests in communities identified on the basis of ethnicity, culture or similar community of interest.[179] The amendments to the repealed constitution regarding whom the community land vests, is an effort by the state to deal with the issue of misappropriation of land meant for the benefit of communities by a few individuals.

3.5 The endorsement of traditional, informal and other mechanisms used to access justice

Courts and tribunals that act in a quasi-judicial capacity ought to be guided by principles laid out in the Constitution, among them, promotion of alternative forms of dispute resolution,

[171] Okoth-Ogendo HWO, 'The Tragic African Commons', 111.
[172] Debate on the colonies, 20 July 1911, *Hansard*, Vol. 28, col. 1350.
[173] https://api.parliament.uk/historic-hansard/lords/1932/may/04/kenya-land-commission on 7 November 2019.
[174] Article 115 (2), *The Constitution of Kenya* (Repealed).
[175] Section 3 (2*), The Judicature Act* (Act No. 16 of 1967).
[176] Section 3 (2*), The Judicature Act* (Act No. 16 of 1967).
[177] Article 115 (2), *The Constitution of Kenya* (Repealed).
[178] Article 61 (1), *The Constitution of Kenya* (2010).
[179] Article 63 (1), *The Constitution of Kenya* (2010).

including traditional dispute resolution mechanisms.[180] Traditional dispute resolution mechanisms, nonetheless, ought to be used in a way that, upholds the Bill of Rights, is not repugnant to justice and morality or does not result in outcomes that are repugnant to justice or morality and is consistent with the Constitution and any other written law.[181]

A taskforce was created and mandated to formulate an Alternative Justice System policy in support of the Constitution of Kenya.[182] The Taskforce on Traditional, Informal and Other Mechanisms Used to Access Justice in Kenya, otherwise referred to as Alternative Justice Systems, consults widely as it develops a Policy on Alternative Justice Systems with a view to enhancing access to, and expeditious delivery of, justice for all citizens.[183] Alternative justice processes have helped reduce the burden on courts in marginalized areas.[184] Some regions in rural Laikipia are an example of such areas. Pastoralists rely heavily on consulting with elders should any issue arise.

The taskforce consults academics, practitioners, the public and other experts to determine the role the Judiciary, as an agent of the State, ought to play in recognizing and regulating alternative justice system mechanisms.[185] The taskforce, in furtherance of its mandate, seeks to determine the relationship between such mechanisms and courts and tribunals as established in the constitution.[186] Additionally, the taskforce also seeks input on the manner in which the rights of the vulnerable and marginalized groups should be upheld and protected in Alternative Justice Systems processes and on the enforcement of outcomes of these processes.[187]

During the National Alternative Dispute Resolution Stakeholders Forum held between 12th and 13th April in Nairobi in conjunction with the Kenyan Judiciary's Taskforce on Alternative

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[180] Article 159 (2) (c), *The Constitution of Kenya* (2010).
[181] Article 159 (3), *The Constitution of Kenya* (2010).
[182] https://www.unodc.org/easternafrica/en/call-for-submissions-on-landmark-alternative-justice-system-policy.html on 21 November 2019.
[183] https://www.unodc.org/easternafrica/en/call-for-submissions-on-landmark-alternative-justice-system-policy.html on 21 November 2019.
[184] https://www.unodc.org/easternafrica/en/call-for-submissions-on-landmark-alternative-justice-system-policy.html on 21 November 2019.
[185] https://www.unodc.org/easternafrica/en/call-for-submissions-on-landmark-alternative-justice-system-policy.html on 21 November 2019.
[186] https://www.unodc.org/easternafrica/en/call-for-submissions-on-landmark-alternative-justice-system-policy.html on 21 November 2019.
[187] https://www.unodc.org/easternafrica/en/call-for-submissions-on-landmark-alternative-justice-system-policy.html on 21 November 2019.

Dispute Resolution and the Nairobi Centre for International Arbitration (NCIA), the Deputy Chief Justice Philomena Mwilu remarked that,

> "The Constitution of Kenya (2010) envisions a multifaceted, pluralistic judicial operative that recognizes the coexistence of alternative dispute resolution and alternative justice systems within and alongside the formal justice system. The judiciary is committed to realizing this and continues to support and undertake activities towards operationalizing alternative dispute resolution throughout the judicial system."[188]

Kenya's new constitutional dispensation appreciates the symbiotic and complementary nature of both the formal justice system and the wealth of traditional systems that have been operating in Kenya at the community level for several years.

3.6 Use of military and security troops force

The state efforts discussed throughout this chapter are in themselves positive or have an inherent expected positive result. The state has not always employed peaceful means to resolve the land issue between ranchers and pastoralists in Laikipia. When need arises, the national government has often deployed other security forces to different areas to supplement the police. In March 2017, President Uhuru Kenyatta, deployed the military to work with the police in arresting the insecurity due to the rampant fights lodged by pastoralists on ranchers in Laikipia.[189]

The Kenya Defence Forces have the constitutional mandate to defend and protect the sovereignty and territorial integrity of Kenya, assist and cooperate with other authorities in situations of emergency or disaster and report to the National Assembly whenever deployed in such circumstances and to restore peace in any part of Kenya affected by unrest or instability, only when such deployment is approved by the National Assembly.[190] The New York Times reported as follows, "The Kenyan government has deployed hundreds of police officers and soldiers, some in bulletproof cars and Humvees, declaring parts of Laikipia 'dangerous and

[188] https://www.idlo.int/news/highlights/enhancing-access-justice-through-alternative-dispute-resolution-kenya on 21 November 2019.
[189] https://www.theguardian.com/world/2017/mar/19/kenya-range-war-reopens-colonial-wounds on 21 November 2019.
[190] Article 241, *The Constitution of Kenya* (2010).

disturbed', which is like a local state of emergency that gives officers more power to crack down on invaders.[191]

Grave human rights violations were reported from this military exercise in Laikipia. The Kenya Human Rights Commission rolled out a report on how Kenya faired regarding security and justice matters on 29th July 2017. They included in the report that a spate of violence, several injuries, multiple deaths, displacement of many from their homes and human rights violations that re-victimized already besieged communities characterized the deployment of Kenya Defence Forces in Laikipia.[192] The outcome of the deployment of Kenya Defence Forces to Laikipia was waged war on pastoralists, specifically, and massive shooting of livestock.

3.7 Conclusion

Since independence there has been no genuine political will on the part of the State to address grievances and disputes relating to land, and as such, all post-independence governments have failed to honestly and adequately address land-related injustices that started during colonialism.[193] This failure on the part of the colonial and post-independence governments is the reason the communities often resort to self-help measures such as violence. This study seeks to propose that Community Justice Systems ought to be resorted to as they do not require the pastoralists and ranchers in Laikipia to only depend on the government to address the land problem. In essence, it involves all members of the community working together towards addressing their own problems and finding a solution that benefits both groups.

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[191] https://www.nytimes.com/2017/07/29/world/africa/africa-climate-change-kenya-land-disputes.html on 21 November 2019.

[192] Kenya Human Rights Commission, *Kenya's scorecard on security and justice: Broken promises and unfinished business*, 29th July 2017, 25.

[193] Kituo cha Sheria, *Summary of the Truth, Justice and Reconciliation Commission (TJRC) Report*, 2014, 47.

CHAPTER FOUR: A QUALITATIVE COMPARISON OF COURTS AND COMMUNITY JUSTICE SYSTEMS AND THE ROLE OF COMMUNITY JUSTICE SYSTEMS IN STRIKING A BALANCE BETWEEN THE COMPETING INTERESTS.

4.0 Introduction

Disputes over land are dealt with formally through courts and arbitration and informally using alternative dispute resolution mechanisms. This chapter seeks to juxtapose the resolution of land disputes through courts and using community justice systems. Thereafter, the similarities, differences and unique aspects of each system drawn from the comparison will be pit against each other to determine which of the two- courts or community justice systems- is a more ideal means of resolving the conflicts over land in Laikipia.

This chapter is divided into three main parts. It begins by looking at resolution of land disputes using the court system, the jurisdiction of the courts that deal with land matters and the challenges the court system presents. The chapter, in the second part, then focuses on resolution of land matters using community justice systems- an alternative dispute resolution mechanism that is specifically tailored to the need to resolve the land issue unique to Laikipia. The last part picks out which of the two is more suited to efficiently address the land issue in Laikipia.

4.1 Resolution of land related disputes using courts

The Constitution of Kenya (2010) directed parliament to establish courts with the status of the High Court to hear and make determinations on disputes relating to the environment and to the use, occupation and title to land.[194] Parliament fulfilled this mandate by passing a law to establish the Environment and Land Court. In carrying out its mandate under the Environment and Land Court Act, the Environment and Land Court ought to facilitate the just, expeditious, proportionate and accessible resolution of disputes governed by the Act.[195]

The Environment and Land Court Act has original and appellate jurisdiction to hear and determine all disputes, among others, relating to title, tenure and boundaries of land[196] and land administration and management[197]. Additionally, the court is not confined to any particular

[194] Article 162 (2) (b), *The Constitution of Kenya* (2010).
[195] Section 3 (1), *The Environment and Land Court Act* (Act No. 19 of 2011).
[196] Section 13 (2) (a), *The Environment and Land Court Act* (Act No. 19 of 2011).
[197] Section 13 (2) (c), *The Environment and Land Court Act* (2011).

category of land, that is, it can determine disputes relating to public, private and community land, including contracts, choses in action or other instruments granting any enforceable interests in land.[198] The Act emphasizes that nothing stated therein shall preclude the court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.[199] This is a limiting clause because it provides for the addressing of cases based only on the right to a clean and healthy environment. This study has brought to light the denial and violation of, and threat to the rights of pastoralists to the land meant to be held in trust for them. The Environment and Land Court Act fails to include the claims of pastoralists in the jurisdiction of the Environment and Land Court.

The Environment and Land Court is expected to be guided by principles laid down in the Act. One such principle is the principle of sustainable development that includes adherence to cultural and social principles traditionally applied by any community in Kenya for the management of the environment or natural resources in so far as the same are relevant and not inconsistent with any written law.[200] Pastoralism is a way of life that involves moving from place to place in search of pasture. As such, communal land ownership is more suited to sustain pastoralism. Therefore, misappropriation of community land hinders pastoralists from practising their way of life. As such, individuals who misappropriate land meant for pastoral communities ought to be brought to account regarding the violation of the land rights of the relevant communities. The Environment and Land Court, despite having the status of the High Court as a superior court, does not have the jurisdiction to hear such a matter.

Communities aggrieved due to violation of their land rights have recourse in the High Court. The High Court has the jurisdiction to determine questions of denial, violation, infringement or threatening of a right or fundamental freedom.[201] However, the jurisdiction of the High Court, as laid out in the constitution, does not extend to matters falling within the jurisdiction of the Environment and Land Court.[202] This therefore presents a challenge considering the confinement of the wording of the Environment and Land Court Act regarding determination of

[198] Section 13 (2) (d), *The Environment and Land Court Act* (2011).
[199] Section 13 (3), *The Environment and Land Court Act* (2011).
[200] Section 18 (a) (ii), *The Environment and Land Court Act* (2011).
[201] Article 165 (3) (b), *The Constitution of Kenya* (2010).
[202] Article 165 (5) (b), *The Constitution of Kenya* (2010).

matters on the right to a clean and healthy environment. I, based on this assessment, opine that the courts are not best suited to make a determination on matters to do with rights of communities to land.

4.2 How the courts have dealt with cases on the land rights of indigenous and marginalized communities

4.2.1 The Maasai occupying Kedong Ranch in Nakuru

The Government of Kenya initiated a geothermal extraction project in Nakuru County.[203] However, this project was met by resistance because the Maasai living in Nakuru vowed to keep their ancestral lands. A few representatives filed a suit raising the adverse effects of the geothermal project and to bar the subdividing and selling of the land which the Maasai depended on for communal grazing and extraction of sale for sand. The basis of the claim was that the property in question, Kedong Ranch, was claimed by the Maasais as their ancestral land.[204] The court, in determining the status of the land, classified it as private land stating that it was registered under a leasehold interest during the colonial era for a period of nine hundred and ninety nine years. The judge categorically stated that the status of the land as community land at one point and entitlement by ancestry was immaterial. The judge went ahead to challenge the claim by the petitioners of the land being held in trust for the Maasai community asking whether it is a trust in customary law and the exact kind of trust was envisaged. Despite Section 28 of the Land Registration Act providing for overriding interests to be enjoyed by others despite registration to a private proprietor, the judge held that the Maasai were not entitled to any rights in Kedong Ranch and were, in fact, trespassers on the land.

A challenge posed with approaching the courts regarding claims of a community to land is the *locus standi* of the petitioner. In this case, Justice Munyao Sila referred to Article 22 (2) of the Constitution of Kenya to determine the veracity of the suit as a representative action. However, he highlighted the risks of a petitioner claiming to be acting in the interest of a group or class of persons to which he affirms that he is a member or one person claiming to be representing a whole tribe or community of persons. Issues of the mandate of the petitioner and the interest of the community in the matter being litigated have to be determined by the court. In this case, it was held that the petitioners were rightfully before the court on behalf of the residents in Kedong

[203] https://www.culturalsurvival.org/news/kenyan-government-manipulates-courts-dispossess-maasai-their-lands on 26 November 2019.
[204] *Parkire Stephen Munkasio and 14 others v Kedong Ranch Limited & 8 others* [2014] eKLR.

Ranch. In cases where the court rules differently, this could be an obstacle to a petitioner acting on behalf of an indigenous or marginalized community as the *locus standi* is decided on a case to case basis.

4.2.2 The Ogiek as an indigenous community occupying the Mau

The applicants in this suit filed the petition on behalf of the Ogiek people claiming that forced eviction from the East Mau forest and its allocation to the respondents in the case was an infringement of their right to their ancestral land.[205] The court found that the Ogiek people depended on the Mau forest for their livelihood, way of life, cultural and ethnic identity. The applicants argued that their right to property as enshrined in the constitution was infringed. The court stated that such infringement was not proven. The court affirmed that conferment of propriety rights is marked by way of formal processes which include allocation, transfer and registration of title, or, in the absence of a legal title of ownership, transactions that confer beneficial interests in land. Failure of the Ogiek community to prove any backing of their property rights claims using any of the above processes caused them to lose their claim to the Mau forest. The judge in this matter distinguished this case from the case of *Kemai & Others vs Attorney General & 3 Others* where the applicants were still members of the Ogiek community. In the Kemai case, the court pointed out that for the Ogiek community to occupy the Mau forest, they needed a license in order to comply with the Forest Act.

There are disadvantages that arose from filing this suit in court. First, the decision of the Kemai court was in total disregard of the livelihood and reality of the Ogiek as a hunter-gatherer community that has since pre-colonial era occupied land in the East Mau forest. Additionally, the Joesph Letuya suit was instituted in 1997 and the judgment was issued in 2014. Grave human rights violations of the Ogiek community had been occasioned by the fact that the suit was in court for close to two decades.

4.2.3 The decision of the African Court on Human and Peoples' Rights regarding the eviction of the Ogiek from the Mau by the Government of Kenya

This case was filed before the African Commission on Human and Peoples' Rights in 2006.[206] It was then referred to the African Court on Human and Peoples' Rights which issued its

[205] *Joseph Letuya & 21 others v Attorney General & 5 others* [2014] eKLR.
[206] https://icj-kenya.org/news/latest-news/104-huge-victory-as-ogiek-community-win-against-kenya-in-african-court on 30 November 2019.

judgment in 2017.[207] The Applicants from the Ogiek community submitted before the court that the Government of Kenya, through the Kenya Forest Service issued them with eviction notices to vacate the Mau forest. They argued before the court that the government acted in oblivion of their state as an indigenous minority community that depended on the Mau for their survival. The Applicant submitted that the Ogiek had been continually subjected to several evictions during both the colonial period and these continued after the independence of the Respondent state. The Ogiek community approached the African Commission on Human and Peoples' Rights because they contended that they tried to approach the local and national administrative offices, taskforces, commissions and national courts but their efforts were unsuccessful. The African Court on Human and Peoples' Rights held that the Government of Kenya had violated the rights of the Ogiek to their ancestral land in the Mau forest. The court ordered the Government of Kenya to take all appropriate measures to remedy the human rights violations occasioned on the Ogiek community and report to the court, informing it of the measures taken.

This case presented a number of challenges. The respondent challenged the legal status of the African Commission of Human and Peoples' Rights acting in its capacity as the applicant on behalf of the Ogiek community. Yet another challenge the Ogiek community faced was the requirement to comply with the rule of exhaustion of local remedies. The Applicant presented evidence to the court affirming that the Ogiek had litigated several cases before the national courts. Of the cases, a majority were decided against the Ogiek while others were pending. Injustices are occasioned on applicants when cases drag because human rights violations continue to occur during the time which a case is in court.

4.3 Community Justice Systems in resolving land disputes

The Constitution of Kenya recognizes alternative dispute resolution mechanisms as a means to resolve disputes in Kenya.[208] The Constitution directs the National Land Commission to encourage use of traditional dispute resolution in land conflicts and disputes.[209] Though embedded in law, the repugnance clause ranks traditional dispute resolution mechanisms lower than formal justice systems. Nonetheless, the current constitutional dispensation and supporting legislation recognizes traditional dispute resolution mechanisms as a means of solving land

[207] *African Commission on Human and Peoples' Rights (on behalf of the Ogiek Community) v Republic of Kenya*, ACmHPR Comm. 006/2012.
[208] Article 159 (3), *The Constitution of Kenya* (2010).
[209] Article 67 (2) (f), The Constitution of Kenya (2010).

disputes among traditional African communities. Resolution of land disputes using local community initiatives consistent with the Constitution, is anchored in the law.[210]

Traditional African communities have their unique cultures, methods, procedures and mechanisms which have been central in resolution of their disputes.[211] Land in African traditional societies surpasses the constricted view of land as a political or economic resource as it is a medium that signifies unity of social and spiritual relations throughout different generations.[212] Looking at land from this African lens points out the non-justiciable nature of land disputes among African traditional communities. Based on this, traditional dispute resolution mechanisms are employed to resolve land disputes in African traditional societies.

With reference to the groups of focus in this study, it is crucial to define what a community is in order to determine if a community justice system rightly applies to them. Wood and Judikis describe a community as a group of people with a sense of common purposes and/or interests, for which they assume mutual responsibility, acknowledge their interconnectedness, respect individual differences among members, and commit themselves to the wellbeing of each other and the integrity and wellbeing of the group.[213] Emphasis is put on the interconnectedness, mutual responsibility and commitment of a community which are vital for dispute resolution and enforcement of group decisions. This definition also departs from ethnocentrism that offers a constricted understanding of what a community is.

The Constitution defines a community on the basis of culture, ethnicity and a community of interest.[214] Community of interest can be acquired through occupancy, long residence in a given locality and social acceptance.[215] As discussed in this study, it would be accurate to infer that the pastoralists and ranchers form a community based on similar interests in cattle rearing. Based on the concept of 'community of interest', communities have devised frameworks for peace

[210] Article 60 (1) (g), *Constitution of Kenya* (2010).
[211] Ng'etich R., 'The Rejected Stone May Be the Cornerstone: A Case for the Retention of Traditional Justice Systems as the Best Fora for Community Land Disputes in Kenya', *Strathmore Law Review*, 2016, 143.
[212] Republic of Kenya, *Report of the Commission of inquiry into the land law system of Kenya*, 19.
[213] Wood G & Judikis J, *Conversations on Community Theory,* Purdue University Press, 2002, 12.
[214] Article 63 (1), *Constitution of Kenya* (2010).
[215] Kameri-Mbote P, *Ours by Right: Law, Politics and Realities of Community Property in Kenya,* Strathmore University Press, 2013, 151.

building, problem-solving, dispute resolution, improving a community's way of life, community crime prevention, community policing and community defense.[216].

Additionally, community justice systems are more suitable in resolving land disputes because as opposed to the formal justice system that focuses on settlement, they focus on resolution.[217] Community Justice Systems focus on dispute prevention or avoidance and restorative justice as opposed to retributive justice.[218] Rather than just focusing on determining who of the parties to a dispute has title to land, community justice systems further deal with underlying problems to the dispute such as clashing interests. With reference to the two groups of interest in this study, rather than a court or tribunal determining who holds title to the land being fought over, community justice systems seek to understand the underlying values and feelings of each party to the dispute.

4.4 Conclusion: A proposition, on a balance, of the best suited mechanism to address the land issue in Laikipia

As discussed in this chapter, the formal justice system has time and again occasioned an injustice to the indigenous and marginalized communities in Kenya due to complex procedures, among other factors. Costs of filing suits in national courts is high but more so in regional courts. Moreover, pastoralist communities comprise mostly of illiterate people. As such, they are ignorant of the law and its procedures and legal representation tends to be costly. All these coupled with several other factors supports the position that courts are not the best suited means to resolve land disputes to which pastoralist communities are a party to.

Community Justice Systems are best suited to resolve the land disputes between ranchers and pastoralists in Laikipia. The National Land Policy defines a community as a clearly defined group of users of land who need not be of a similar clan or ethnic community and hold clearly defined rights and obligations to land and land-based resources.[219] The culture of cattle rearing among ranchers and pastoralists and a similar community of interests rightly groups the pastoralists and ranchers as a community. This study thus proposes that a tailor-made

[216] Tharp D and Clear T, *Community Justice: A Conceptual Framework,* Criminal Justice, 2000, 323-329.
[217] Ng'etich R., 'The Rejected Stone May Be the Cornerstone: A Case for the Retention of Traditional Justice Systems as the Best Fora for Community Land Disputes in Kenya', *Strathmore Law Review*, 2016, 162.
[218] Kariuki F, 'Community, Customary and Traditional Justice Systems in Kenya: Reflecting on and Exploring the Appropriate Terminology' 3 *Alternative Dispute Resolution* (2015), 168.
[219] Republic of Kenya, *Sessional Paper no. 3 of 2009 on National Land Policy*, 2009, 63.

community justice system specifically for the pastoralists and ranchers in Laikipia is the most efficient means to resolve the land issue.

CHAPTER FIVE: CONCLUSION, FINDINGS AND RECOMMENDATIONS

5.0 Introduction

This chapter wraps up this study by stating the findings, addressing the objectives set out at the beginning of the study and offers recommendations on how best to resolve the land disputes in Laikipia between ranchers and pastoralists.

5.1 Findings based on this study

a) The Kenyan legal framework supports the property rights of both ranchers and pastoralists.
b) The land disputes between ranchers and pastoralists in Laikipia can be efficiently and effectively resolved using Community Justice Systems.
c) The imposition of colonial laws and the English land holding system by the British in Laikipia adversely affected the communal land tenure system among pastoralists in Laikipia, Kenya.
d) Land alienation measures by the colonial government, specifically the Maasai agreements, caused the pastoralists in Laikipia to lose their land to the Crown. This land was in turn vested in ranchers.
e) African customary law and communal land tenure was undermined and disregarded by the colonial government. English laws and privatization of property were given priority.
f) Both ranchers and pastoralists have different claims to the same parcels of land in Laikipia.
g) The post-colonial government employed various efforts to address the unsatisfaction of the pastoralists in Laikipia but they mostly turned out to be unsuccessful.
h) Misappropriation of Trust Lands further caused pastoralists in Laikipia to lose their land.
i) Recognition of African customary law as a source of law in Kenya is not enough because of the repugnance clause.
j) Traditional dispute resolution mechanisms are ranked lower than formal justice systems.

5.2 Recommendations

The following are solutions this study proffers to resolve the land issue in Laikipia:

5.2.1 A shift in focus from land ownership to land use

The Government of Kenya and relevant authorities ought to focus on land use as opposed to land ownership when dealing with the land issue in Laikipia. From a strict positivist view of the law, ranches fall in the category of private property and is owned by individual ranchers. However, so as to balance the competing interests between ranchers and pastoralists over the same parcels of land, measures have to be put in place to ensure they benefit from the large parcels of land bordering community land. Benefit rights such as migratory corridors ought to be given to pastoralists despite not holding title to ranches.

5.2.2 An investigation into the claims of illegally acquired community land in Laikipia

The National Land Commission has been tasked with the mandate to inquire into the status of illegally acquired land and make recommendations regarding such parcels of land.[220] The National Land Commission ought to look into claims of historical land injustices in Laikipia. The law states that for historical land injustice claims to be permissible, they have to have been occasioned by colonial occupation, an agreement or treaty between the government and a community during the colonial era or an inequitable land adjudication process.[221] These three requirements are all present in the situation in Laikipia.

The National Land Commission ought to look into the claims to land in Laikipia and make recommendations that will not be prejudicial to either *bona fide* rancher owners or pastoralists. The law provides remedies to claimants affected by historical land injustices in Kenya.[222] They include restitution and, in instances where it is impossible to restore the land, compensation. Additionally, rehabilitation by providing social infrastructure and programmes on affirmative action for communities that are marginalized such as the pastoralist communities in Laikipia is an available remedy. Lastly, revocation of title to illegally acquired land or an official declaration of public land and its reallocation, and injunctions orders of a declaratory or preservative nature are further remedies pastoralists in Laikipia are entitled to. Availing these remedies to pastoralists in Laikipia after ascertaining the legality of the claims will avert the attacks occasioned on ranch owners who have illegally acquired community land.

[220] Section 5 (e), *National Land Commission Act* (Act No. 5 of 2012).
[221] Section 38 (4), *Land Laws (Amendment) Act* (Act No. 28 of 2016).
[222] Section 38 (d), *Land Laws (Amendment) Act* (Act No. 28 of 2016).

5.2.3 Educating pastoralists on sustainable cattle keeping methods and other means to gain a livelihood

As discussed in chapter one of this study, one of the key reasons for the feuds over land in Laikipia is the persistent seasonal drought and the adverse effects of overgrazing on community land. Rangelands affected by overstocking and overgrazing ought to be rehabilitated to avoid the invasion of pastoralists on ranches during the dry season Pastoralists ought to be educated on sustainable cattle rearing practices and alternative ways of earning a living. This will enable pastoralists to avoid practices such as overstocking that cause land to deteriorate. Moreover, finding alternate means of livelihood will enable pastoralists to engage in activities that enable them to lead decent lives regardless of weather conditions

5.2.4 Constituting of a tribunal for the purpose of resolving disputes in Laikipia between ranchers and pastoralists

From the discussion in chapter four, this study affirms that community justice systems are the best suited mechanisms to resolve the land disputes in Laikipia between ranchers and pastoralists. A tribunal specifically tailored to resolve the land issue between ranchers and pastoralists ought to be constituted to conduct hearing of claims over the same parcels of land. The Judiciary through the Judiciary Taskforce on Alternative Justice Systems ought to proffer solutions based on means that have been proven to work based on pilot schemes and to ensure documentation of the outcomes of the sessions. Elders from different pastoralist communities in Laikipia and representatives of ranchers ought to form part of the tribunal to ensure just outcomes.

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