CURBING THE INDIVIDUALISATION OF COMMUNITY LAND RIGHTS IN KENYA

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By
Mary Gakenia Kogi
Adm No. 078229

Prepared under the supervision of
Francis Kariuki

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DECLARATION

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

Signed: .....

Date: .....

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

Signed:.....

Mr Francis Kariuki

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DEDICATION

To God for His grace and my family for their inspiration, good will and prayers which have followed me all my life.

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ABSTRACT

Community land rights are not adequately catered for in law, policy in Kenya. This is because first, they have not been given as much attention as the other forms of tenure. Second, the informal nature of customary rights has led to its distortion and misinterpretation. As a result, there has been neglect and abuse of community land that has led to the individualization of such land. This individualization of land takes place in the form of conversion of community tenure into private or public. The study sought to investigate whether the current land laws adequately secure community land rights and recognize customary law independently as they do to other forms of tenure hence the continuous individualization of community rights.

The study was conducted through literature review in a thematic approach where literature acknowledgement is done, of the various authors who have similarly addressed the issue. This includes the unravelling of the causes of individualization of community land. As seen, there were many land legislations that were effected in Kenya to try and support community tenure up to date but the land conflicts continue.

Inorder to try and resolve some of the issues with regards to community land, codification of law alone, does not necessarily help in recognition of community tenure because customary laws by their nature change with the socio-economic factors. The study recommends that these rights should be allowed to exist on their own and accommodate cultural diversity. Kenya is encouraged to acknowledge that the dynamics and local resources such as indigenous knowledge systems and the needs of the people, must guide government's land tenure reform programme.

LIST OF ABBREVIATIONS

ELC	Environmental Land Court
ANC	African National Congress
CLRB	Community Land Rights Board
CLARA	Community Land Rights Act
IPILRA	Interim Protection Information Land Rights Act
CRLR	Commission on the Restitution of Land Rights
IDPs	Internally displaced persons

LIST OF STATUTES

Community Land Act, (2016).

Constitution of South Africa, (1996).

East African Order in Council, (1897).

Forests Act, (2005).

Groups Representative Act, (1970) Repealed.

Indian Land Acquisition Act, (1894).

Interim procedures, Interim Protection of Informal Land Rights Act, (1996).

Land Act, (2012).

Land Group Representatives Act, (Cap 287, 1968) Repealed.

Land Titles Ordinance, (1908).

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The Crown Lands Ordinance, (1915).

The Land Registration Act, (2012).

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Trust Lands Act, (Cap 288, 2010) Repealed.

LIST OF CASES

Isaka Wainaina v. Murito wa Indagara, 9 EALR, 102,(1992).

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Tongoane and Others vs Minister for Agriculture and Land Affairs and Others, 2010 (6), SA 214.

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CHAPTER ONE
Introduction to the study

1.0 Introduction

Land, which is a natural landscape, has been an important and key subject of debate in Kenya. Community land is land owned by communities on the basis of their ethnicity, culture or similar community of interest.[1] This land is held for the benefit of all members of the community. The neglect and abuse of community land has led to the individualization of such land as a defense against perceptions that community land is owned by nobody, even in areas where the suitable land use and cultural norms favor community ownership of land.[2] The attendant laws over the years have tried to address the issue of land but have proved to be inadequate especially with regards to grazing rights on communal land. As a result of lack of this, individuals have easily allocated land as they wish with disregard to the community that enjoys the rights to the land.[3] The research therefore tries to identify and emphasize the need to recognize customary law independently. It also tries to ensure the interests of all the members are taken into consideration during allocation of rights and duties to the land by trying to curb individualization of land rights which has left majority of the communities dispossessed.

1.1 Background

Historically, land in Kenya was owned communally and it was strictly guided by the customary law of the various communities.[4] Communities have been seen to play a major role in the management and of communal land and land resources.[5] Before the promulgation of the 2010 Constitution of Kenya, customary rights were not given much attention in law.[6] This is seen by the fact that the land laws pay more attention to private and public tenure as much as the Constitution recognizes communal tenure under Article 63.[7] The political authorities in the community

[1] Article 63(1), *Constitution of Kenya* (2010).
[2] www.theeastafrican.co.ke/OpEd/comment/Community-land-in-EA-is-not-a-precursor-of-private-ownership-/-/434750/1869300/-/item/1/-/qam2rt/-/index.html <Accessed on 12th December>.
[3] www.theeastafrican.co.ke/OpEd/comment/Community-land-in-EA-is-not-a-precursor-of-private-ownership-/-/434750/1869300/-/item/1/-/qam2rt/-/index.html <Accessed on 12th December>.
[4] Kameri-Mbote, P, *Property Rights and Biodiversity Management in Kenya*, ACTS Press, Nairobi, 2002, 6.
[5] Clarke, R.A,'Securing Community Land Rights to Achieve Sustainable Development in Sub Sahara: Critical Analysis and Policy Implications, 5(2) *Law Environment and Development*, 2009, 130-151.
[6] Migai Akech, '*Rescuing the Indigenous Tenure from the Ghetto of neglect: Inalienability and protection of customary rights in Kenya*'; ACTS Press, 2001, 8.
[7] Article 63, *Constitution of Kenya* (2010).

exercised control rights over the land which was referred to as the commons.[8] This identified the existence of organized land and resources available exclusively to specific communities, or families operating as corporate entities.

The coming of the colonialists saw the introduction of formal systems of land ownership. The British settlers took advantage of the nomadic nature of most African communities as a basis of claiming that Africans did not own any particular property and were completely unaware of the idea of property ownership. Land was alienated from customary systems, for the use of white settlers, who relied on African labour. Africans were restricted to "native reserves" which formed the basis of ethnically-defined administrative units, which are the results of today's districts and locations.[9] Every ethnic group in Kenya experienced land losses, though some communities lost more than others. For example, in 1904 the Maasai were moved from their preferred grazing grounds in the central Rift Valley, to two 'reserves', and then in 1911 one of these reserves was again moved, against the wishes of the pastoralists.[10]

The many problems faced by the native communities in the reserves led to the formulation of the Swynnerton Plan by the colonial government.[11] The plan recommended tenure reforms where African farmers would be provided with, in the first instance, the consolidation of different holdings or the enclosure of communal lands. More generally, within areas held under 'common property' tenure systems, adjudication of customary land, and group-ranch legislation for example in Maasai areas; led to the individualization and sale of plots.[12]

The aspect of individualization of land was further introduced through the registration of the titles held by individual Africans. The East African Royal Commission of 1953-1955 concluded that individualization of land ownership should be a main policy.[13] However, such ownership should not be confined to individuals only but to extended groups such as customary associations and cooperatives of Africans.[14]The registration of titles was effected by the Native Lands Registration Ordinance of 1959, which introduced a registration system based on the

[8] HWO Okoth Ogendo, '*The Tragic African Commons: A Century of Expropriation Suppression and Subversion'*, 2002,8.
[9] Judi W, Chris H and Elvin N, 'Land Tenure and Violent Conflict In Kenya',(2008),12.
[10] Hughes and Lotte. 'Rough Time in Paradise: Claims, Blames and Memory Making Around Some Protected Areas in Kenya" in Conservation and Society, 5 (3), (2007),7-9.
[11]R.J.M Swynnerton, 'A Plan to Intensify the Development of African Agriculture in Kenya', (1955), 14.
[12] Judi W, Chris H and Elvin N, 'Land Tenure and Violent Conflict In Kenya', (2008),13.
[13] *Report of East Africa Royal Commission*, 351, (1953-1955).
[14] *Report of East Africa Royal Commission*, 351, (1953-1955).

English model where all rights and interests which were in existence under customary law were extinguished which led to the subjugation of customary tenure systems.[15]

It became more evident that in instances where the state or the individuals take over ownership of the land access for the communities previously inhabiting, the land was curtailed. The enactment of the Trust Lands Act[16] led to the creation of a trusteeship system where the former native reserve areas were now vested on the County Councils established and this Act regulated the manner in which these lands were to be held and administered.[17]However, county councils, which are the trustees of Trust Land, have many cases disposed of trust land irregularly and illegally. Further, in the case of pastoral communities, the group representatives entrusted with the management of that land have in many cases disposed of group land without consulting the other members of their groups.[18] Groups of persons holding land had their rights catered for under the Land (Group Representatives) Act[19] and this for the first time led to the catering of the rights of groups holding land which included ethnic communities. This system was later to experience challenges of dispossession of the group members by those who represented them who converted the land into private land without the knowledge of the group members.[20]

The National Land Policy defines community as a group of users of land which may, but not be a clan or ethnic community. It has also identified a few issues that have arisen such as; the fact that the process of individualization of tenure has undermined traditional resource management institutions and ignored customary land rights not deemed to amount to ownership.[21] Another challenge facing community land rights is negative ethnicity that has challenged national integration, sustainable and optimal land use.[22] This is evident from the 2007 post-election violence, where most of the effects were seen thorough most of the communities that were left landless. It further gives recommendations on securing community land under section 66 of the same.

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[15] Smith Otieno, 'Community Land Rights In Kenya', (2013),6.
[16]Section 14, *Trust Lands Act*, (Cap 288, 2010) Repealed.
[17] Smith Otieno, 'Community Land Rights In Kenya', (2013),7.
[18] Section 65, *Sessional Paper No. 3 of 2009 on National Land Policy,* (2009).
[19] *Land Group Representatives Act*, (Cap 287,1968)Repealed.
[20] Smith Otieno, 'Community Land Rights In Kenya', (2013),7.
[21]Section 64, *Sessional Paper No. 3 of 2009 on National Land Policy,* (2009).
[22] Patricia K, Collins O, Celestine M, Muirigi K, '*Ours by Right: Law Polictics and Realities of Community Property in Kenya*', 2013, 31.

The delay of the enactment of the drafted Community Land Bill can also be said to contribute to the ignorance of community land rights. The Community Land Bill 2015, being not just an ordinary land legislation is said to govern most of the country's land.[23] It addresses the rights of communities in accessing community land rights and seeks to unfold the transition following the last elections in 2007-2008 which led to cases of corruption by the former county councils in dealing with trust lands during the period of change over to county governments. However, this bill was finally enacted as the Community Land Act of 2016.

Various case studies have shown the degradation of community land rights as follows for example; in the Tana River delta, the issue of land ownership and access has a complicated history to the extent that historical injustices in this region have a special emphasis in the National Land Policy. In this regard, a very large number of people in this region are squatters on their own ancestral land having no legal ownership rights over the land on which they live and derive their livelihood.[24] Research shows that from the 1960s the government sought to assist the communities by giving them land to own communally as group ranches. This was a nationwide effort and not just in the coastal region. Several group ranches were formed in the Tana delta and they formed limited companies to manage the ranches on behalf of the communities. The group ranch members then contributed money and took loans to undertake cattle ranching and other projects. Unfortunately due to various reasons including poor management and droughts, such as the one in 1984, most of the group ranches lost their livestock and were no longer profitable. However, over time, group ranch members were allocated land within the ranches to cultivate food crops for subsistence. These allotments did not have any legal documents to support ownership and therefore posed a problem.[25]

In the case of ranches such as the Wachu ranch, a group ranch decided to lease out its land to an investor where their intention was that they will be allowed by neighboring ranches to graze their livestock in those ranches. Once the ranches are leased for commercial crop production they were fenced off. Not only did group ranch members not access this land for grazing, other group ranches will no longer have access to this land as well. Unfortunately, the group ranches are not

[23] www.businessdailyafrica.com/Opinion-and-Analysis/Why-community-land-law-delay-is-worrying/-539548/2743288/-/rbrn1nz/-/index.html < Accessed on 12th December>.
[24]Pauline Makutsa, 'Land Grab in Kenya: Implications for Small-holder Farmers', A publication of the Eastern Africa Farmers' Federation, 22.
[25] Pauline Makutsa, 'Land Grab in Kenya: Implications for Small-holder Farmers', A publication of the Eastern Africa Farmers' Federation, 24.

talking to each other and agreeing on how they will share unleased land. In the not so distant future, conflicts over land, pasture and water will become severe in the delta as more group ranches lease out the land and it gets fenced off. The issue of where these people are going to be settled is not being looked into adequately as seen in the case study.[26]

This policy neglect is traceable to 1965 in Republic of Kenya, Sessional Paper Number 10, On African Socialism and its Application to National Development in Kenya.[27] The misuse of this interpretation of rules therefore led to landlessness of many members of the community because of those who took advantage. Later on, the establishment of group ranches saved various communities such as the pastoralists who sought for grazing land.

Group ranches have not worked well because the legal framework has not been efficient and has neither paid much attention to this type of land tenure. Furthermore, the National land policy continues to advocate for individual land rights. Some of the challenges presented under the individualization of communal tenure are that first, the parameters for determining communal land tenure are too general. Community land is not only based on ethnicity but also similar community of interest as stated in Article 63[28] of the Constitution of Kenya. The broad descriptions of what community land consists of gives a wide discretion to misinterpretations that may cause injustices amongst the members of the community.

1.2 Statement of the problem

Community land should benefit all the members of the community. However, over the years, the recognition and protection of community land rights has been a contentious issue. The attendant laws have tried to address this issue but have proved to be inadequate in solving disputes. As a result, the problem is seen where individuals have continuously allocated land to themselves while disregarding the other community members who should also enjoy the rights to the land. It is quite evident that, codification of law does not necessarily help in recognition of community tenure because customary laws by their nature change with the socio-economic factors and hence should be allowed to exist on their own. In order to solve these disputes of landless communities there must be faithful implementation of land policies which will need monitoring and must be

[26] Pauline Makutsa, 'Land Grab in Kenya: Implications for Small-holder Farmers', A publication of the Eastern Africa Farmers' Federation, 26.
[27] Collins Odote, 'The Dawn of Uhuru? Constitutional Recognition of Communal Land Rights', Vol.17, 2013,89.
[28] Article 63(1), Constitution of Kenya, (2010).

undertaken with community participation.[29] This is together with the independent recognition of the nature of customary laws of each community.

1.3 Research Objectives

The research will attempt to study the following research objectives;

1. The appropriateness of the current land laws in protecting community land rights.
2. Establish the challenges and assess the recognition of customary rights.
3. What recommendations can be suggested in the current legal regime to curb the problem; including how to solve non-recognition of customary law (comparative analysis).

1.4 Hypothesis

1) The current land laws do not adequately secure community land rights and recognize customary law independently as they do to other forms of tenure hence the continuous individualization of community rights.

1.5 Literature Review

This research employs a thematic approach in conducting literature review. It entails the acknowledgement of the various authors who have similarly addressed the issue. The unravelling of the causes of individualization of community land has been broken down from various research angles as follows;

a) Meaning of property and Community land rights

A community, as it has been said in the Constitution of Kenya 2010,[30] shall be identified on the basis of ethnicity, culture or similar community of interest. Communal land tenure systems in this context is used to define the form of land ownership practiced by the various African communities guided by customary law and which has evolved over time adopting new characteristics. In an article by Smith Otieno, communal forms of land ownership is in most cases guided by the customary law of the various communities holding where these customary laws and

[29] Collins Odote, ' The Dawn of Uhuru? Constitutional Recognition of Communal Land Rights', Vol.17, 100, 2013.
[30] Article 63(1), *Constitution of Kenya*, (2010).

practices vary from community to community.[31] Customary land-holding systems are the forms of land holding practices which are in most cases unwritten and practiced by the various communities under the scope of customary law.[32] He further states that the processes of adjudication, consolidation and registration of community land are not applied and thus land ownership operates in an informal context.

Clarke R.A, defines communal tenure as tenure which is a social institution in which relationships between individuals and groups govern rights, rules and values related to land use.[33]Celestine Nyamu also defines community land rights as a social system that takes shape according to the cultural context in which it is rooted.[34]

However my study tries to address the need for recognition of a social system and group of different culture where their community land rights are recognized formally under the processes of adjudication, consolidation and registration of community land.

b) Nature and classification of community land rights

Bentsi-Enchill, states that interests in land tend to vary with the type of land.[35] Customary law and its attendant rights were treated as inferior to the newly formalized rights under English law.[36]Professor Kameri also brings out the aspect of community and land rights and their role in society. She states that legal institutions for the protection of property rights need to recognize and protect the rights of local communities.[37]Okoth Ogendo describes the nature of community land rights which he refers to as commons. Commons in this case refers to, ontologically organized land and associated resources available exclusively to specific communities, lineages or families

[31] Smith Otieno, 'Community Land Rights In Kenya', (2013),2.
[32] Duncan M, 'Which way for the country': Special newspaper for the conference on the community land law, 2013,3.
[33] Clarke, R.A, 'Securing Community Land Rights to Achieve Sustainable Development in Sub Sahara: Critical Analysis and Policy Implications, 5(2) Law Environment and Development, 2009,130-151.
[34] Celestine Nyamu-Musembi, '*Breathing Life into Dead Theories about Property Rights: De Soto and Land Relations in Rural Africa*, 'Working paper 272, 2006,11.
[35] Bentsi-Enchill K, 'Do African Systems of Land Tenure Require a Special Terminology?' Journal of African Law, Vol. 9, No. 2, 1965,131.
[36] Celestine Nyamu-Musembi, '*Breathing Life into Dead Theories about Property Rights: De Soto and Land Relations in Rural Africa*, 'Working paper 272, 2006,10.
[37] Kameri-Mbote P, '*Property Rights and Biodiversity Management in Kenya*', ACTS Press, Nairobi, 2002,12.

operating as corporate entities.[38]He further explains that Africans commons, as a proprietary system, nonetheless survived. The commons survived mainly because the expectation that they would disintegrate and dissolve by reason by internal contradictions, presumed social and cultural anachronism, and inability to resist the impact of modernizing Western values did not materialize.[39] At the structural level, the commons were managed and protected by a social hierarchy organized in the form of an inverted pyramid with the tip representing the family, the middle the clan and lineage, and the base the community. At the normative level, access to the resources of the commons was open to individuals who qualify on the basis of socially-defined membership in the levels described above.

Migai Akech also describes that indigenous tenure cannot be alienated and advocates for the protection of customary rights in Kenya.[40] Kameri Mbote, Collins Odote, Celestine Musembi and Murigi K, state that colonialism did not only impose alien tenure relations in Kenya, but it also introduced, conceptual and sociological confusion in traditional tenure systems and as a result, African tenure systems have suffered.[41] My study will focus more on whether the nature of this community land rights have a legal basis for their protection.

c) ***Effects of individualization of land tenure***;

Land tenure as seen generally in various article and books, has been individualized into private ownership. In article by Celestine Musembi, he criticizes De Soto's theory of the advantages and importance of individualization of land. He states that, formal property rights cannot take all the credit because they were originally indigenous.[42] This analysis show that customary rights should be formally recognized as they existed indigenously. In an article presented on the Conference on community land, Duncan M states that without the law, individuals will easy access and allocate

[38] HWO Okoth Ogendo, '*The Tragic African Commons: A Century of Expropriation Suppression and Subversion*', 2002,1.
[39] HWO Okoth Ogendo, '*The Tragic African Commons: A Century of Expropriation Suppression and Subversion'*, 2002,1 .
[40] Migai Akech, '*Rescuing the Indigenous Tenure from the Ghetto of neglect: Inalienability and protection of customary rights in Kenya'*; ACTS Press, 2001,6.
[41] Patricia K, Collins O, Celestine M, Muirigi K, '*Ours by Right: Law Politics and Realities of Community Property in Kenya*', 2013,10.
[42] Celestine Nyamu-Musembi, '*Breathing Life into Dead Theories about Property Rights: De Soto and Land Relations in Rural Africa*, 'Working paper 272, 2006,10.

land as they wish in disregard to the community that enjoys the rights to the land in question.[43] He tries to show the effects of not securing community land rights that leads to individual allocation of the land rights. From report done on analysis on group ranches, Pauline Makutsa analyses the fact that a very large number of people in the Tana River delta are squatters on their own ancestral land having no legal ownership rights over land on which they live and derive their livelihood.[44]

Judi W, Chris H and Elvin N, state that more generally, within areas held under 'common property' tenure systems, adjudication of customary land, and group-ranch legislation for example in Maasai areas, led to the individualization.[45] My study will focus more how communal tenure can be made accessible to all the members of a community especially with regard to pastoralists and group ranches.

d) Securing of community land rights

Land tenure, has long remained a controversial, politically charged and potentially destabilizing issue. The land laws have been heavily criticized as to their failure to achieve security on community tenure as will be seen and supported in the study. In order to increase security of tenure in an African context for example Kenya, a sociopolitical process must be included of which formal law is just one aspect. Clarke A. R recognizes the importance of securing community land rights. He states that, securing communal rights of access and usage is therefore crucial to the effectiveness of any scheme which empowers communities to manage communal land.[46] This article focuses on how to achieve sustainable management of the 'commons', areas that comprise common pool resources.

Pauline Makutsa also states that government needs to secure the land rights of all communities especially where land is held communally either as groups or by government institutions such as county and municipal councils.[47] Claims for the re-turn of land and compensation for injustices

[43] Duncan M, 'Which way for the country': Special newspaper for the conference on the community land law, 2013,3.
[44] Pauline Makutsa, 'Land Grab in Kenya: Implications for Small-holder Farmers', A publication of the Eastern Africa Farmers' Federation, 22.
[45] Judi W, Chris H and Elvin N, 'Land Tenure and Violent Conflict In Kenya', 2008,3.
[46] Clarke, R.A, 'Securing Community Land Rights to Achieve Sustainable Development in Sub Sahara: Critical Analysis and Policy Implications, 5(2) Law Environment and Development, 2009,132.
[47] Pauline Makutsa, 'Land Grab in Kenya: Implications for Small-holder Farmers', A publication of the Eastern Africa Farmers' Federation, 6.

has been the current trend because many communities have been displaced.[48] My research will be directed towards establishing ways of avoiding general prescriptions and be highly context-specific. Strengthening of community-based land management authorities and community empowerment will also be an angle of research that differs from mentioned authors.

1.6 Theoretical Framework

To begin with, the study employs the theory of African Commons as explained by Okoth Ogendo. This theory describes the commons as ontologically organized land and associated resources available exclusively to specific to specific communities, lineages or families operating as corporate entities.[49] He defines community land rights as organized in the form of an inverted pyramid with the tip representing the family, the middle the clan and lineage, and the base the community. This communal aspect by Okoth therefore tries to show that customary land tenure is important to the specific communities especially for those societies which recognise and depend on the associated resources.

Another theory that is used in the study is the theory of communalism.[50] Sandel and Taylor who are main proposers of the theory analyzed that, in relation to the close relation between the individual and the community, communitarianism is the social and political philosophy that emphasizes the importance of the community in the functioning of social and political life. The two proposers further posit that because individual identity is partly constituted by culture and social relations, there is no coherent way of formulating individual rights or interests in abstraction from social contexts. This therefore shows that indigenous community land rights cannot be ignored by the individualization of community land rights. Each member of the community has right to this land rights just like all the other members of community.

Thirdly, the occupation theory is be used to illustrate the importance of the observance of community rights. This theory gives a right a party who is the original or first occupant of property entitlement to dispose of the property as they wish.[51] The essence behind the occupation theory is that given that all material resources are given to mankind in common, such material resources

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[48] Hughes and Lotte. 'Rough Time in Paradise: Claims, Blames and Memory Making Around Some Protected Areas in Kenya" in Conservation and Society, 5 (3), 2007,13.
[49] HWO Okoth Ogendo, 'The Tragic African Commons: A Century of Expropriation Suppression and Subversion', 2002, 3.
[50] M Sandel, C Taylor, 'Community and Culture: Political Liberalism; Communitarianism and Multiculturalism', 1983,6.
[51] //prezi.com/mn0giayl9vtd/property-law-occupation-theory < Accessed on 21st February 2017>.

become the private property of individuals. This therefore gives communities a basis to safeguard their rights to their ancestral land or land on which they have identified first as a group of persons.

1.7 Justification to the study

The research is important as it addresses land issues where land is viewed as an important aspect of livelihood. The study therefore tries to establish whether the law recognizes and protects community land rights, how individualization of community land rights took place from the past to date, the steps that have been progressively taken to curb the problem facing pastoralists and group ranches and whether the current legal regime recognizes customary law sufficiently enough to curb the problem.

1.8 Methodology

The research design is broadly desk research and hence largely qualitative. Both primary and secondary sources shall be used. Primary sources include the Constitution of Kenya, statute. They stated the legal framework to governing community land in Kenya that forms a critique in the study. Secondary sources such as books, journals, reports, working papers and online sources were also used.

A comparative study on South Africa is also necessary to relate and compare with how Kenya can try to curb the individualization of community rights and the flexibility it has on accessing community land rights. South Africa in itself has been trying to address historical injustices through demanding for restitution of land to those communities that were dispossessed.

1.9 Chapter Breakdown

Chapter 1: Introduction

This chapter contains the introduction to the study, background, statement of the problem, research objectives, hypothesis, literature review, theoretical framework, justification, methodology, chapter break down and conclusion.

Chapter 2: History of community land rights

This chapter contains a description of the history of community land rights and their governance.

Chapter 3: Comparative analysis with South Africa and Kenya

This section involves the comparison of the laws in South Africa and Kenya with regards to community land rights.

Chapter 4: Lessons that Kenya can learn

This section shows some of the lessons Kenya can learn from South Africa's community tenure regime.

Chapter 5: Conclusion and Recommendations

This chapter concludes the research, by stating what it has achieved and recommendations given to curb the problem.

CHAPTER TWO

History of Community Land Rights in Kenya

2.1 Introduction

The history of community land rights can be traced back from the traditional African system where land was owned communally by various communities.[1] Land was then governed under a formal system of land ownership when the colonialists came to Kenya as described in the course of this chapter. To understand the history of community land rights, it is key to note the fundamental characteristic of a community-based property rights.

2.1 Historical era of community land

Customary land law tenure system was largely obtained prior to the advent of colonialism in Kenya. Historically, land in Kenya was owned communally and it was strictly guided by the customary law of the various communities.[2] Access to land was a key aspect that gave property holding a positive feature to everyone in the community, and hence was referred to as the commons. The management and protection of such commons was in the form of a social hierarchy which was an example of an inverted pyramid; the tip representing the family; the middle, the clan and lineage; and finally the community.[3] The political authorities in the community, such as the traditional chiefs, exercised control rights over commons.[4] Over the years, communities have been seen to play a major role in management of communal land and land-based resources.[5] In this African setting, land was held as a trans-generational asset where at different levels of social organization, the management and use of the land was done in a specific manner.[6] This identified the existence of organized land and resources available exclusively to specific communities, or families operating as corporate entities.

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[1] Kameri-Mbote, P, *Property Rights and Biodiversity Management in Kenya*, ACTS Press, Nairobi, 2002, 6.
[2] Kameri-Mbote, P, *Property Rights and Biodiversity Management in Kenya*, ACTS Press, Nairobi, 2002, 6.
[3] HWO Okoth Ogendo, '*The Tragic African Commons: A Century of Expropriation Suppression and Subversion'*, 2002, 8.
[4] HWO Okoth Ogendo, '*The Tragic African Commons: A Century of Expropriation Suppression and Subversion'*, 2002, 8.
[5] Clarke, R.A, 'Securing Community Land Rights to Achieve Sustainable Development in Sub Sahara: Critical Analysis and Policy Implications, 5(2) *Law Environment and Development*, 2009,130 -151.
[6] HWO Okoth Ogendo, '*The Tragic African Commons: A Century of Expropriation Suppression and Subversion'*, 2002, 3.

2.2 Community land rights in the Pre-colonial era

During the pre-colonial era, groups were considered either agrarian or pastoral and hence could determine resource management in the interior of Kenya. With this consideration, the agrarian societies depended a lot on tilling the land for crop production while the pastoralists on the other hand, believed that all livestock was given to them by God.[7] Along the Kenya coastline, colonialism was marked mainly by the coming of the Portuguese, headed by Vasco da Gama, in the 1500s who facilitated the building of the Fort Jesus. The goal was to establish naval bases that would protect Portugal's growing trade routes since Ottoman Turks had blocked the land trails to India.[8]

However, the Asian people removed the Portuguese, especially the Arabs who invaded the Coastal Strip in early 1800s. This gave way to Islamic control under the Imam of Oman who controlled the heavy involvement of slave trade, where their activities led to mass evictions of the indigenous coastal communities from their land. They alienated the coastal communities such as the Mijikenda from their land through forceful evictions to create room for Arab settlers and through their practice of slave trade.[9] By late 19th century, under the Oman regime, trading activities fell on the hands of the British who were interested in securing the Indian trade routes. This eventually led to British colonization of Kenya.[10] The significance of this activity in relation to land is that it is a factor that made many indigenous communities, especially the Mijikenda, to flee areas that they were occupying due to fear of being captured and sold as slaves. Eventually, the indigenous communities vacated their homes, grazing and agricultural lands which were then occupied by the Arabs. This lands today constitute the most prime land in present-day Kenya.[11]

2.3 Community land rights in the colonial era

The institutions of leadership in the customary aspect were eroded by the coming of the colonialists and hence the introduction of formal systems of land ownership.[12] The colonialists acquired land from the natives in several ways. First; through conquest, whereby fighting was involved and when they defeated the native, they disposed them of their land. Secondly, was

[7] Valentine Wakoko, 'The Evolution Of Land Law In Kenya,'2015, 1.
[8] www.kenyaconstitution.org/history/early-kenya-history/ < Accessed 30th October>.
[9] www.politicskenya.net/colonial-policies-land-injustices-in-kenya/ < Accessed 30th October>.
[10] www.kenyaconstitution.org/history/early-kenya-history/ < Accessed 30th October>.
[11] TJRC, 'Report Of The Truth, Justice And Reconciliation Commission,' Vol IIB, 2013, 170.
[12] Tom O. Ojienda, 'Principles of Conveyancing in Kenya, A Practical Approach', 2007, 39.

through agreements, where the community leaders agreed to give their lands by signing of agreements with the British.[13] The white settlers, relied on African labour which was provided by the Africans who were restricted to native reserves which formed the basis of ethnically defined areas such as locations.[14]

As the years progressed, the Crown was not capable of dealing with land because that would interfere with the rights of the native owners in the region. Land that was not occupied in a protectorate was considered wasteland and the crown would declare ownership over it. The protectorate status did not confer radical title to the land in the territory in 1833 as seen in the case of the Ionian Island.[15]However, this decision was revised and the Crown was given the power to dispossess unoccupied land. The Berlin Conference of 1885, led to the partition of East Africa into territories of influence by the European powers where the British settlers took over the land in Kenya. Britain later compromised with Germany which accepted, and the British persuaded the Sultan to sign an agreement ceding his mainland territory. This excluded a 16 km-wide strip of land on the Kenyan coast, over which Germany set up a protectorate.[16] Later on, in 1887, the British East Africa Association, led by Sir William Mackinnon, claimed rights to the coastal miles strip. This further continued in 1888, where the association became the Imperial British East Africa Company, which received a Royal Charter from the British government, and the original grant to administer the territory.[17] On 1 July 1895, the British revoked the charter and established the East African Protectorate which had direct rule over the interior.[18]

Incorporation of the Indian Land Acquisition Act of 1894, that was as a result of the East African Order in Council of 1897, provided for compulsory land acquisition of the railway and a ten mile strip on both sides of the railway. This establishment was mainly for government buildings and other purposes.[19] With the main objective of securing land for settlers, the East African Land Regulation was also enacted. This legislation drew a distinction between land in the Sultan's domain and land under the Protectorate inorder to monitor governance. The Commissioner was

[13] Ronald J. Daniels, Michael J. Trebilcock and Lindsey D. Carson, The Legacy of Empire: The Common Law Inheritance and Commitments to Legality in Former British Colonies, *The American Journal of Comparative Law*, Vol. 59, No. 1, 2011,111-178.
[14] Judi W, Chris H and Elvin N, '*Land Tenure and Violent Conflict in Kenya*', 2008, 12.
[15] justicemicar.wordpress.com/2015/07/18/theories-of-the-concept-of-property-ownership-in-kenya-and-its-development-to-its-present-position/ <Accessed on 2nd December>.
[16] Peter Veit,'*History of Land Conflicts in Kenya*',2011,1.
[17] Peter Veit,'*History of Land Conflicts in Kenya*',2011,2.
[18] Valentine Wakoko, '*The Evolution of Land Law in Kenya*,' 2015, 6.
[19] Valentine Wakoko, '*The Evolution of Land Law in Kenya*,' 2015, 4.

given the powers to sell freehold land owned by the crown which did not form private property of the sultan. Accordingly, in 1908, the Land Titles Ordinance required that proprietors be persons having or claiming to have any interest in property that is immovable within the ten-mile coastal strip inorder to lodge their claims. This included whether of titles, mortgages or other interests, within six months with a Land Registration court.[20]

Every ethnic group in Kenya experienced land losses, though some communities lost more than others. For example, in 1904 the Maasai were moved from their grazing grounds in the central Rift Valley, to two reserves. This was as a result from signing the Anglo–Maasai agreement.[21] Later, when the colonial government became interested in the Maasai land in Laikipia to settle more settlers, they forced the Maasai to sign the second Anglo-Maasai agreement in 1911, where the pastoralists where moved yet again, to *Narok* and *Kajiado* districts.[22]

In 1915, the Crown Lands Ordinance was re-defined to Crown lands with the inclusion of land occupied by native tribes. This also meant that it would be land reserved by the Governor for the use and support of members of the native tribes.[23] This Ordinance marked the beginning of private individual land ownership in Kenya, a step that led to the problem of individualization. Africans had no right to have land to themselves, whether they occupied it, or it was reserved for their use.[24] By the time Kenya was declared a colony in 1920, the British had acquired full control of the land in Kenya. In this effect, the colonial government officials became the allocators of land rights.

The many problems arose in the consequent years which include land fragmentation, that were faced by the native communities in the reserves. This issues then led to the formulation of the Swynnerton Plan by the colonial government.[25] The Plan recommended tenure reforms where African farmers would be provided with, firstly, the consolidation of different holdings of land. Furthermore, within the areas held under common property tenure systems, registration of individual titles and group-ranch legislation for example in Maasai areas; led to the

[20] The Report of the Select Committee on the Issue of Land Ownership along the Ten-Mile Coastal Strip of Kenya, (1978), Government Printer 2.
[21] Hughes and Lotte. '*Rough Time in Paradise: Claims, Blames and Memory Making Around Some Protected Areas in Kenya" in Conservation and Society*, 5 (3), 2007, 7-9.
[22] www.politicskenya.net/colonial-policies-land-injustices-in-kenya/ <Accessed on 30th October >.
[23] *The Crown Lands Ordinance*, (1915).
[24] *Isaka Wainaina v. Murito wa Indagara*, 9 EALR, 102.
[25] R.J.M Swynnerton, '*A Plan to Intensify the Development of African Agriculture in Kenya*', 1955, 14.

individualization and sale of plots.[26] The Swynnerton Plan failed the African land tenure systems not only for infuriating problems of land fragmentation, but also for hindering the adoption, progress, and diffusion of intensified farming measures such as crop rotations and application of manure. Another important recommendation was that, security of tenure by giving the process legal backing through the issue of title certificates, this would stimulate the growth of a rural middle class eager to support the agricultural betterment campaign.[27] Furthermore, this Plan also derived directly from the importance of land tenure reform, the nurturing individual farm planning in African Reserves. Thus, rather than the concerning consolidation and addition as ends in themselves, these reforms were to sign the commencement of a major agrarian revolution in African reserves.

The East African Royal Commission of 1953-1955 settled that individualization of land ownership should be a main policy. However, such ownership should not be restricted to individuals only but to protracted groups such as customary relations and organizations of Africans.[28] The registration of titles was achieved by the Native Lands Registration Ordinance of 1959, which adapted a registration system based on the English model. All rights and interests which were in actuality under customary law were removed which led to the suppression of customary tenure systems.[29] It became more evident that in cases where the state or the individuals acquired ownership of the land, access for the communities formerly occupying, the land was abridged.

2.4 Post independence era in Kenya

After independence in 1963, there were the creation of settlement schemes.[30] The enactment of the Trust Lands Act[31] was also another legislation that led to the creation of a trusteeship system where the first native reserve areas were now conferred on the County Councils who regulated the manner in which these lands were to be held and administered.[32] Trust land

[26] Judi W, Chris H and Elvin N, '*Land Tenure and Violent Conflict in Kenya*', 13, 2008.
[27] Makana, Nicholas E, 'Peasant Response to Agricultural Innovations: Land Consolidation, Agrarian Diversification and Technical Change. The Case of Bungoma District in Western Kenya, 1954-1960', *A Journal of African Studies, 35(1)*, 2009, 3, < //escholarship.org/uc/item/4rh67483 > Accessed on 22nd October 2016.
[28] *Report of East Africa Royal Commission*, 351, (1953-1955).
[29] Smith Otieno, '*Community Land Rights In Kenya*', 2013, 6.
[30] Kameri M, Collins O, '*Breaking the Mould'*, Strathmore University Press, Nairobi, 2016, 15. For example the Million scheme which sought the redistribution of white settler farms to the landless citizens.
[31]Section 14, *Trust Lands Act*, (Cap 288, 2010) Repealed.
[32] Smith Otieno, '*Community Land Rights In Kenya'*, 2013, 7.

entails areas that were occupied by the natives during the colonial period and which have not been combined, registered in individual or group names and native land that has not been occupied by the government.[33] In the case of pastoral communities, the group representatives assigned with the management of that land have in many cases disposed of group land without consulting the other members of their groups.[34]

Groups of persons holding land had their rights catered for under the Land (Group Representatives) Act[35] and this led to the providing of rights to the ethnic communities. A group ranch refers to a demarcated piece of rangeland, to which a group of pastoralists who graze their herds on it, have official land rights. The Act establishes the position of a Registrar of Group Representatives whose roles are to supervise the administration of the groups, and ensure proper records of the groups are kept.[36] These group representatives have a duty to hold any property and to exercise their powers on behalf and for the overall benefit of all the members of the group.[37]This structure was later to experience challenges of dispossession of the group members by those who represented them and converted the land into private land without their knowledge.[38] Firstly, the group representatives lacked the authority of traditional leaders and therefore, with the questioning of their legitimacy comes to the disregard of the rules with regards to group ranches. Secondly, government policy tended to emphasize on individual rights with prevalent view that the group rights would eventually mature into individual ones.[39]

Sessional Paper Number 10, On African Socialism and its Application to National Development in Kenya[40] gave rules on how to govern community land rights. However, the misinterpretation of the rules led to landlessness of many members of the community because of those who took advantage. The Ndungu Land Report[41] also tried to evaluate the allocation of land rights, where over the years, land rights were seen as a political issue. It was mandated with inquiring details into the unlawful allocation of public lands, identifying public officials who were involved in illegal allocations, and making recommendations for appropriate measures for the

[33] Collins Odote, '*The Legal And Policy Framework Regulating Community Land In Kenya an Appraisal'*,2015 , 15.
[34] Section 65, *Sessional Paper No. 3 of 2009 on National Land Policy*, (2009).
[35] *Land Group Representatives Act,* (Cap 287, 1968) Repealed.
[36] Collins Odote, '*The Legal And Policy Framework Regulating Community Land In Kenya an Appraisal'*,2015 ,16.
[37] Section 3- 8, *Land Group Representatives Act*, (Cap 287, 1968) Repealed.
[38] Smith Otieno, 'Community Land Rights In Kenya', 2013, 7.
[39] Kieyah J, Patricia Kameri Mbote, *Securing Property Rights in Land in Kenya; Formal vs Informal* , Oxford University press, 2010, 4.
[40] Collins Odote,' *The Dawn of Uhuru? Constitutional Recognition of Communal Land Rights*', Vol.17, 2013,89.
[41] *The Ndungu Land Report*, (2005).

restoration of the illegally allocated lands. The Commission found that many of the illegal allocations of public land took place before or after the multiparty general elections of 1992, 1997 and 2002.[42]

During this years, most of the communities were displaced. The report recognized the existence of Trust land, which was land held by County Councils on behalf of local communities, groups and families in accordance with applicable customary law. However, because trust land had long become the target of land grabbing, the Commission decided to regard all trust lands which had been illegally allocated as public land for its own investigative purposes. This contributed to the loss of more community land rights because land was then individualized when it was declared public. The Commission found that, trust land can only be detached from the communal ownership of local people through legally set adjudication processes, where the members of these communities are given ample notice and opportunity to claim their ownership in accordance with their customary law. [43] However, despite all these legally strict safeguards, it is in the distribution process that most of the corruption and fraudulent practices relating to land disputes have occurred and led to disregarding of communities land rights.

Different communities continued to graze their livestock on the same land. The main reason was that, the economic lifestyle and the climatic conditions were not favoring the settled forms of production and hence discouraging individualized property ownership.[44] For a longtime, Kenyan rangelands had been occupied by communities for the past decade. An example is in the Tana River delta where, the issue of land ownership and access had a complicated history to the extent that the historical injustices caused have a special emphasis in the National Land Policy. A very large number of people in this region are squatters on their own ancestral land having no legal ownership rights over the land on which they live and derive their livelihood.[45] Research shows that from the 1960s, the government sought to assist the communities by giving them land to own communally as group ranches. Regrettably, due to numerous reasons including poor management and droughts, such as the one in 1984, most of the group ranches lost their livestock and were no longer profitable to the communities. However, over time, group ranch members were allotted

[42] *The Ndungu Land Report*, (2005), 54.
[43] *The Ndungu Land Report*, (2005), 54.
[44] Asiema, J. K. & Situma, F.D.P. (1994), 'Indigenous people and the Environment; The case of the Pastoral Maasai of Kenya', 1994, 149 – 171.
[45]Pauline Makutsa, 'Land Grab in Kenya: Implications for Small-holder Farmers', A publication of the Eastern Africa Farmers' Federation, 22.

land within the ranches to cultivate food crops for subsistence. These allocations did not have any legal documents to support ownership and therefore posed a problem.[46]

The Ogiek, one of the latest forest-dwelling hunter-gatherer communities, are among some of the most marginalized of all indigenous peoples and minorities in Kenya.[47] They have lived for a long time in the Mau Forest in Kenya's Rift Valley and in the forested areas around Mt Elgon. Before and after independence, the Ogiek have been routinely subjected to arbitrary forced evictions from their ancestral land by the government, without consultation or compensation. Since 1993, the Kenyan Government has analytically carved out huge parts of Mau Forest for settlement of people from other communities. This has caused constant conflict with the Ogiek who saw the destruction of the forests and the alienation of their lands as a continued threat to their survival.[48] The beginning of the conflict was now marked by ownership of the forest where the government also claimed ownership by virtue of the forest gazettement and declaration of 1942 under the Forest Act. However, the community continued claim to the same land on the basis of historical use and occupancy as their land.[49] This case continues to be a current debate in the High Court.

2.5 Current framework governing community land rights in Kenya

2.5.1 Ndungu Land Report

This report focused on scrutinizing illegal and allocation of public land and provided an insight into the struggles over land in Kenya and making recommendations for appropriate measures for the restoration of illegally allocated lands. The report sought to identify the reasons for the continuous landlessness with recurrent land disputes amongst individuals and between communities. The Commission's review of the land system was that it was divided into three categories namely; public land, trust land and private land. It also gave recommendations such as the need for computerization of land records, as well as for a comprehensive land policy. Further there was to be established a Land Titles Tribunal, which would be charged with reviewing each and every case of suspected illegal or irregular allocation of land.[50]

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[46] Pauline Makutsa, 'Land Grab in Kenya: Implications for Small-holder Farmers', A publication of the Eastern Africa Farmers' Federation, 24.
[47] /minorityrights.org/law-and-legal-cases/the-ogiek-case/ < Accessed on 12th November>.
[48] Sang Joseph K, 'The Ogiek in Mau Forest; Kenya ', 2001, 9.
[49] Sang Joseph K, 'The Ogiek in Mau Forest; Kenya ', 2001, 14.
[50] Roger Southall, 'The Ndungu Report: Land & Graft in Kenya', Published in: Review of African Political Economy, 103, March 2005,6.

2.5.1 Njonjo Land Report

The Ndungu Land Report then paved way for the Njonjo Land Report which was drafted by the Njonjo Land Commission, established in 1999. It was mandated with the coming up of the Principles of a National Land Policy framework and a new institutional framework for land registration.[51]

2.5.2 National Land Policy of 2009

The National Land Policy was then introduced by the Njonjo Commission which identified a few issues that had arisen over the years. This mainly included the fact that the process of individualization of tenure has undermined traditional resource management institutions and ignored customary land rights not believed to amount to ownership.[52] Another challenge facing community land rights is negative ethnicity that has challenged national integration, sustainable and optimal land use.[53] This is evident from the 2007 post- election violence, where most of the effects were seen thorough most of the communities that were left landless. It further gives recommendations on securing community land under section 66 of the same.

Parliament enacted a new land regime in 2012, namely; The Constitution of Kenya, The Land Act, The Land Registration Act, The National Land Commission Act and The Environment and Land Court Act.

2.5.3 Constitution

Article 63 of The Constitution of Kenya, gives a provision for community land. The provision states that community land is land owned by communities on the basis of their ethnicity, culture or similar community of interest. It also states that community land shall not be disposed of or used except in terms of legislation, specifying the nature and extent of the rights of members of each community individually and collectively.[54]

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[51] Andrew Arika, 'TJRC, Ndung'u & Njonjo led Commissions; what their reports had on Lamu and whether they have any impact on LAPSSET', 2016,2.
[52]Section 64, *Sessional Paper No. 3 of 2009 on National Land Policy*, (2009).
[53] Patricia K, Collins O, Celestine M, Muirigi K, '*Ours by Right: Law Polictics and Realities of Community Property in Kenya*', 2013, 31.
[54] Article 63(4), *Constitution of Kenya*, (2010).

2.5.4 Land Act and Land Registration Act

In the Land Registration Act, it provides for a community register that entails community land and its identified areas of common interest, members of the community and users of the land.[55] The conversion of land, which is a crucial factor in analyzing the causes of individualization of land is regulated under the Land Act.[56] This Act also states that "*Community land shall be managed in accordance with the law relating to community land enacted pursuant to Article 63 of the Constitution.*"[57]

Regardless of the current laws, delay of the enactment of the drafted Community Bill of 2015 can also be said to contribute to the ignorance of community land rights. The Community Land Bill 2015, being not just a conventional land legislation is said to govern most of the country's land.[58] It addresses the rights of communities in accessing community land rights and seeks to disclose the shift following the last elections in 2007-2008 which led to cases of corruption by the former county councils in dealing with trust lands during the period of change over to county governments.

2.5.5 Community Land Act

The Community Land Act[59] is the latest legislation on community land that deals with the recognition, protection and registration of community land rights. It states that, "*Every person shall have the right, either individually or in association with others, to acquire and own properly, in accordance with Article 40 of the Constitution*." Administration and management is also a key aspect recognized under this Act to protection community land rights.[60] The regulation of conversion of land and allocation of individual rights to community land is also provided for in the Act so as to reduce the cases of illegal allocation of land to individuals. Community land shall also vest in the community and maybe held under customary, freehold, leasehold and such other tenure system recognized under the Act or other written law.[61] The classes of holding community land are classified under; communal land, family or clan land, reserve land, or in any other category

[55] Section 8, *The Land Registration Act*, (2012).
[56] Section 9, *Land Act*, (2012).
[57] Part IV, *Land Act*, (2012).
[58] www.businessdailyafrica.com/Opinion-and-Analysis/Why-community-land-law-delay-is-worrying/-539548/2743288/-/rbrn1nz/-/index.html < Accessed on 12th November>.
[59] *Community Land Act*, (2016).
[60] Part III, *Community Land Act*, (2016).
[61] Section 4(3), *Community Land Act*, (2016).

of land recognized under this Act or other written law.[62] The Act further gives the validity of existing customary rights of occupancy. It states that, "*A person, family unit, group of persons recognized as such under any customary law or who have formed or organized themselves as an association, a cooperative society or any other body recognized by any written law, who are members of a community may apply to the registered community for customary right of occupancy*".[63]

However, in as much as communities have a right to occupy land, various limitations are given in some legislations. With regards to the Forest Act, to begin with, its states that communities shall not be prevented from using such forests as has been their custom.[64] The Minister on the other hand may declare any forest area by gazettement to be a nature reserve for the preservation of bio diversity but ought to be compensated.[65] This is evident in the cases of the Ogiek and the Endorois communities.

There has been the establishment of the Truth, Justice and Reconciliation Commission (TJRC) that has been mandated to probe land problems in post independent Kenya, in order to decide the underlying causes of violent conflicts that have arisen in relation to land for purposes of recommending appropriate redress.[66] This report provides the basis for understanding why colonial land policies and practices concerning land acquisition, ownership and use, but significantly prompted the struggle for independence. Most importantly, it explains why, at independence, many Kenyans who had suffered land-related injustices waited anxiously for redress by the first independent government in the form of land restitution, restoration and compensation which is, suggestively, the reason why many who were disappointed have, over the years, resorted to self-help measures to realize what they believe to be injustices and try and seek redress, but have been flagrantly overlooked or ignored.[67]

2.6 Conclusion

Despite the introduction of new land laws which have tried to address historical injustices, group ranches have not worked well because the legal framework has not been efficient and has

[62] Section 12, *Community Land Act*, (2016).
[63] Section 14, *Community Land Act*, (2016).
[64] Section 22, *Forest Act*, (2005).
[65] Section 32, *Forest Act*, (2005).
[66] TJRC, 'Report Of The Truth, Justice And Reconciliation Commission,' Vol IIB, 2013, 222.
[67] TJRC, 'Report Of The Truth, Justice And Reconciliation Commission,' Vol IIB, 2013, 167.

neither paid much attention to this type of land tenure. The attitude of the judiciary can be said to have changed with the recent years. The Kenyan judicial system, introduced the Environmental Land Court (ELC) that is mandated and equipped to deal with the existing range of land disputes in an effective, efficient and conclusive manner. However, it is feared that the current legal regime which includes the amalgamation of the various land registration regimes and establishment of the ELC may end up being tainted with political interests and protecting the interests of the leading class.[68]

In as much as the government policy continues advocates for individual land rights, some of the challenges presented under the individualization of communal tenure are that first, the parameters for determining communal land tenure are too general. Community land is not only based on ethnicity but also similar community of interest as stated in Article 63[69] of the Constitution of Kenya. The broad descriptions of what community land consists of gives a wide discretion to misinterpretations that may cause injustices amongst the members of the community.

[68] Maureen Wangari Maina, 'Land Disputes Resolution In Kenya: A Comparison Of The Environment And Land Court And The Land Disputes Tribunal,' Published LLM Thesis, University Of Nairobi, 2012,24.
[69] Article 63(1), *Constitution of Kenya*, (2010).

CHAPTER THREE
Comparative Analysis between South Africa and Kenya

3.1 Introduction

This chapter gives an analysis of South Africa's protection of community land rights as compared to Kenya's legal framework. Just like Kenya, tension between individual freedom to hold property and the imperative to address historical injustices persists. South Africa's constitution and its Community Land Registration Act will be analyzed and critiqued to show the transition from the apartheid era to the current legal framework. South Africa has also been facing similar challenges as Kenya with regards to discrimination of customary law tenure of indigenous and marginalized communities. As seen with the victims of Kenya's unsettled land question, it is evident that it has led to the dispossession of several marginalized communities such as the Ogiek among many others, whose interests have not been properly addressed by policies and laws.

3.2 History of South Africa's community land legal framework

The South African tenure can be characterized as a dual system where customary system is derived from African law and individual tenure from western law.[1] The country's experience with the apartheid regime saw the demand for the enactment of a legislation which was to address the problems faced by the native Africans in accessing land rights and also to ensure tenure security for all South Africans, especially the Bantusans.[2] To begin with, the recognition of customary law has been linked by the recognition of cultural diversity in the country.[3] This link is seen to be important in asserting rights through the international law angle to safeguard the rights of indigenous community rights. South Africa's Constitution of 1996 then came in to protect the right to access land by its citizens and also seeks to ensure that historical injustices are addressed.

The land reform programme that South Africa adopted to try and eradicate the land inequalities and injustices of the past of three pillars namely; restitution, redistribution and tenure security. Redistribution of land was to those who needed it, but cannot afford it and restitution for

[1] Kameri-Mbote P, Odote, C, Musembi, C and Kamande W, *Ours by Right: Law, Politics and Realities of Community Property in Kenya*, Strathmore University Press, Nairobi, 2013, 85.
[2] Smith Otieno, 'Community Land Rights In Kenya', 2013, 7.
[3] Kameri M, Collins O, '*Breaking the Mould'*, Strathmore University Press, Nairobi, 2016,111.

those who were deprived of their land due to the system of apartheid.[4] The land restitution programme has its basis founded in section 25(7) of the Constitution,[5] which provides redress to those persons who were dispossessed of property after 19th June 1913. Section 25(5) of the Constitution introduced the second pillar of land reform, which is the redistribution programme. The state is mandated to take reasonable legislative and other measures, to foster conditions which enable citizens to gain access to land on an equitable basis. Thirdly, tenure security, is supported in section 25(6), which offers redress to anyone whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices.

The jurisprudence of customary law sought to bring out the argument that this law was discriminatory against women in the allocation of land and inheritance rights.[6] In addition, it has been pointed out that colonial codifications distorted the nature of customary law. The transition was largely marked by the misinterpretation of customary law and reveals the successes and failures on the part of the courts in their efforts to rehabilitate African law. It sought to analyze the laws from an indigenous setting, during the apartheid regime, the relation between it and the Constitution. Customary law was prone to be misunderstood even by the Constitutional Court especially during the apartheid regime as will be seen in this chapter. That inability to recognize customary law as equal to other laws meant that communities had weak claims to their land.

The Constitution finally recognized customary law as an independent source of law as held in the Constitutional Court as seen in the case of *Bhe* [7] where the court argued that the basic law in the Constitution requires that customary law should be accommodated and not merely tolerated. The conclusions to the debate on when the Constitution refers to 'living customary' was established in the *Shibulana*[8] judgment, were the court held that, customary law must be permitted to develop, and the analysis must be rooted in the existing practice of the community in question. This was in terms of; the history and tradition of that community, the actual experience on the ground, the feasibility of a particular version of customary law and compliance with the Bill of Rights.[9] With regards to the recognition of customary law as seen in the *Alexor case,* the court stated that customary law must now form an integral part of the law in its current Constitution and

[4] Van R, Ngqangweni and Njobe , 'ANC Basic Guide', 1994.
[5] *Section 25(7) Constitution of South Africa*,(1996).
[6] Kameri M, Collins O, '*Breaking the Mould'*, Strathmore University Press, Nairobi, 2016,108.
[7] *Bhe and Others vs Khayelitsha Magistrate and Others* (2005), 1 SA 580.
[8] *Shilubana and Others vs Nwamitwa*,(2009).
[9] Kameri M, Collins O, '*Breaking the Mould'*, Strathmore University Press, Nairobi, 2016,108.

the originality of indigenous law is an independent source of law.[10] This decision was incorporated into African law by the African Commission on Human and Peoples' Rights in the *Endorois*[11] case.

Before, The Natives Land Act of 1913 which is was known as the Black Land Act and the Native Trust and Land Act, 1936(now the Development and Trust Land Act) were the key statutes which determined where Africans could live.[12] The first attempt at securing the unrecognized tenure rights was introduced by the National Party government through the Upgrading of Land Tenure Rights Act 112 of 1991. This Act aimed to end the state's role as the nominal owner of communal land and to transfer land to tribes.[13] South Africa's governing social democratic political party, The African National Congress (ANC), formed its own land policy that called for security of tenure but also for the legalisation of various forms of tenure including communal tenure systems.[14] The Bantu Laws (Amendment) Act of 1972 justified the forced resettlements of Africans and stated that a Bantu tribe, which may consist of a community of individuals, could be removed from where they lived without any recourse to Parliament, even if there were some objections to the removal. The relocation of the community members to the homelands from the white rural and urban areas was therefore never voluntary.[15]

The second attempt for securing unrecognized tenure was post constitutionally through the Interim Protection of Informal Land Rights Act of 1996.It defined an informal land right to mean the use or occupation of land in terms of customary or indigenous practices.[16] It further stated that no one should be deprived of their right to land and if so, they should be compensated.[17] This Act, however, had a few short comings such as; of a good number of land administrators were not sensitised on how to implement the law and that its regulations were never promulgated. In 1997, there was the establishment of the White Paper on Land Policy which recognized those existing and who have user rights on 'state land' as owners.[18] It stressed that communal tenure system offers

[10] *Richtersveld Community vs Alexkor Ltd & Another*, (2004), 3 All SA, 244.
[11] *Endorois Welfare Council vs Kenya*, (2010).
[12] Smith Otieno, 'Community Land Rights In Kenya', 2013, 7.
[13] M Weideman, 'Tenure Reform: The Former Homelands', 2004, 23.
[14] ANC, Land Policy Document, Education Section, April, 1992.
[15] www.uir.unisa.ac.za/bitstream/10500/1191/1/02thesis.PDF < Accessed on 16th December 2016.
[16] Kameri M, Collins O, '*Breaking the Mould'*, Strathmore University Press, Nairobi, 2016,117.
[17] Interim procedures, Interim Protection of Informal Land Rights Act, 1996.
[18] Aninka Claassens , 'Communal Land, Property Rights and Traditional Leadership', Rural Women's Action Research Programme, Centre for Law and Society, University of Cape Town, 2014, 2.

secure access to land for the poor especially because land under these systems cannot be sold for offsetting debt.[19]

In 2003, law and policy favoured the transfer of title on communal land to traditional leaders and institutions, as opposed to the community members themselves since the Traditional Leadership and Governance Framework Bill did not give them enough power. This saw a boycott headed by the Community Land Rights Board (CLRB). The Community Land Rights Act of 2004 then came into place and provided far reaching measures such as;[20]

1) Vesting ownership of community land in communities through the traditional institutions;
2) Provision for a land administration committee which was to represent a community which owns community land;
3) Legally recognise and formalize the African traditional systems of communally held land under within the framework provided in the Constitution.

Section 211(1) of the same provides that "*the institution, status and role of traditional leadership, according to customary law, are recognized, subject to the Constitution*".[21] Under the Act, communities are also required to develop and register community rules so that they acquire legal status. However, even with the establishment of the Act, the codification of the rules that govern the registering of communities is seen as another error that denies the existence of customary rules which should be viewed as independent laws.[22]

In the *Tongoane case* [23] presented first in the High Court, then the Constitutional Court for certification marked the constitutional challenge of the Community Land Rights Act (CLARA). It was argued that, ownership of community land rights were placed on the hands of the local chiefs who would rob the members of their rights. This was an issue with the recognition of tribal authority and the role it had in securing land rights. It was further said that, CLARA would replace customary land tenure systems through the establishment of the traditional institution which would undermine decision making at the lower levels of communities. After the case was referred to the

[19] Aninka Claassens, 'Communal Land, Property Rights and Traditional Leadership', Rural Women's Action Research Programme, Centre for Law and Society, University of Cape Town, 2014, 3.
[20] Kameri M, Collins O, *Breaking the Mould*, Strathmore University Press, Nairobi, 2016,119.
[21] Section 211(1), *Constitution of South Africa*, (1996).
[22] Kameri M, Collins O, *Breaking the Mould*, Strathmore University Press, Nairobi, 2016,121.
[23] *Tongoane and Others vs Minister for Agriculture and Land Affairs and Others*, 2010 (6), SA 214.

Constitutional Court, it was argued again the Act would undermine the flexibility nature of customary law.

In 2008, fifteen key provisions of CLARA were declared invalid and unconstitutional, including those of transfer and registration of communal land, determination of rights and the establishment and land administration committees but the judgment did not strike the whole Act out. [24] In 2011, the Department of Rural Development and Land Reform released the Green Paper on Land Reform which was to upgrade tenure. It was a proposed policy but was signed into law on 31st July 2013. It gave a historical background of the discrimination on community land rights and the protection of communal rights against side interests. However, this Act excluded communal tenure on the grounds that it was too complex and hence it did not progress further.[25] In response to the policy proposal, the Department of Rural Development and Land Reform was called on to return to the Interim Protection of Informal Land Rights Act (IPILRA) which provided for majority decision making within communities and recognizes customary forms.[26]

Recently, the entire Communal Land Rights Act was struck down by the Constitutional Court in 2010 and neither did the Traditional Courts Bill get enough support in Parliament. It is therefore not wrong to say that South Africa faced challenges in trying to establish an efficient framework for community tenure. The recognition of customary law as an independent law was a major challenge for the courts when interpreting legislation. The link between asserting of land rights and cultural diversity was lacking. Consequently there was misinterpretation of customary law in the courts when solving disputes. Even as more laws were introduced, there was lack of sensitizing of land administrators on how to carry out their duties and implement the law which did not help in solving land disputes. Moreover, there was conflict between the role of tribal authorities and decision making at lower levels of communities when it came to the administration of communal land rights. With the introduction of the land registration system, it was seen that it effectively provided a mechanism for the transfer of wealth to those with a better social or economic position, hence creating tenure insecurity for less influential right holders.[27] This therefore beat the purpose of the pillar of tenure security that was a reform trying to be achieved.

[24] *Richtersveld Community vs Alexkor Ltd & Another*, (2004), 3 All SA,244.
[25] Kameri M, Collins O, *Breaking the Mould*, Strathmore University Press, Nairobi, 2016,123.
[26] Kameri M, Collins O, *Breaking the Mould*, Strathmore University Press, Nairobi, 2016,123.
[27] www.uir.unisa.ac.za/bitstream/10500/1191/1/02thesis.PDF < Accessed on 16th December 2016>.

With regards to the distribution programme, it aimed at redistributing 30% of white-owned commercial agricultural land by to the black South Africans and settling almost 80,000 of claims for redistribution by 2005. To date, which has been more than seven years after the initial target, all land claims have still not been settled and less than 10% of those of the redistribution target has been achieved by the state.[28] Also the slow pace of the two land reform programmes; redistribution and restitution, 90% of agricultural land transferred is not being used productively.[29] This has therefore led to high levels of poverty and unemployment. It is safe to say that these hastily drafted ideas such as those in the Green Paper do very little in protecting the rights of communities especially from private investors and their own traditional authorities.[30]

Despite the fact that South Africa faced challenges, it was able to be successful in some areas that led to the securing of tenure rights. Some of the communities were compensated through the restitution process that was provided for in the constitution such as the Khoe and the San which speeded up dispute resolution processes. Since Kenya's Constitution also has this provision, it may borrow the aspect of implementation like in South Africa since as seen over the years, most of the displaced communities have never been compensated and hence land disputes have continued to exist over the years. Kenya also faces the challenge of the conflicts between protected areas and community land similar to South Africa. South Africa therefore seems to be an appropriate country from which Kenya can learn from since they share in some similar challenges as seen in the next chapter.

3.3 Similarities and differences in South Africa and Kenya's legal frameworks

South Africa and Kenya have been facing land conflicts which have been geared by politicized racial discrimination. Their legal frameworks seem not to be adequate in solving community land issues. Both countries have regimes that have for a long time been characterized by a dual tenure system where customary tenure is derived from African customary law on one hand and individual tenure based on the English law on the other.[31] To begin with, land laws have seen South Africa and Kenya through the colonialists and their occupation and subjugation which

[28] HJ Kloppers and GJ Pienaar, 'The Historical Context Of Land Reform In South Africa And Early Policies,' Vol. 17 No. 2, 2014,5.
[29] www.politicsweb.co.za. < Accessed on 12th January 2017>.
[30] Kameri M, Collins O, *Breaking the Mould*, Strathmore University Press, Nairobi, 2016,127.
[31] Kameri-Mbote P, Odote, C, Musembi, C and Kamande W, *Ours by Right: Law, Politics and Realities of Community Property in Kenya*, Strathmore University Press, Nairobi,2013.

eventually led to widespread land dispossession following military conquest in the 1890s. For example; the Tomlinson Commission of 1948 in South Africa is similar to Kenya's Swynnerton plan of 1954 in the sense that they both aimed at creating a class of black commercial farmers through consolidation and registration of land. The emergence of the popular resistance movements; the *Umkhonto we Sizwe* and the *Mau Mau*, were the derivatives of land dispossession which were both unified by one objective. This was, to redistribute land to the formerly dispossessed African population.[32]

With regards to indigenous communities, the Supreme Court of Appeal of South Africa also recognizes the definition of aboriginal title of land as that of, an indigenous community which forms a distinct ethnic group who occupied that particular land for a long time. South Africa's constitutional provision spells out that, the primary objects of the Commission for Promotion and Protection of Rights of Cultural, Religious and Linguistic Communities are basically to promote respect for the rights of cultural, religious and linguistic communities.[33] Section 31 of the same also states that, persons belonging to a cultural, religious or linguistic community may not be denied right to enjoy the culture, practice their religion and use their language.

For example, for a long while the indigenous San people, the oldest and most marginalized inhabitants in Africa, have staved off hunger and thirst. Most of them live in remote and arid environments, as they keep livestock and harvest plants. They often don't have rights or traditional claim to the land they work. Active ingredients of the plant were patented by South Africa's Council for Scientific and Industrial Research and his was done without the consent of San communities, despite being based on their traditional knowledge. An agreement was then made between the South African San Council, the National Khoisan Council and a local pharmaceutical company, to negotiate on benefit sharing where Cape Kingdom Nutraceuticals, gives San and Khoi communities 3% of the profits from products.[34] However, there have been concerns that benefits will flow only to an elite leadership. As has been noted more regulation does not necessarily help.

The country seeks that, equal attention should be given to; building the long-term financial and technical capacity of communities to engage in commercialization, transferring technology to

[32] Kariuki S,'Can Negotiated Land Reforms Deliver? A Case Of Kenya's, South Africa's And Zimbabwe's Land Reform Policy Debates,' University of The Witwatersrand, South Africa, 2004,18.
[33] Section 185, *Constitution of South Africa*, (1996).
[34] www.theconversation.com/justice-is-still-not-being-done-in-the-exploitation-of-indigenous-products-5708 <Accessed on 13th January 2017>.

African countries, adding value to raw material, facilitating market access and interrogating the unequal power relations of African natural product value chains. This are similar characteristics that are visible in claims made by indigenous communities in Kenya, such as in the case of the Ogiek despite the fact that the High Court decided otherwise. Kenya should therefore implement benefit sharing as supported in Section 36 of the National Land Policy and promote community participation.[35]

The financial implications of the process of land reforms are also high, a problem that is aggravated by the fact that funding for the land restitution process in South Africa is mainly reliant on state coffers.[36]

The 2010 Kenya Constitution retains the inconsistency clause on customary law, but recognizes that the application of customary law is now limited to the Constitution.[37] That provision is now similar to the South African Constitution clause on supremacy of the Constitution.

In conclusion, the recognition of customary law has been linked with the recognition of cultural diversity and the Constitutional Court was heavily involved with trying to solve the problem of the distortion of customary law.[38] The South African constitution, was then able to have a more elaborate bill of rights including the protection of community land rights which while certifying existing property rights, it requires the state to also take reasonable steps to enable citizens to gain equitable access to land, promote tenure security and provide redress to those who were disposed of property as a result of past discriminatory laws and practices.[39] This is evident in that most of the land disputes have been solved through compensation unlike in Kenya. South Africa continues to recognize that the dynamics and local resources such as indigenous knowledge systems and the needs of the people must guide government's land tenure reform programme.[40] Kenya can therefore learn some lessons as discussed in the next chapter.

[35] Section 36, *Sessional Paper No. 3 of 2009 on National Land Policy,* (2009).
[36] Sibanda S, 'Land reform and poverty alleviation in South Africa', Human Sciences Research Council, Pretoria June 2001, 3.
[37] Article 2, *Constitution of Kenya*, (2010).
[38] Kameri M, Collins O, *Breaking the Mould*, Strathmore University Press, Nairobi, 2016,111.
[39] Section 25(6), *Constitution of South Africa,(*1996).
[40] www.uir.unisa.ac.za/bitstream/10500/1191/1/02thesis.PDF < Accessed on 16th December 2016.

CHAPTER FOUR

Lessons that Kenya can learn from South Africa to secure Community Land Tenure in Kenya

4.1 Introduction

For community tenure reform to attain its objectives, it is not enough to define rights and core principles in legislation.[1] As the Kenyan scholar Okoth-Ogendo highlights, one of the famous colonial rationalizations for the appropriation of land in Africa was that customary structures were too 'primitive' to give out property rights and this made African land free for anyone who wanted to take it, an example being Kenya. The weak status of customary land rights in national laws as seen in the previous chapters, is a condition shared by many rural communities.[2]

As a result of this, the debate on land rights has always been about private ownership of land and its contradiction with the principles of African tenure. Recognizing existing rights and providing institutional support for community-based systems ought to be one of the options available as seen in South Africa within an integrated but with a diverse system of property rights.[3] Since Kenya has identified some of the issues that causes individualization of community land rights and has compared its legal framework with that of South Africa, it can therefore learn some lessons on how to improve its community-based land systems.

4.2 Lessons that Kenya can learn

Firstly, in Kenya there is an ultimate mismatch between the community land titling structures and the actualities of African tenure as described by customary law.[4] As seen with regards to the jurisprudence on land in Kenya, it has ignored the customary rights and focused heavily on codified law.[5] Secondly, the support provided by the government, both in the preliminary stages of the establishment of these structures has been completely inadequate to date.[6]

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[1] Janet P, Feja L, Tom L, Saskia O and Cynthia M, 'Securing community land and resource rights in Africa: A guide to legal reform and best practices,' 2013, 58.

[2] Liz Alden Wily, 'Customary Land Tenure in the Modern World Rights to Resources in Crisis: Reviewing the Fate of Customary Tenure in Africa', 2011,10.

[3] Ben Cousins, 'Reforming Communal Land Tenure In South Africa; Why Land Titling Is Not The Answer', School of Government, University of the Western Cape, 2002, 6.

[4] Peter Onyango, 'Balancing of Rights in Land Law: A Key Challenge in Kenya', University of Nairobi; Department of Commercial Law, Kisumu, 2014,300.

[5] Peter Onyango, 'Balancing of Rights in Land Law: A Key Challenge in Kenya', University of Nairobi; Department of Commercial Law, Kisumu, 2014,301.

[6] Ben Cousins, 'Reforming Communal Land Tenure In South Africa; Why Land Titling Is Not The Answer', School of Government, University of the Western Cape, 2002, 3.

Customary law is set to be flexible to suite the different communities. This is because customary rights and traditional tenure tends to evolve over time, adapting to the changing social and economic conditions.[7] Different typologies of community land rights should be identified and each issue addressed with its own typology. Kenya can therefore try to recognize customary law independently even under the Constitution.

Traditional institutions should not replace decision making in the lower levels of communities but facilitate dispute solving. To prevent further undermining of community systems, Kenya should also address the fact that there is lack of a clear government policy with regard to traditional authorities.[8] Where implementation and enforcement steps by the law are set out clearly, the law ought to provide procedural rights which will enable communities and NGO's to monitor the implementation and enforcement of those laws by the government and traditional institutions which will in turn bring effective enforcement where the relevant institutions are not performing.[9]However, this traditional institutions must be governed in accordance with the Bill of Rights as provided for in the Constitution.

An update to legislation with the Constitution is another lesson Kenya can learn. Section 36 and 37 of the National Land policy states that, the land policy reforms are not likely to succeed in the absence of a sound constitutional framework. This policy which was enforced in 2009 prior to the 2010 Constitution, needs to be reviewed and changes effected to be in line with the supreme law. South Africa has repealed its attendant land laws to conform to its Constitution.

In South Africa, the land reform programme is divided into three pillars namely; redistribution, restitution and tenure reform.[10] As seen in chapter 3, redistribution of land was to those who needed it, but cannot afford it and restitution for those who were deprived of their land due to the system of apartheid.[11] The land restitution programme has its basis founded in section 25(7) of the Constitution,[12] which provides redress to those persons who were dispossessed of property after 19th June 1913. Section 25(5) of the Constitution introduced the second pillar of land reform, which is the redistribution programme. The state is mandated to take reasonable

[7] Kameri M, Collins O, '*Breaking the Mould'*, Strathmore University Press, Nairobi, 2016,115.
[8] M Weideman, 'Tenure Reform: The Former Homelands', 2004, 16.
[9] Janet P, Feja L, Tom L, Saskia O and Cynthia M, 'Securing community land and resource rights in Africa: A guide to legal reform and best practices,' 2013, 58.
[10] Van R, Ngqangweni and Njobe , 'ANC Basic Guide', 1994.
[11] Van R, Ngqangweni and Njobe , 'ANC Basic Guide', 1994.
[12] *Section 25(7) Constitution of South Africa*,(1996).

legislative and other measures, to foster conditions which enable citizens to gain access to land on an equitable basis. Thirdly, tenure security, is supported in section 25(6), which offers redress to anyone whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices. The goal of the restitution policy in South Africa is therefore to restore land and provide other restitutionary remedies to people dispossessed of their land, in a way that provides support to the dynamic process of reconciliation, reconstruction and development.[13] Some of the members of the Khoe and San communities benefited from the land restitution programme.

As seen in South Africa, it was the first African state to speak up in favor of indigenous rights during the UN Working Group on Indigenous Peoples.[14] It implemented an Act that, sought to reopen the window for community members deprived of their land due to past discriminatory laws and to institute claims with the help of the Commission on the Restitution of Land Rights (CRLR).[15] The main objective of the CRLR is the restitution of rights in land or awards of alternative forms of equitable redress to claimants which Kenya itself can borrow as a system to resolve land claims.[16]

Most of the land claims in South Africa have been sorted out despite the fact that land reform process have been slow. This is because most of the settlements have been through cash compensation for land lost and the fact that most of the remaining settlements are rural claims.[17] Inorder for Kenya to dispense clogging land disputes, it should do so by implementing compensation as provided for in the Community Land Act, to most of the communities. Kenya can consequently then avoid high cost mistakes as in the case of South Africa where they can adopt a more cost effective process of land reforms.[18]

While Kenya has plans for protected areas and community land, there has not been an overall biodiversity plan unlike in South Africa which has provincial biodiversity assessments to implement conservation in a cost effective way. As a result of lack of this, Kenya has faced costly measures to achieve biodiversity. Furthermore, co-management is also another methodology

[13] Kariuki S, 'Can Negotiated Land Reforms Deliver? A Case of Kenya's, South Africa's And Zimbabwe's Land Reform Policy Debates,' University of The Witwatersrand, South Africa, 2004, 18.
[14] www.kas.de/suedafrika/en/publications/35255/ <Accessed on 14th January 2017>.
[15] *Restitution of Land Rights Amendment Act*, 2014.
[16] www.gov.za/about-SA/rural-development <Accessed on 22nd December 2016>.
[17] Kariuki S, 'Can Negotiated Land Reforms Deliver? A Case of Kenya's, South Africa's And Zimbabwe's Land Reform Policy Debates,' University of The Witwatersrand, South Africa, 2004, 21.
[18] Kathleen H, 'Land Tenure Reforms and Conservation tools in South Africa and potential application to Kenya', 2010, 10.

Kenya can adopt. This will enable the country to specify how and when the conservation will take place and provide benefits to the communities, since the law provides a vague procedure on how to go about it for example between the Kenya Wildlife Service and the surrounding community.[19]

From the establishment of the challenges Kenya faces with regards to community land rights, it can secure community tenure in the following ways;

1. Increased developmental projects in areas such as the oil and mining exploration in Turkana.

The recent discovery of oil in Turkana County has brought the plight of the Turkana people, a marginalized pastoralist group in semi-arid northwestern Kenya.[20] The recent discovery of oil brought tension and violent conflicts among the Turkana locals against foreign investors such as Tullow Oil Company. It is evident from this region that the main challenge facing the individualization of community tenure is the conversion of tenure to public tenure. Almost 77,000 square kilometers of land was allocated for prospecting and some clans found themselves barred from accessing the land without warning.[21] There was also the disruption of traditional grazing patterns but some clans were compensated. However, compensation directly to the clans was seen to raise some legal problems because of the current informal nature of land tenure.[22] Benefit to the local people has now been seen as a contentious issue. The need for policy cannot be understated, but a legitimate policy process is a product of public consultation. It is therefore, clear that there is lack of information and participation by the local communities yet their rights to that land are supported by the Community Land Act[23] and the Constitution. [24] Training opportunities in construction and the service industries and skills to the community members is likely to be needed in the future and hence could be a solution here. Mechanisms for disseminating information and genuine participation of locals in decision-

[19] Kathleen H, 'Land Tenure Reforms and Conservation tools in South Africa and potential application to Kenya', 2010, 18.
[20] www.tandfonline.com/doi/abs/10.1080/19376812.2014.884466?journalCode=rafg20 <Accessed on 14th January 2016>.
[21] Martin M, 'Summary of Exploration and Appraisal, Tullow Kenya BV, 2011-2015' at Turkana County Government Stakeholders' Meeting, Maanzoni Lodge, Machakos, 10-12th February 2016.
[22] David M,'Six new wildlife conservancies to help restore peace in Turkana, West Pokot' , Mobile Nation, 6 May 2015.
[23] Section 5 and 14, *Community Land Act* ,(2016).
[24] Section 63, *Constitution of Kenya*, (2010).

making need to be facilitated by the county and national governments, to avoid conflict between the community and the state and investors.[25]

2. The Competing interests over community land

This includes the example of the Mau forest and its inhabitants such as the Ogiek who are forest dwellers. As known, the Mau forest has historically been a critical water catchment area which is also rich in agriculture. As discussed in previous chapters, before and after independence, the Ogiek have been routinely subjected to arbitrary forced evictions from their ancestral land by the government, without consultation or compensation. This has caused constant conflict with the Ogiek who saw the destruction of the forests and the alienation of their lands as a continued threat to their survival.[26] However, in as much as communities have a right to occupy land, various limitations are given in some legislations. With regards to the Forests Act, communities are not to be prevented from using such forests as has been their custom.[27] The Minister on the other hand, may by gazettement declare any forest area by gazettement to be a nature reserve for the preservation of biodiversity but ought to be compensated.[28] Compensation may also not be enough since this communities have established their livelihood on that land for a long time. The government should then ensure that there is public participation in any activities carried out in the forest and that they will receive reasonable benefits. Also, allocation of alternative land may not be appropriate because of the ancestral ties to the particular land.

3. The increased encroachment by sedentary groups.

Communities such as the Maasai in Kajiado and Narok have historically also faced the challenge of land dispossession by sedentary groups.[29] As they are dependent on productive grazing lands for their herds of cattle and goats, the Maasai have necessarily been custodians of the natural habitat.[30] Of late, they have been losing their lands to entities and private developers. This therefore separate them from resources they have been using for generations

[25] life-peace.org/hab/avoiding-the-local-resource-curse-in-turkana-kenya/ <Accessed on 14th January 2016>.
[26] Sang Joseph K, 'The Ogiek in Mau Forest; Kenya ', 2001, 9.
[27] Section 22, *Forest Act*, (2005).
[28] Section 32, *Forest Act*, (2005).
[29] See Chapter 2.
[30] www.maasaierc.org/the-maasai-people <Accessed on 14th January 2016>.

to survive.[31] Conflicts between sedentary farmers and pastoralists also arise mainly over access to water and land because of the increased occupation of land by their communities. Inorder to solve this conflicts, communal participation and local capacity building efforts should be encouraged where the communities themselves agree that there will be no more raiding of stock or grazing on agriculturalists' land. Measures to ensure total access to resources should also be taken by the government.[32]

4. The destruction of sacred sites and graves which cannot be compensated monetarily

For example in Kwale and Kilifi counties, many of these sites happen to be small groups of indigenous forests whose sacred status has been preserved by the local Mijikenda people, known as the *kaya* forests.[33] Threats from other communities and the increase in the Mijikenda population caused people to move out from the original *kaya* settlements and to establish new villages, but for many the elders continued to live, and to be buried and hence still respected the sanctity of the forest. Over the years, the development of tourism led to land grabbing and conversion of community land tenure to public. This issue is however, being addressed by the government by publishing the forests and acknowledging them as national monuments. However, this does not mean that the community property is not at risk. The authority of the Kaya elders should then be recognized by law and even in community participation inorder to try and secure their community rights.

In conclusion, legislation needs to facilitate practical implementation of community land rights. In as much as the definition of a community is provided for in legislation, the great hurdle of interpretation has proved to be a difficult task. There should therefore be a mechanism that reconciles this differences.[34] The mechanisms used should recognize ethnic identity while promoting national unity inorder to avoid ethnic conflicts that have existed over the years.[35] This consequently brings in the issue of identifying the members of the community and the rights they are entitled to. Most importantly, as legislation tries to regulate customary law, the law makers

[31] www.culturalsurvival.org/publications/cultural-survival-quarterly/maasai-survival-kenya <Accessed on 14th January 2016>.
[32] www.accord.org.za/ajcr-issues/%EF%BF%BCpastoral-conflict-in-kenya/ <Accessed on 14th January 2016>.
[33] www.culturalsurvival.org/publications/cultural-survival-quarterly/sacred-groves-threatened-development-kaya-forests-kenya <Accessed on 14th January 2016>.
[34] Kameri M, Collins O, *Breaking the Mould*, Strathmore University Press, Nairobi, 2016, 2.
[35] Kameri M, Collins O, Celestine M, Muirigi K, 'Ours by Right: Law Politics and Realities of Community Property in Kenya', 2013.

cannot go as far as codifying customary rights out of existence but should accommodate the principle of substantive justice for example addressing the effects of post violence on communities and the dispossession of their land; and ensuring that the historical land injustices have been addressed and compensation to community members has actually been implemented as seen in South Africa.

For the internally displaced persons (IDPs) due to the post-election violence, research shows that many displaced persons still fear to return home because of the dishonesty of the government in providing adequate security for them. Despite the land reform programmes put in place by government, resettlement of the IDPs did not work because the government fails to recognize the underlying causes of the violence for example; the inequality and the resentment amongst the ethnic groups.[36] Cultural diversity should be considered inorder to try and solve the differences between communities.

Setting a secure deadline and clear criteria and data after a land injustice has taken place can also be critical in ensuring efficient restitution.[37] South Africa, illustrates more appropriate and flexible land tenure systems which enable pro-poor frameworks to be more developed as is the major issue with community land rights that Kenya can borrow.[38]

[36] Oluwafemi A, John-M, 'Post-Election Crisis in Kenya and Internally Displaced Persons: A Critical Appraisal,'2011,177.
[37] Kathleen H, 'Land Tenure Reforms and Conservation tools in South Africa and potential application to Kenya', 2010, 10.
[38] International Institute for Environment and Development, 'Innovation in Securing Land Rights in Africa: Lessons from experience', 2006, 11.

CHAPTER FIVE

Conclusion, Findings and Recommendations

5.1 Introduction

This research tries to establish ways to resolve the individualization of community land rights by trying to answer the question of whether legislation recognizes the nature of customary law and whether it holds community land rights as equal to other statutory land rights. A breakdown of Kenya's path to solving community land disputes has been done in the various chapters including the comparison with South Africa and the lessons Kenya can learn. It is evident that codification of the recognition of customary rights is not enough. The solution for reforming communal tenure is seen to lie between titling of land and allowing customary rights to be recognized independently.[1] There is a need to ensure that customary governance is not breached by vested interests. The largely unresolved land question in Kenya can be said to be ascribed to the settling of indigenous communities leading to their marginalization. This leads to the jeopardizing of rights that consequently leads to poverty and increasingly has a direct effect on valuable local common resources such as forests. Communities as a whole should have complete control as an oversight authority in community land administration so as to reduce exploitation by individuals.

In June 2013, the University of Nairobi, Strathmore University and Kenya Land Alliance organized a conference on Community land under the theme Best Practices and Approaches for the Protection of Community Land Rights that was to create options for an effective legislation on community land. One of the main aims of that conference was to share ideas and practices from other countries on their community land rights and influence Kenyan legislation as seen in Chapter three and four on South Africa. Currently, the introduction of the new land model in Kenya, the Community Land Rights Recognition was designed to be piloted as part of the process to establish the rules to implement the law and to ensure that cadastral survey doesn't inhibit community's rights to use the land.

[1] Kameri M, Collins O, *Breaking the Mould*, Strathmore University Press, Nairobi, 2016, 23.

5.2 Findings

The study found that for community tenure to progress, it may include putting in place procedures through which these communities can define and register their land rights. The procedures are not enough and therefore the community members must have access to information about anything that might affect their land rights and be consulted about decisions affecting their land. The study also found that, traditional institutions should have a say in as much as there is community tenure legislation. However, in as much as traditional authorities have control over allocation of tenure rights, the lower levels in the communities should also have a say on adjudication of rights. Measures should also be taken to ensure that traditional leaders do not misuse the powers they have in issuing tenure rights and by selfishly acquiring the benefits meant for the whole community.

Government involvement aimed at consolidating the content of customary law in a statutory format are seen to unlikely achieve their anticipated result of solving tenure disputes. Indeed, this approach hardly secures customary rights since it would disadvantage the very essence of customary law and its flexibility to respond to changes in circumstances dealing with land. This is because such laws are likely to remain 'on paper' and therefore not benefit communities.[2] It is evident from the many legislations analyzed in Chapter 2 on the historical background of statutory land laws. Chapter 3 on the other hand, gives a comparative analysis between South Africa and Kenya where there is an acknowledgement that recognize that the dynamics and local resources such as indigenous knowledge systems and the needs of the people must guide government's land tenure reform programme.

5.3 Recommendations

1) Implementation of community resource management practices

In view of the Kenyan context, rather than the creation of new local land administration institutions and procedures, national reforms should allow them to take place through the existing community land and resource management practices as provided for in the Community Land Act. This therefore recommended that measures to ensure implementation by the institutions should be taken to ensure that the structures work in an efficient manner.

[2] Janet P, Feja L, Tom L, Saskia O and Cynthia M, 'Securing community land and resource rights in Africa: A guide to legal reform and best practices,' 2013, 14.

2) **Address the challenges brought by setting a cut-off date for the process of restitution**

With regards to compensation of communities who have been disposed of their land, a cut-off date for this restitution is set.[3] This includes historical injustices that occurred between 15th June 1895 when Kenya became a protectorate under the British East African Protectorate and 27th August, 2010. It should be noted with consideration that there are disputes which have occurred before and after those dates that still need to be solved.

3) **To make changes to the National Land Policy**

A review and update to the National Land Policy on the provisions in Section 36 and 37 needs to be made. This policy which was enforced in 2009 prior to the 2010 Constitution where it urged the repealed to effect changes that were now made in the 2010 Constitution.

4) **Adoption of co-management strategy**

There has not been an overall biodiversity plan in Kenya. It is important in solving the major issues of investments or the conversion of tenure for public purposes which equivalently affect the communities' livelihood. This strategy will therefore enable the country to specify how and when the conservation will take place and provide benefits to the communities.

5) **Role of Courts**

The courts have a great role in promoting security of tenure by recognizing the importance of community land rights. The emphasis on the importance of the access and the link between land rights and the Bill of rights, such as the right to water and land, should be made by the court by setting them out for example; when deciding on land mark cases. For example; the Inter-American Court on Human Rights, in a precedent-setting recognized the presence of property rights of indigenous community traditional lands. The international court, which is located in San José Costa Rica and the American hemisphere's most significant human right tribunal, declared that the state of Nicaragua violated the human rights of the Mayagna Sumo indigenous community

[3] George, 'Vindicating Indigenous Peoples' Land Rights In Kenya', (LLD), Faculty of Law, University of Pretoria, 2008,206.

(*Awas Tingni*) and ordered the state of Nicaragua to recognize and protect the legal rights of the community with respect to its traditional lands, natural resources, and environment.[4]

6) Address the lack of political good will

This is evident for example in the case of the Endorois where in as much as the court passed a judgment, it has not been effected due to the influence of the political nature of the country and hence they resulted to the human rights Commission. Measures should therefore be taken to ensure the judgment is implemented to the community members.

7) Role and recognition of advocacy groups

More advocacy institutions, public or private such as; Strathmore University and the Kenya Land Alliance should be promoted and established to advocate for the protection of community land rights where they create options for an effective legislation on community land.

5.4 Conclusion

The study has achieved its objectives and responded to the statement of problem. The objectives were:

i. **To investigate the appropriateness of the current land laws in protecting community land rights.**

From the analysis of the historical background on land laws in Kenya, the attendant land laws have tried to accommodate and recognize the existence of community land rights even by stating that they are equal to other tenure rights but this proved not to be the case as land conflicts increased over the years.

ii. **To establish the challenges and assess the recognition of customary rights**

The challenges faced by community land rights have been identified by the laws in Chapter 2 of in this research. As seen the recognition of customary rights has been codified and this is not enough to secure community tenure.

[44] //www.ciel.org/news/international-court-rules-in-favor-of-indigenous-community-land-rights/ <Accessed on 21st February 2017>.

iii. **To recommend and suggest in the current legal regime ways to curb the problem; including how to solve the non-recognition of customary law**

As seen in Chapter 3 and 4, the codification of the recognition of customary rights is not enough, the study encourages that customary law should be viewed independently with the accommodation of cultural diversity and community participation.

5.5 Hypothesis

The current land laws do not adequately secure community land rights and recognize customary law independently, hence the continuous individualization of community rights.

The study has proved the hypothesis by highlighting that, despite the codification community land rights which is evident in the land legislations, it is not enough to secure community tenure rights in law. The research urges that the government must ensure there is implementation of proposed reform programmes as highlighted in the National Land Policy and the Community Land Act, especially where the government converts community tenure to public tenure and promote community participation in activities that involve the use of their land.

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