

Genealogy of Land Ownership, Use and Management Problems in Kenya During the Pre-August 2010 Constitution Period. A Review

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Abstract

This paper provides a foundation for understanding various social, legal, economic and political aspects that impinge on land and land use management in Kenya. It provides an 'archaeology' of land ownership and land use problems, which indicates that these problems are historically and culturally contingent. The paper presents a brief historical review of land ownership and land use to build an understanding of how historical aspects relate to customary land use and how the superimposition by English land laws during the colonial period affected (and continues to affect) land use and its management.

This paper also describes the legislative framework that guides land ownership, use and management in Kenya. A further review of legal aspects on land management and land resource use planning is offered in order to examine how a sectoral approach to policy formulations and enforcement has affected planning. Included in the review are statutes that address land tenure, land use legislation, environmental legislation, forestry legislation, water laws, the Public Health Act, the Constitution of Kenya, planning legislation, and the Local Government Act. In addition, the paper looks at the enforcement aspects of land use planning laws.

KEYWORDS: Land, Laws, Management, Policy, Enforcement, Planning.

1. Introduction

Land was a central tool of social and economic control for the colonial government. Such was the imprint of the colonial government that, at independence, the Kenyan government continued with a slightly modified land use management regime of the colonial government. This adoption of colonial land governance resulted in land ownership which was highly skewed in terms of distribution and closely linked to political power, wealth, and social status. Consequently, in building an understanding of land ownership and land use, it is useful to focus on the political economy of land use and access to land [1]-[2].

Reference [3] explained that the land tenure¹ system currently in place in Kenya is a dual one,

¹Following [6], the term 'land tenure' is used to define how individuals gain access to, and acquire use rights over, land, either temporarily or permanently.

combining aspects of English land laws and African customary laws. This system evolved as a result of Kenya's colonial history whereby a settlers' economy was superimposed on the then long established tribal customary land tenure and management systems. I believe that the settlers' economy in Kenya was guided or was underpinned by the colonial government's modernisation approach. This was a programme aimed at transforming the colony into a 'modern state' using 'Western' (occidental) planning and legal templates, while disregarding other legal forms and knowledge systems such as indigenous knowledge systems.

2. Phases of land management and laws in Kenya

To delve into the history of Kenya's land laws and use, reference's [3] three phases categorisation that is, pre-colonial, colonial and post-colonial, is useful.

2.1 Land management initiatives in pre-colonial Kenya

In the pre-colonial period, she argues that land use was guided and controlled by customary laws and procedures which were dominant among different ethnic communities. In this phase, most land was owned by an entire community while individual community members only had user-rights to land. These user-rights were subsidiary to joint communal rights. The user rights' system was based on individuals' land needs which were determined by community leaders. Community leaders had powers to make decisions on who could use the land and for what. This system was not however uniform among all Kenyan ethnic communities; it varied from one ethnic community to the other depending on cultural, geographical, political, and socio-economic circumstances [4]. Hence, a pre-colonial customary land tenure system existed everywhere but applications depended on local context.

2.2 Land management initiatives in colonial Kenya

The second phase of [3] development was the colonial period. Reference [5] noted that towards the end of the nineteenth century, when the colonisation of Africa was effectively resolved in the Berlin Conference of 1884, Kenya became a British Protectorate. It then became a Colony in 1920. One of the goals of colonisation was to

generate economic benefits to the colonising country. This was made possible by the establishment of sectors that could generate economic returns such as mining and farming. For this to be possible land was needed, but that land was however already 'occupied' by different ethnic groups. This necessitated the adoption of several methods to gain access to this land including violence, trickery and in some cases mutual agreement [7]-[8].

Since there were no national land laws, settlement by White settlers took place in haphazard ways that had little or no regard for pre-colonial land tenure systems. There was a need to create some order among the White settlers. Legislation under the name 'East African Order in Council of 1897' was introduced by the Imperial British East Africa Protectorate Company (IBEA), which was administering Kenya at that time [4]. This was the beginning of the process of modernisation based on Weber's 'purposive rationality', which was aimed at replacing African's traditional forms of authority and belief systems [8]. The Order allowed settlers to be granted certificates of land ownership for a term of 21 years which were renewable for a similar period upon expiry. In an attempt to avoid land use conflicts, the Ordinance also forbade the settler occupation of land that was under usual cultivation by native tribes [9].

However, [5] argued that clauses forbidding settlers' occupation of land cultivated by natives and the limiting of the lease periods to 21 years, led to the Order being perceived by the settlers as an impediment to long term agricultural investment. As a result of such perceptions, settlers began to lobby for the nullification of natives' rights to land ownership by suggesting that all land in Kenya should be put under the legal authority of the Crown. The lobbying resulted in the proclamation of the 1901 Order in Council which was intended to enable settlers to acquire freehold title or long leases in the Protectorate.

Reference [5] observed that through the 1901 Order in Council all 'unoccupied' land (i.e. land being empty did not mean it was without owners) in the protectorate was proclaimed to be Crown land. Reference [5] continued to note that, in 1908 the Crown Land Bill was enacted to give the Governor of the Colony the power to reserve, sell, and lease or dispose land in the Protectorate.

As settlers got a foothold in the local economy, amendments to the Crown Land Bill were pushed through in 1915 and this led to a redefinition of Crown land to include all lands occupied by native tribes. The Ordinance changed the leasing period from 21 years to 99 years for town plots and 999 years for rural agricultural land [5]. The Ordinance thus permitted settlers to change short leases to long-term leases. Perhaps the most insidious aspect of the Ordinance was that it delineated the native reserves to which native tribes were confined; natives were not to own land outside these reserves [10]. As this happened, Kenya had changed from being a Protectorate to a Colony. I believe that the consequence of this change was that most aspects of the English Common laws were adopted into the Colony's legal framework, notwithstanding the existence of tribal legal systems.

Among the laws adopted from English Common law was the English Property Law. According to [11], this law was needed to govern land ownership and use. Reference [8] argued that adopting the property law affected land ownership by native tribes in several ways: First, the law vested land ownership in individuals rather than in the community, a structure which differed from the customary land tenure system. Secondly, the law brought a wave of settlers into communal grazing, cultivation and forest land, formerly used by native tribes [4]. Reference [13] added that to strengthen activities involving property transfers, leases, mortgage and covenant activities, the colonial government also incorporated the Transfer of Property Act of India. This was further enhanced by the enacting of the Registration of Titles Ordinance in 1920 to secure land tenure of the settling proprietors, which enabled the issuing of Title Deeds [12]-[4]. The law that gave the security of tenure was necessary to support a cash crop economy which was meant to produce raw materials for metropolitan industries. Cash crops grown at that time were sisal, coffee and wattle

trees (which take time to establish and require high initial capital investment).

Despite securing land tenure by issue of Title Deeds to landholders, [12] argued it was still costly to undertake agriculture in the colony. This was due to huge capital required for the establishment of cash crop production and in addition, the production required extensive labour which was unavailable from the natives who were engaged in peasant subsistence economy. Furthermore there were fears of competition from the natives who had the advantage of family labour at their disposal. And therefore to gain a competitive advantage over the native peasants, the settlers lobbied the colonial government to control the factors of production (such as land and labour) and the markets (domestic and international) for their products in their favour [12]. Reference [12] continues to note that in response to the settler's lobby the colonial government came up with a number of restrictions that touched on the natives which prohibited their cultivation of cash crops such as tea and coffee. This was also followed by the acceleration of seizure of highly productive land that belonged to natives and institutionalized the use of force on the natives to work as labourers on settlers' farms through the introduction of hut and poll taxes [12]-[7]-[8]. The introduction of taxes was to force peasants in subsistence economy to seek paid employment to get money to pay taxes.

The establishment of native reserves and the alienation of land from native tribes led to massive relocation of natives from their original land to the reserves [5]-[7]-[2]. Alienation and the subsequent eviction of natives from communal land lead to increased prevalence landlessness, decline in the quality of agricultural land due to "...fragmentation, overstocking and soil erosion, and the disintegration of social and cultural institutions in the reserves" [3].

Natives responded to these changes by expressing grievances to the Colonial Government. In response to the grievances, the Colonial Government established the Carter Land Commission in 1933. The commission was tasked to investigate land grievances, assess native's land needs, determine the nature and extent of land claims by natives, and define the status of the White Highlands. The outcome of the Carter Land Commission was the enactment of the Native Land

Ordinance in 1938, which led to the release of additional land for cultivation by natives [14]. It is worth clarifying here that English Law governed ownership and access to land in areas controlled by the White settlers while customary law continued to govern the land ownership and access in native reserves.

Despite this legislative change, [5] noted that the problems associated with land persisted, especially in areas with significant population density such as Central Kenya. It was at this time that local areas such as Central Kenya started to revolt against the Colonial Government through a guerrilla movement known as Mau Mau (1952-56), with land as a core organising theme. [15] added that the Mau Mau rebellion was waged not only over the alienation of native land but also over the right of natives to participate in commercial agriculture. The increase in rebellion led to the establishment of the Royal Land Commission on East Africa whose chairman was Lord Swynnerton [17]. The output of this Commission was a 1954 report which was variously referred to as Swynnerton Plan [11].

The aim of the Swynnerton Plan was principally to initiate land reforms in the native reserves. In order to implement the land reform programme, the Land Consolidation Act of 1959 was enacted [7]. In this programme, land adjudication as the first step was meant to ascertain individual or group rights to the parcel/s of land within a given area. This was followed by land consolidation which involved the merging of fragmented parcels of land into single units. Finally, the consolidated land units were registered and a title deed issued [12]-[16]-[4]. It was assumed that individual land ownership would encourage native farmers to invest their labour and resources in improving agricultural production capacity of their land² [4]-[2]. Furthermore, it was assumed that farmers could use Title Deeds to secure credit for agricultural development [4]. The author of the Plan also envisaged that increased land productivity in native reserves would reduce

²According to reference [6] this property rights paradigm is based on neo-classical economic theories, which argues that traditional African land-tenure systems induce inefficient allocation of resources, because property rights are not clearly defined, costs and rewards are not internalised, and contracts are not legal or enforceable. In addition the theory holds that individualisation of land tenure will increase the landholder's security of tenure thus increasing levels investment on land.

the clamour for land redistribution especially in the White Highlands.

It may seem that the Swynnerton Plan thus had political and economic objectives of ensuring political stability by creating a class of native farmers whose success would lead to both the loyalty and support for the status quo and also absorb the landless Africans as wage labourers in their farms [12]-[2]-[18]. According to [13] abundant labour was also expected to result from displacement of people from regularised land and exit from agriculture through an active land market.

The land reforms were however not without problems that led to grievances related to land alienation, land registration and subsequent landlessness. The problem was most obviously experienced in Central Kenya [5]. Even though the new (land) tenure laws stipulated legal rights to land, "...individual proprietor traditional rights of access and inheritance continued to determine the (native) farmers' freedom of disposition" [4] in many ethnic communities where the reforms were implemented.

Even though the Swynnerton Plan period lasted only five years (1954-1959), reference [15] argued that later governments (including the independence government) carried on the policies and principles that were contained in the Plan. This was particularly so in regard to the Plan's notion of private property rights on land, and the principle of extending the control of the State on the market and land production process. I believe that the spirit of Swynnerton Plan still influences the many policies on land uses in the postcolonial period. My argument is derived from [5]-[11], assertion that the first Independence government of 1963 adopted most existing colonial land laws and policies. For example, much of the content of the 1963 Constitution of Kenya was inherited from the colonial government. It may have been meant to protect the interests of the settlers who opted to continue farming in Kenya after the political independence [4].

2.3 Land management initiatives in the postcolonial Kenya

In addition to adoption of the colonial land laws, [4] noted that the independence government enacted the Registered Land Act (Cap 300) to govern land in native reserves that were under

customary laws. This Act, though it was meant to address land problems in the former native reserves, embodied much of the English Law. This was meant to further the objectives of the Swynnerton Plan which was to promote individual land ownership against communal ownership. Due to limitations of individualised land ownership in the areas of pastoral and nomadic land use (where the ways of life and land ownership were predominantly communal), maintaining the status quo was necessary. To cater for the land rights of such areas, where individual land ownership was largely impossible, the Land (Group Representatives) Act (Cap 287) was enacted through the amendment of the Land Adjudication Act (Cap 284) in 1968 (five years into independence) [4].

Another aspect of land management that was inherited from colonial administration by the independence government (according to [3] was the land re-settlement programme. Among other purposes, this programme was meant to accommodate landless natives who had been displaced either during land confiscation or by the application of the land reform programme in native reserves [4]. The programme also aimed at re-settling those who were squatting on the White Highlands. With funding assistance from the British government and the World Bank, the government purchased land from departing settlers at market prices on willing-buyer and willing-seller basis [5]. The reclaimed land was vested in the Settlement Trust Fund, a government agency which was meant to sell 'on-sale' land to natives at a reduced price.

Reference [11] observed that the reclaimed land sale process was not easy for many landless people. Under the purchase terms of the Settlement Trust Fund, buyers were required to show that they were capable of repaying a compulsory land purchase and development loan, either by showing previous farming record or, proof of stable income. Most of the landless (mostly squatters and farm wage labourers) of that time could not meet these Settlement Trust Fund's requirements and were therefore not eligible for land allocation, a programme which was meant to benefit them. The result of this was that well-to-do middle class farmers, politicians, civil servants and businesspeople ended up benefiting from the programme which was initially meant for the

landless [4]. Thus the problem of landlessness continues to date, a scenario exemplified by the commentaries in the Newspaper excerpt 1 below.

According to [5]-[3], the government had insufficient funds to buy land from departing settlers. To address the problem the government, through the *Sessional Paper No. 5 of 1965*, emphasised the need for co-operative self-help efforts, a form of African Socialism embedded in the *Harambee*³ slogan. People were therefore encouraged to pool their resources and organise the collective purchase of land from departing settlers. Land buying companies and farming co-operatives were established and through them many landless were able to buy land [4].



Newspaper excerpt 1: Commentaries on land problems. Source: [19].

Land problems have never been resolved, as [5] argued, since the independence government efforts to address land problems have been reflected in all National Development Plans. Government efforts on land reform were meant to promote rapid

growth in agricultural productivity and employment, promote the Kenyanisation of agriculture, encourage better conservation of existing land and natural resources and, bring new land into production. As part of its land use policies the government implemented several new measures, including encouraging the intensive use of land among small-scale farmers, through an agricultural extension department. I believe this was mostly driven by the realisation that the intentions of the Swynnerton Plan of creating a class of native farmers and pool of labourers could not be achieved because people were still reluctant to sell their small parcels of land in favour of employment. Also experiences from the colonial farm labour may have prompted people to cling to individual economic autonomy rather than working for others.

For example, in the 1978/83 Development Plan [20] the government stated that the small farm family land unit would be the main instrument for farm management and rural development. Emphasis on the small farm family land unit was derived from evidence that on the whole, small farms produced more per acre, utilise land more fully, employ labour-intensive methods of production, and are a source of both subsistence and cash crops.

Family farms as the focus for agricultural development have three implications that underlie more detailed government policies. First, the family owns its land. Second, the family manages its land. Third, the family works on its land. Ownership of large holdings of land that were suitable for small farming was thus to be discouraged (a shift from Swynnerton Plan). The Government also announced its commitment to discourage absentee landlordism, landlord-tenant systems of farming, and the holding of idle land for speculative purposes. To achieve this end, the Government considered the introduction of tax on idle land as this was denying the country opportunity to make full use of land resources. The policies that the Government intended to introduce for the management of land resources were to prevent such malpractice as land hoarding for speculative purposes (which are common especially in areas with urbanisation potential). And also the policies were meant to firmly establish the small farm as a principal decision-making unit in agricultural development (which I believe was meant to make

³ *Harambee* literally in Swahili language means "all pull together." This has its basis on egalitarian practices which are customary to many ethnic communities of Kenya. However, it has been adopted as community self-help initiatives e.g. fundraising for community development projects/activities. *Harambee* may be informal affairs that last for few hours whereby invitations are made by word of mouth, or formal, multi-day events that are advertised in newspapers [18].

up for joblessness amidst dwindling investment in the industrial sector).

Establishing ownership of land in compact family farm units has been the main purpose of Kenya's ongoing land adjudication and registration programs. Once registered, land can form a basis for obtaining credit, a source of funds if it is sold, and an object for subdivision among heirs. The first was encouraged by the government; while the other two were to be carefully controlled if the family farm system was to flourish. With the implementation of land adjudication and registration, reference [5] observed that the volume of land transactions among smallholders increased (land sale especially in the form of small portions). At the same time incidences of concentration in land ownership among farmers who were better-off economically (through purchase) increased [4] which I think was an intended consequence of the Swynnerton Plan.

During the 1989-1993 National Development Plan period [21] the government once more committed itself to establishing a National Land Commission to consider all policy issues related to land. Detailed recommendations were made by the Commission which aimed at ensuring that envisaged land policies, land laws and regulations met the country's future development needs. The government stated that in order to develop a suitable framework to manage land effectively, it was going to set up an Independent Land Use Commission to review questions related to land and advise on optimal land use patterns for present and future generations in various agro-ecological zones. This has not happened, although land policy has since been drafted and adopted by the Parliament.

In the 1994-1996 National Development Plan [23], the government noted that accurate and up-to date database information on land is lacking. Also lacking are large-scale urban maps on the basis of which planners, policy makers and investors can make informed investment decisions.

In the 2002-2008 National Development Plan [22], the government noted that landlessness remained a national problem and more so its resultant squatter settlements. Also, the issue of conflict among different departments dealing with land is seen as contributing to decay and inefficiency, especially in urban areas (an issue which I followed up during

the case study discussion). The major aims of the government during the plan period is to settle the landless, prepare a land use policy, review land rates for urban properties, enforce the Physical Planning Act, and improve land information systems. Little was done, though Plan period has already expired.

3. Land Tenure Systems in Kenya

In this section I look at the various modes of land ownership that exist in Kenya. At the outset, it is worth stating that the adoption of the colonial land ownership regime at independence and the subsequent piece-meal and reactive ways that land laws have been amended or introduced have led to legal overlaps and ambiguities. These notwithstanding, over the years, such legislation have given rise to three land tenure systems namely, private, customary and public tenure [14]-[4]-[24].

3.1 Private tenure

Reference [11] argued that the private tenure system is a product of the colonial regime of English Law. The private tenure system allows an individual or corporate entity exclusive rights and "...title to a specified estate in land" [4]. The private tenure system "...includes all freehold and leasehold land held by individuals, companies, co-operative societies, religious organizations, public bodies, and legal bodies" [4].

Private land status may result from several initiatives: acquisition of public land by the private entity through "...alienation under the Government's Land Act, the Trust Land Act or adjudication of trust land (under the Land Adjudication Act); determination of claims under the Land Titles Act, .." [4] or sale of land by the Settlement Fund Trustees. Although the land holders in this tenure system are at liberty to use their land in a manner they consider suitable under the land use laws [4], there is no absolute land use freedom. Laws of nuisance under the Public Health Act and Environmental Management and Coordination Act EMCA can impose conditions on land use deemed injurious to the public [26]. The law that supports this form of land ownership is embodied in the Registered Land Act (Cap 300) [25]-[14].

3.2 Customary Tenure

Customary tenure is a form of land ownership system found mainly in areas where the process of the adjudication, consolidation and registration is yet to take place [25]-[4]-[24]. Under this tenure system, land is held by a clan, an ethnic group or the whole community. Every community member's right of access to land depends on their needs and position within that community [4]. Access to land and its resources is thus determined by the individual or group membership to social units of production which includes a family or a community [26]-[4]. The political authority of the units or community (such as elders, head of the clan, or head of the family) is entrusted with the rights to control use and access of land [4]-[24].

3.3 Public tenure

References [4]-[24] indicates that public tenure land defines government forests, national parks and reserves, open water bodies, townships and other urban centres as well as other gazetted and non-gazetted public/government lands. These categories of land are administered under the Government Lands Act (Cap 280). In relation to public lands, the government is deemed to be a private landowner. The land under this system is reserved by the government for public purpose, but it can be privatised through allocation to an individual or corporate entity [4]. The allocation is done through a Presidential grant which can confers freehold or leasehold title to the land to an individual or corporate body [29]-[26].

4. Legal Framework for Land Ownership and Use

Kenya has various laws that directly or indirectly touch on land management, but it lacks a comprehensive land policy. Land management in Kenya have been addressed in reactive and piecemeal ways and therefore there are numerous laws that address land and land resources albeit with duplication and conflicts [30]. These laws target various aspects of land use, such as land exploitation, land control, land use planning, and land conservation [14]-[4]. A brief overview of these Acts and how they have influenced land use in Kenya is given below. These Acts are offered in a thematic sequence rather than in time sequence.

4.1 The Agriculture Act of 1967 (Cap 318)

References [4]-[27] notes that, the Agriculture Act (Cap 318) is aimed at promoting and maintaining stable agriculture, promote the development of land for agricultural, and to promote soil conservation. They further indicate that the Act essentially spelt out the Minister's statutory powers in regard to the achievement of the set objectives. And that there are a numerous agencies (such as, District, Provincial and Central Agricultural Committees) earmarked to assist the Minister of Agriculture in performing his/her stipulated tasks.

Reference [4] argued that "the Agriculture Act is one of the most authoritative..." among land use legislation in Kenya. However, they see its breadth as perhaps being its major weakness; for example, "[t]he Act makes provision (see Box 1) for regulating the planting of cash crops such as coffee and tea (and that) [t]hese crops can neither be planted nor [uprooted] without a permit" from agricultural officers. These provisions have failed to work, under various circumstances such as in the peri-urban areas where competing needs for land defy such restrictions or make non-compliance attractive given the minimal penalties written into the law. I believe the Act is a colonial relic, as it is based on the tenets of the police power, that "commands and controls" [4]. I argue that it was meant to make it hard for native peasant farmers to venture into cash-crop farming. However, following independence, government promotion of the peasant economy found it appropriate to retain such command and control to safeguard cash-crop farming on small-scale farming units as a source of self-employment. In general, the command and control approach has served as a major disincentive for the efficient use of land for agricultural production in the face of other competing land uses, as there is no room for public negotiation and participation in implementation of the Act's various provisions.

Box 1: Provisions of the Agriculture Act of 1967 (Cap 318). Source: [4].

Under the Act the Minister and the sub-organs of the Ministry, have authority and powers to undertake the following tasks on land use:

- Ensure production of food crops by declaring essential food crops or scheduled crops as special crops, and enforcing the production of such crops;
- enable new settlements and provide rules that govern such settlement, including outlining the crops to be grown, the number and type of livestock to be kept, and the agricultural production procedure;
- limit activities that exploit land and damage the environment. Under this prerogative, the Ministry, through and in consultation with its various offices, can demarcate land for preservation under a land preservation order;
- order land development and alter land development procedures in consultation with other boards;
- make rules for preservation, utilisation and development of agricultural land including the control of erection of buildings;
- limit the size of land available to farm workers housing and use, and empower local authorities to make by-laws for the same purposes, and;
- dispossess owners of land if they violate land preservation orders, crop delivery specifications and land development orders.

4.2 The Land Control Act of 1963 (Cap 302)

The aim of the Land Control Act (Cap 302) of 1963 is to control agricultural land transactions [4]-[28]. Specifically, Section 5 of the Act calls for the establishment of Land Control Boards with the responsibility of controlling all land transactions. The Act gives these boards the power to either permit the transfer of agricultural land or refuse such transfers. Furthermore, Section 6 of the Act controls the transactions in agricultural land by declaring null and void any land transaction that take place without the consent of the Board [4].

When making decisions on whether to grant or refuse consent to proposed transactions in agricultural land, various considerations guide the Land Board. These include: "... the impact of the land transfer to the economy of the control area; the intended use of the transferred land; and the nationality of the person receiving the land" [4].

The authors further argued that these provisions were meant to assist in realising the stated [legislative] objective of enhancing productivity of agricultural land by ensuring that land is used economically and it is conserved for future production, given the scarcity of arable land in Kenya.

Among the drawbacks of this Act is that it does not specify the minimum land subdivision size for agricultural use. Failure to specify the minimum size has made the Act ineffective in controlling subdivision of agricultural land areas such as the peri-urban areas where land subdivision is done for residential purposes but under the guise of agricultural use. Another drawback is the discretionary power that the Land Control Board enjoys in deciding whether to approve or reject a land subdivision application, a situation likely to breed corruption. These drawbacks will be revisited later, in the discussion of the influences of land use conversion in the case study area.

4.3 The Environmental Management and Co-ordination Act (EMCA) of 1999

Kenya was without a comprehensive legislative framework for environmental regulation for a long time. The legislation governing the environment was thus confined to the common law and a number of statutes regulating sectors such as water, health, forestry, agriculture and industry [30]. The EMCA became operational on 14 January 2000. Through the EMCA Act, two administrative bodies, the National Environment Council (NEC) and the National Environment Management Authority (NEMA) have been established. The role of the NEC is to formulate policies, set national goals and promote cooperation among different stakeholders. NEMA is tasked to supervise and coordinate all matters touching on the environment and to implement the provisions of the Act [4]-[31].

NEMA is still laying an institutional framework in many areas of the country and its impacts are yet to be fully felt or seen. Other than its evolving operational status, NEMA also conflicts with other sectoral agencies of the government whose mandates were left intact even after its enactment. These include Public Health, Lands and Physical Planning departments. Conflicts are also emanating from other line ministries such as the Ministry of Agriculture through the Agricultural Act, where the

power to demarcate land for conservation still remains. Therefore, even if EMCA is to be fully implemented in areas with heterogeneous land uses (such as peri-urban areas), it is not likely to change environmental problems induced residential land uses.

4.4 Forestry legislation

Although the Forest Act of 2005 [32] has been enacted, the institutionalisation of the Act is still taking place. Thus its effectiveness is yet to be felt in halting further forest land conversion in areas such as the peri-urban areas.

Conservation, management and utilization of forests and forest resources in Kenya is also governed by other Acts such as the Plant Protection Act (Cap 324), the Timber Act (Cap 386), the Water Act (Cap 372), the Wildlife Act (Cap 376), and the Local Government Act (Cap 265) among others. This further adds to the puzzle of conflicting and overlapping institutions in land management.

4.5 Water laws

The management of water resources in Kenya is governed by the Water Act 2002 [33] which was enacted following *Sessional Paper No.1 of 1999* (Mireri, 2006: 116). Formulation of *Sessional Paper No. 1 of 1999 on National Policy on Water Resources Management and Development* was a long term strategy aimed at integrating water resources management with other land use activities. Furthermore the strategy aimed at giving the Minister concerned the power to declare a water catchment a protected area, thus regulating or prohibiting activities that do not promote water conservation goals [25]. The Water Act, in conjunction with the Public Health Act, provides laws that can be applied to address the issues of surface water pollution.

4.6 Public Health Act of 1972

In Kenya, before building plans are approved they have to go through the Public Health Department at the district level. The Public Health Act gives public health officers the discretionary powers to approve or reject building plans. These powers are based on health issues, such as those based on quality and sanitary conditions of the buildings. The main emphases of the Act as it relates to land

use are good sanitation for ensuring a healthy environment, the setting of engineering standards for sewerage reticulation and access to buildings. The Act is further strengthened by other statutory provisions such as Local Authorities' by-laws and Building Codes [35].

The Act has in many cases complemented physical planning and local authority officers in addressing land use development that they deem illegal (but where their respective laws are weak) through application of the nuisance stipulations of the Act. The implementation is, however, hampered by weak coordination among departments and inadequate workforce for the enforcement.

4.7 The Chief's Authority Act of 1924 (Cap 128)

The Chief's Authority Act was first introduced in the 1920s as the colonial administration sought to develop a framework of local government. This Act has extensive policing powers particularly on land use and management within chief's areas of jurisdiction. The Act confers on the chief the power to order regulations on particular uses of land. The Act, for example, gives chief the power to order people to plant specified crops on their land, if a particular area is suffering from or is threatened with shortage of foodstuffs [4]-[2]. Also, the Act also gives the chief powers to prohibit grazing in land that is being rehabilitated or have fodder crops [4]-[2].

4.8 Constitution of Kenya⁴

Protection of ownership rights to properties is enshrined in Kenya's Constitution. Sections 75 and 84 guarantee the protection against dispossession of private property. Reference [4] note that the "...compulsory acquisition of land for public interest embodied in Section 75, 117 and 118 of the constitution" requires that such acquisition may operate if: (i) it can be justified to be of public interest and that public interests will be promoted; (ii) the benefits arising from the acquisition far exceed hardships or inconveniences to the owner(s) of the land to be acquired; (iii) land owner(s) are compensated promptly and in full. With goodwill and commitment by the government officers

⁴This paper acknowledges that, as from 27th August 2010, Kenya has a new constitution but the structure and institutions for which it proposed are still being operationalized by the time of writing this paper.

concerned, these provisions in the Constitution can be applied in dealing with land uses that are contributing to environmental pollution.

5. Land Use Planning Laws

This section focuses on the laws that specifically relate to land use planning. In elaborating how these laws work, I will give a brief introduction on the evolution of land use planning practices.

I should begin by emphasizing that, although the Physical Planning Act was enacted in 1996 and came into force in 1998; its full institutionalisation is still taking place. Therefore, to lay the foundation of land use planning in Kenya and how it relates to land use today, it is appropriate that I elaborate on both the Town Planning Ordinance of 1931 (Cap 134), and the Land Planning Act (Cap 303) of 1968.

As already mentioned, the East Africa Protectorate 1903 Ordinance was the first land use statute in Kenya. This was followed by the Land Use Proclamation of 1911. This coincided with the Simpson Committee Report of 1911-1912 that gave local authorities powers to make by-laws that were to be approved by the Governor in Council. It was this Committee that also recommended zoning of Nairobi City on the basis of racial segregation [37].

The enactment of the Town Planning Ordinance in 1919 guided planning activities until 1931 when it was replaced by the Town Planning Act (Cap 134). The Town Planning Act was solely in use for urban land use planning until 1961 when the Development and Use of Land (Planning) Regulations were enacted. The Development and Use of Land (Planning) Regulations became the Land Planning Act (Cap 303) in 1968. The Town Planning Act of 1931 remained in use, thus making both Acts run parallel in management of land use in Kenya [37]. This remained in force until 1996 when both Acts were repealed and merged into the existing Physical Planning Act of 1996.

5.1 The Town Planning Act of 1931 (Cap 134)

Control of the development and preparation of Township Plans by the Government Town Planning Department were undertaken under sections 23 and 24 of the Town Planning Ordinance. Section 23 addressed the issues pertaining to the preparation of

Town Planning Schemes (Development Plans) outside Municipalities and Townships [36].

The Act had some specifications which were relevant to land use control: first, the Act sought to control land use in all areas within a distance of five miles of the boundaries of municipalities, townships and former towns. Second, the Act had provisions on controlling all land use activities that were situated within 400 feet of the roads specified in the schedule.

Section 12(1), gives the central government powers to refer a case to the local authority in case of areas where no Interim Planning Authority existed. These powers were necessary in cases where: first, the agricultural land to be subdivided exceeds 20 acres. Second, the agricultural land will result into plots of less than 20 acres. This provision was applicable to areas when large coffee farms were being subdivided into small plots for residential purposes.

Third, in cases of application to subdivide agricultural land within three miles of an adjacent municipality, the involvement of the adjacent municipality was to be sought. This was due to the recognition that such land uses will affect the neighbouring municipalities by (for example) putting more pressures on the available services and infrastructure.

Fourth, the Act allowed the involvement of whatever other governmental authority the central government may see fit. Since most urbanization especially in peri-urban areas cut across political and administrative boundaries, this provision was necessary in enhancing coordination and collaboration in managing cross-boundary matters such as environmental pollution resulting from residential land use development.

5.2 The Land Planning Act of 1968 (Cap 303)

This legislation resulted from the formalisation of the Development and Use of Land (Planning) Regulations 1961 into a statute. The Act was aimed at the preparation of Development Plans, appointment of Planning Authorities and the control of development (Government of Kenya, 1968). Part 11 of the Act empowers local authorities to take control of land use in areas where planning schemes have been prepared and gazetted. Some of the major plans prepared under this framework included the Nairobi Metropolitan

Growth Strategy (NMGS) of 1973 and the Human Settlement Strategy (HSS) [38].

The Minister responsible for Physical Planning was the key authority in the Land Planning Act. Through the Commissioner of Land's Office and the Physical Planning Department, the Minister was responsible for the preparation of Town Plans, Area Plans, Subdivision Plans and Use Plans for the un-alienated government land. The approval, enforcement and compliance with plan were ensured by the Commissioner of Lands. With the enactment of Physical Planning Act 1996, these tasks are now under the domain of the Director of Physical Planning.

5.3 Physical Planning Act of 1996 (Cap 286)

The Physical Planning Act 1996 aims at guiding the preparation and implementation of Physical Development Plans [39]. This Act came into being after the repeal of the Land Planning Act and the Town Planning Act. In main the Act is aimed at the physical planning of land, regulating land use and ensuring that specific requirements are met before the use and development of land is approved. It underpinned the establishment of Interim Planning Authorities to which land development plans must be submitted for approvals before land developments begin [4].

According to Physical Planning Act (Cap 286) Section 5, the preparation and formulation of Development Plans occur under the mandate of the Director of Physical Planning (see Box 2). In controlling and guiding land use development in Municipal areas and other urban areas, Section 29 of the same Act gives the following power to the local authorities:

- To prohibit or control the use and development of land and buildings in the interests of proper and orderly development of its area;
- to control or prohibit the subdivision of land or existing plots into small areas; and,
- to formulate by-laws to regulate zoning in respect of use and density of development.

Box 2: Roles of Director of Physical Planning as outlined in the Physical Planning Act. Source: [39].

- Be responsible for the preparation of all Regional and Local Physical Development Plans;
- from time to time initiate, undertake or direct studies and research on matters concerning physical planning;
- advise the Commissioner of Lands and local authorities on matters concerning alienation of land under the Government Lands Act and the Trust Land Act respectively;
- advise the Commissioner of Lands and local authorities on the most appropriate use of land including land management such as change of user, extension of user, extension of leases, sub-division of land and amalgamation of land; and,
- require local authorities to ensure the proper execution of Physical Development Control and Preservation Orders.

Further local authority powers are spelt out in Section 30 of the Act. These powers allow them to charge fines and demolish illegal structures to ensure compliance with approved plans within their jurisdictions.

Although the Physical Planning Act was meant to guide land use planning in Kenya, it has mainly focused on the "...planning in urban centres and the development of facilities such as roads, buildings and factories" [4]. This explains why it has had minimal impact in areas such as peri-urban areas, which are largely classified as agricultural and not urban.

5.4 Local Government Act of 1963 (Cap 265)

The Local Government Act has its origins in the period immediately prior to independence when the then Governor of Kenya published the Local Government Regulations in April 1963. The Local Government Act repealed the Township Ordinances (Cap. 133) and the Municipalities Ordinances (Cap. 136). At independence, Kenyan laws ceased to be Ordinances by virtue of Kenya becoming a sovereign State, and all ordinances became Acts. Consequently, the Kenya Local Government Ordinance became the Local

Government Act of 1963. Local authorities were created under the Local Government Act. The colonial foundation of the Local Government Act may be the source of its weaknesses.

The Local Government Act (Cap 265), Section 166 requires every Municipal Council, County Council or Town Council, to control development and use of land, and to ensure orderly land use development in their areas [4]. The Local Government Act empowers local authorities to implement Physical Development Plans and to control developments in area of their jurisdiction [40]. As discussed above, however, the preparation of Physical Development Plans is vested on the Director of Physical Planning who is based in the Ministry of Lands and Settlement.

Under the Act, Section 162, empowers local authorities to control the subdivision of a new parcel of land or existing plots until approval is granted (see Box 3). Where such subdivisions require a change of use (for example, from agriculture to residential or industrial land uses) they should be registered on a lease basis. Lease agreements give conditions to be fulfilled and failure to meet conditions can cause lease permission to be revoked. The objectives of controlling subdivisions as outlined in the Physical Planning Handbook [41] are:

- Ensuring that resultant plots are accessible;
- ensuring that proposed population density is in accordance with available services such as water, sewers, roads, and drainage;
- ensuring that there are planned and coordinated developments; and,
- ensuring that proposed use (s) is/are compatible with surrounding use(s).

Box 3: Criteria for assess a subdivision proposal for approval. Source: [41].

The Physical Planning Handbook also gives various planning considerations that can form the basis of determining whether subdivision proposals should be approved or not, and include:

- Proposed use of subplots is in compliance with provision of an existing development plan or zoning regulations for the proposed subplots for the area;
- proposed subplots have adequate access;
- size and density of subplots are in accordance with zoning regulations for the area;
- boundaries, dimensions and acreage of subplots are clearly indicated;
- open spaces and social infrastructure are adequately provided;
- proposed subplots are compatible with adjacent development;
- favourable impact on the environment and level use of existing facilities such as roads, water and sewage disposal;
- minor access roads of 9 meters reserve width provided should not be more than 100 meters long or serve utmost 20 plots; and,
- provision of 6 meters greenbelts along ring roads and bypasses.

Although the above objectives are meant to ensure orderly land use developments, they are rarely applied. This is due to the lengthy process in acquiring approvals on subdivision application from local authorities. The Act also gives too much power to the Minister for Local Government and denies local authorities the necessary autonomy. In the absence of autonomy, it is not possible for best practice and experience to develop.

6. Enforcement of Land Laws

The foregoing review of the legal frameworks governing land use, tenure and resources indicates that there are many Acts of Parliament that relate to land and land resources. This section examines ways in which various laws on land ownership and use are enforced. Reference [4] argue that the enforcement of land laws is as important as laws

themselves. Enforcement is done at different levels by different governmental agencies. Among the key agents in land use control enforcement are the Executive; Land Boards; the Judiciary; and, Councils of Elders.

6.1 The Executive

According to [4], the powers of the executive in relation to land use are extensive. These powers allow the President to nullify, exempt individuals or corporate entities from statutory payments of stamp duty or other fees, and also to order certain transactions in regard to any parcel of land. In the current government structure the Prime Minister has constitutionally entrenched supervisory power on all Ministries. The Minister for Land and the Minister for Agriculture have powers to enforce conditions on land use clearly "...stipulated in the Agriculture Act (Cap 318) and the Land Control Act (Cap 302)" [4].

The Minister for Agriculture is given an open hand by both Acts to determine spatial jurisdiction of a particular land for agricultural purposes and thus can control land use in any given area. For example, when agricultural land ownership is in dispute, the Minister for Agriculture has powers of determining the ownership. The Minister can also apply the Land Control Act to any area or situation at his/her discretion [4]. These powers by the Executive, which is headed by politicians, have on different occasions interfered with enforcement of land use laws. Land use issues are long-term whereas political tenureship is limited to electoral terms. Politicians sometimes overlook the planning regulations that guide land use and end up making decisions that are short-term or are tied to their terms in office. The Executive, as will be explained later on, have in different occasions interfered with planning operations by giving 'orders from above' in favour of their cronies or supporters. Whereas their actions are within land use laws, they have however interfered with orderly implementation of planning regulations in different areas of the country and more so where such regulations put limits on the whims of landholders.

6.2 Boards and tribunals

Reference [4] indicated that land laws in Kenya are governed and enforced by boards and tribunals. At the national level, the Agricultural Appeals Tribunal acts as the final arbitrator of all forms of

land disputes. The Agricultural Appeals Tribunal arbitrates land ownership conflicts if the directives by the Minister for Agriculture are contested. They also noted that tribunal also "...arbitrates conflicts (regarding) Ministerial directives on land preservation and land development order." Other lower level boards with subordinate arbitration powers on land "...are the District Land Control Boards, the Provincial Land Control Appeals Board and the Central Land Control Appeals Board."

In ratifying land transactions, the powers of Land Control Boards are superior to those of the Judiciary [4]. Reference [4] further indicated that the hierarchical powers of control of land transactions start with the Minister for Agriculture at the lower end and with the Central Land Board at the top. In between, there are the District Land Board and the Provincial Land Board. In addition, there are other broad categories of boards which deal with land issues such as the various Regional Agricultural Boards which play a statutory and advisory role to the Minister for Agriculture, the Land Boards, and the Agricultural Land Tribunal.

Land boards, as will be discussed later, have seriously impeded planning in areas where land, although recognised as agricultural, is primed for residential purposes. The board members (in connivance with residential land developers) have been approving land subdivisions under the guise of doing so for agricultural purposes. The powers of Land Boards, which do not include the Physical Planning Office, have undermined the powers of this office to control land development in different areas.

6.3 The Judiciary and the Elders Courts

Reference [4] observes that, "[t]he judicial system in Kenya plays an important role in the enforcement of land laws". Judicial system, particularly the ordinary Courts of Law, presided all disputes concerning land ownership before the 1981 the Magistrates' Jurisdiction (Amendment) Act. The amendment gave Councils' of Elders the powers to resolve land disputes outside the formal magistrate courts. These powers of the Council of Elders entail hearing and determining cases about land ownership, land subdivision, determination of land boundaries claims, rights to occupy or work on land, and trespass cases [4]-[42].

Reference [4] explains that the Elder's Courts are supposed to file the records with the Resident Magistrate's Court once a decision on land disputes is made. And that "...the Resident Magistrate's Court has powers to accept decisions of the elders without any alteration and enter the judgement in favour of the person who is judged by the record to have won the case.." Also, the court has power to instruct the Elder's Court to reconsider a case or modify or correct a record filed by the elders. In addition, the court may also set aside the record of elders and require the case to be re-considered by a new panel or afresh [4]-[42]. In this case therefore, the Resident Magistrate's Court still maintains considerable powers in land disputes. If a concerned party or parties dissatisfied with the Resident Magistrate's ruling, they can appeal to a higher court. Following the Magistrates' Jurisdiction (Amendment) Act, however, there lacks the possibility of appeal if decision by the Elder's Court is accepted by the Resident Magistrate's Court and a decree have been issued. There are however exception where the decree is considered to be in inconsistency with the decision of the elders [4].

The original aim of establishing the Elders' Courts was to solve many of the problems (such as the high volume of legal cases) and disputes concerning land. Therefore this objective has not been achieved as there are still several land and "...land-related litigations in High Courts despite an elaborate and innovative system of settling land disputes through Elders' Courts" [4]. There are a number of reasons for the continued increase in land related litigations despite the establishment of Elders' Courts, in that these Courts do not have powers to adjudicate disputes concerning touching on land that is already registered. There is also a lack of clarity on the mandate of the Elders' Courts in the law, corruption, and the general public lacks knowledge of the functions and mandates of these courts thus rendering them ineffective [4].

Due to failures of the Elder's Court system in Kenya and the slow pace in adjudicating cases in High Courts, there has been delay in land related litigations. This has left huge tracts of land idle as the litigants wait for resolution of disputes [4]. These hold-up in litigation has also affected long-term investment in land and therefore have profound implications on land use development (among the implications of this failure are instances

in the case study areas where the land markets have turned to neo-customary and informal ways of conducting transaction as will explained later on). Furthermore, even if the Courts are to be enhanced and cases expedited, most people in Kenya would not take advantage of the legal system to enforce land rights. This is because to gain access to the legal system through the Courts one needs to be knowledgeable of his/her legal rights and also to have the resources to pursue these rights through appropriate legal channels. Most people, however, lack this capacity and this limits their access to the legal system [4].

7. Conclusion

Looking at a brief history of land issues in Kenya one begins to understand a genealogy of land ownership and use problems in Kenya. The review notes that over the course of colonial and postcolonial land management history, a dual system of land legislation has evolved, whereby both Customary and English Common laws guided land ownership and use. The review further indicates that the independence government did little to harmonise this dual system, and instead while trying to placate the dispossessed natives, ended up formulating laws which were reactive rather than pro-active to land concerns. In addition the paper observes that over time land legal process has given rise to three land tenure systems which have varying effects on land management regimes and use.

The review also reveals that Kenya has had many laws dealing with land and land use planning. It thus follows that land use planning problems are not so much about the absence of laws or the lack of policy or legal framework. The institutions vested with the authority for land use planning, however, have inadequate capacity to enforce land laws and to formulate and implement land policies in a coordinated manner. Therefore land use problems have persisted despite the existence of a variety of land laws in Kenya. The review has pointed out that land use and land management problems are historically contingent.

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