



UNIVERSITY OF NAIROBI, PARKLANDS CAMPUS

LLM RESEARCH THESIS

RESEARCH TOPIC

**CRITIQUE OF THE LAND VALUE TAXATION LAWS AND ITS IMPACT ON THE
RIGHT TO OWNERSHIP OF PROPERTY IN KENYA: A CASE STUDY OF
MOMBASA COUNTY**

BY

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DECLARATION: I, **Salma Noah Ramadhan**, declare that this thesis which I submit in partial fulfillment of the requirement for masters of laws degree (LLM) at the University of Nairobi is my original work and has not previously been submitted for any degree at another University.

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Supervisor approval

This thesis has been submitted for examination with my approval as the university supervisor

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Signed..... Date.....

DEDICATION

“To my parents for their never-ending support all throughout my life. My husband and children for their moral and psychological support and the people of Mombasa County to whom land taxation justice is of utmost urgency”

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In undertaking this task of writing, I encountered many challenges, but my dear husband Dr. Jaffar Musa Bahati and my children: Najma Jaffar, Luqman Jaffar and Swaleh Jaffar have been my constant support for all purpose and intent, patiently and tirelessly encouraging me to forge ahead, never to relent. A big thank you to my lovely family.

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Not forgetting my dear grandmother, Zainab Ali, my parents and my family and all people of Mombasa County who have been victims of the exorbitant land taxes from the county. Better times are coming.

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CHAPTER 1

INTRODUCTION

1.0 BACKGROUND

Land has always been the greatest commodity in the Kenyan economy. As such, it is always subjected to various charges, levies and government taxes from both national and county level, in particular, the Constitution of Kenya, 2010 expressly preserves the power to raise revenue through property tax for the County Government. It is indeed one of the two (2) specific taxes that County Governments are expressly permitted to levy under Article 209 (3) of the Constitution without the need for authorization by an act of parliament (the other being entertainment tax)¹.

In Kenya, land taxation, (commonly referred to as rating) was introduced in the 1900 by the British Colonial rules when the local governments were created. It was first applied in Mombasa on an annual rental value basis under street cleaning and regulations. In 1901, the same was applied in Nairobi. In 1923, the annual rental value rating was found unsatisfactory as there was no evidence of development save for very few properties. There was thus desire to broaden the tax base and it was not until 1928 that the recommendation of the District Committed to employ unimproved site value rating instead was introduced. However, in Nairobi, this was introduced since 1920 in conformity with the systems then existing in Australia, New Zealand and West Canada².

This was and has been the practice in Kenya even after the introduction of Chapter 266 – Valuation of Rating Act empowering the local authorities to value the land for purposes of rates with Section 8 thereof, defining value of land to include by implication, the capital value that the

¹ Constitution of Kenya, 2010, Art. 209 (3)

² McCluskey, William J and Riel C.D. Franzsen, Land Value Taxation: An Applied Analysis (Routledge 2005)

seller would have gain in the event of selling the property³. However, since the promulgation of the Constitution 2010, when the government was devolved. Certain administrative and revenue mandates were devolved to the counties amongst them rates collection and general administration⁴. To this end, counties were called upon to make their own laws and regulations governing their tax rating systems.

This saw the Mombasa County enacting her Mombasa County Rating Act, 2014, with Section 4 (1) (c) as read together with schedule 3(1) specifically prohibiting the use of the value (capital) of the land in arriving at the site value rate for purposes of property rates taxation⁵ (without providing what to use instead). Furthermore, Honorable Justice Mumbi Ngungi in Judicial Review No. 4 of 2016 made it illegal for any county government to rely on the national legislations for purposes of property rate taxation⁶. This notwithstanding, the Mombasa County abandoned her county legislation, resorted to the national legislation and using the value of the land (capita; value, though hiding under the disguise of naming it site value rate), come up with her valuation roll 2016 -2018 published in the Kenya gazette of September 2018 that has raised the rates to more than one thousand percent.

The county has also enacted her finance bill 2018 – 2019 (since assented into law) hiking the percentages on the rates payable from 4% flat rate (as provided for in the Rating Act) to 8% - 14%⁷ making properties that were initially paying annual rates at 40,000 – 50,000 now paying 1, 200,000 (1.2M) (the over a thousand percent above stated)⁸.

³ Section 8, Valuation of Rating Act, Cap 266

⁴ Article 209 (3), the Constitution of Kenya, 2010

⁵ Section 4(1)(C) as read together with Schedule 3 (1), Mombasa County Rating Act, 2014

⁶ Judicial Review 4 of 2016 Republic Vs Kiambu County Executive Committee & 3 Others Ex parte James Gacheru Kariuki (2017) eKLR

⁷ Mombasa County Finance Bill, 2018 - 2019

⁸ Mombasa County Valuation Roll, 2016-2018: Old Town Properties: Ingilani

The paper seeks to illustrate these legal pitfalls in the property tax laws in Kenya. Its goal is to use international best practice and our Constitution, 2010 to demonstrate why the property tax should never be based on the commercial/capital value of the land, more so in Kenya, where the commercial value of the land is already a subject of other tax regime such as the capital gain tax and the stamp duty as at the time of land transactions. The study opines that it is overstretching and somewhat illegal to subject the same commercial/capital value of the land to the annual rate payment, that this is tantamount to rendering the locals landless. The Paper seeks to explain why the Mombasa County Valuation Roll 2016-2018 and the Mombasa County Finance Bill, 2018-2019 seeking to increase rates payable to exorbitant amounts pinned on the capital value of the land and at crazy percentages (being 8% - 14%) based purely on discretion of county assembly should never see the light of the day, more so, the county having since abandoned most if not all of its responsibilities owed to the people of Mombasa County.

It seeks to propose amendments to/repeal of Section 8 of Cap, 266 (Valuation of Rating Act); the Mombasa County Rating Act, 2014 and the Constitution of Kenya, 2010 in a bid to seek solution to the annual land value taxation problems facing Mombasa County. The paper proposes for adoption of site value instead (of capital value), so that rates are increased based on the improved services rendered by the county government to make the county more appealing in terms of the flourish and splendid services so rendered enabling it attract more commercial interest, thus increasing in site value. It proposes that any legislation on valuation for purposes of rates should be precise with no iota of vagueness.

1.1 PROBLEM STATEMENT

While Mombasa County Rating Act, 2014, Section 4 (1) (c) as read together with Schedule 3(1) prohibits the use of the land value in arriving at the site value rate for purposes of property rate

taxation⁹, and the Courts (Mumbi J) by way of judgement law, declared it illegal the use of national legislations by the counties for purposes of property rate taxation¹⁰. Mombasa County, in her valuation roll 2016 – 2018, nevertheless, disregarded all these laws¹¹, the resultant effect being substantial violations of land policy principles provided in Article 60 of the Constitution¹², violation of her citizens’ rights guaranteed in Article 40 of the Constitution¹³ Article 43 (1) (b) of the Constitution and violation of the general principles of taxation as provided in Article 201 of the Constitution of Kenya, 2010¹⁴.

1.2 RESEACH OBJECTIVES

This research will seek to address the following research objectives:

- 1) To find out the legality of Section 8 of Valuation for Rating Act, Cap 266 as the base determinant of land rate tax;
- 2) To find out why Mombasa County abandoned her own legislation and adopted the national legislation in arriving at her valuation roll 2016-2018 despite knowing the illegal nature of such a conduct;
- 3) To determine the legality or otherwise of the Mombasa County Valuation Roll 2016-2018;
- 4) To determine the Constitutional implication of relying on the national legislation (Cap 266, Section 8); the newly introduced Mombasa County Valuation Roll 2016-2018 and the Mombasa County Finance Act 2018-2019 as regards the principles in Article 60 and 201 and the rights guaranteed in Article 40 and 43.

⁹ Supra fn. 5

¹⁰ Supra fn. 6

¹¹ Gazette Notice No. 10241 & Mombasa County Valuation Roll 2016 - 2018

¹² Article 60, the Constitution of Kenya, 2010

¹³ Article 40, the Constitution of Kenya, 2010

¹⁴ Article 201, the Constitution of Kenya, 2010

1.3 RESEARCH QUESTIONS

This research will seek to address the following questions:

- 1) Why is Mombasa County relying on the national laws and not her own laws in arriving at property rates taxation?
- 2) What are the Constitutional implications of Mombasa County's newly introduced land valuation roll and finance bill 2018-2019 (new land taxation legal framework) and to what extent are these laws violating the Constitutional principles enshrined in Article 60, 201 and 209 and the rights guaranteed in Article 40?¹⁵
- 3) Why has Mombasa County introduced a new legal document (valuation roll 2016-2018 and finance bill 2018 – 2019) that seeks to exorbitantly raise the property rates taxes of her citizens without first addressing the failure of the existing regime?
- 4) How can Mombasa county achieve financial independence without infringing on her citizens constitutional rights and violating various constitutional principles?

1.4 RESEACH HYPOTHESES

- 1) This study proceeds on the hypothesis that several legislations on property tax in Kenya, and Mombasa County in particular are inefficient, inadequate, vague, conflicting and ultra vires thus giving counties wider discretion to act with impunity on the property rating tax imposed on its people (as is the case with Mombasa County Valuation Roll, 2016) as a result, infringing on the various Constitutional principles and rights.
- 2) If Mombasa County relies on its own laws (after the inadequacies are sufficiently addressed) in coming up with a valuation roll, it will come up with a legitimate legal

¹⁵ Article 201, 209 , 60 and 40 of the Constitution, 2010

document that promotes the right to ownership of property by her people and observe all the constitutional principles.

1.5. JUSTIFICATION

The study is meant to demystify the legislations governing the property tax regime in Kenya and Mombasa county in particular. It is no doubt that the power to impose taxes and charges is enshrined in the Constitution of Kenya 2010¹⁶ and the Local Government Act Cap 265. Article 209 (3) (a) allows the County Government to impose property rates whereas subsection (4) allows the national and county government to impose charges for services. Land taxation is further extensively provided for in Cap 266, Cap 267, the Valuation for Rating Act (Subsidiary Legislations) and (for Mombasa County) the Mombasa County Rating Act, 2014, the Mombasa County Finance Bill 2018/2019. The Local Government Act Sections 160 and Section 168 – 181 provides for the various responsibilities and services to be discharged by the County Government as a fiduciary duty to the taxes so collected from land rates and other sources of revenues.

This study finds that from the provisions of Section 8 of Cap 266, the definition of valuation for purposes of property tax (rating) is too vague, broad and conflicting leaving too much discretion to any person to employ it with impunity (as the case in Mombasa County with her Valuation Roll 2016 - 2018) with likelihood violation of the people Constitutional right to ownership of property and violation of various Constitutional principles. Mombasa County in particular, conveniently decided to abandon her own rating act (which is what the law demands and which is also inefficient/inadequate and vague) and adopt the national legislation (Cap 266) taking advantage of her vague provision in Section 8 to illegally impose exorbitant rate to the people of Mombasa County. The study further presupposes that the percentage chargeable on the said rates

¹⁶ The Constitution of Kenya 2010, Art. 209

are too exorbitant in comparison to other major cities. That the fiduciary duty by the County have since been abandoned. The study therefore, seeks to offer recommendations to avoid this actual eminent harm, illegalities, injustices and violations to the people of Mombasa County. The research urgency and timeliness cannot be overstated.

1.6 THEORETICAL FRAMEWORK

This study relies on two (2) main theories being: the theory of right and the sociological approaches to law with the most dominant theory being the theory of right. The right theory is used to provide means through which the inefficiencies, flexibility, elasticity and uncertainty in the land taxation laws can be made better.

1.6.1 THEORY OF RIGHT.

As propounded by Hohfeld¹⁷ rights have both ‘opposite’ and ‘correlatives’, for him rights are strictly correlative to duties. That whenever anyone is under some duty someone else has a corresponding right and vice versa.

In light with this study, this theory attempt to explain the problem with the law as it is. It is the position of this study that the uncertainty, flexibility, elasticity and inefficiencies of the land taxation laws is a deliberate action by the governance to the subject. That for decade, governance have taken the wrong definition of tax as being the absolute right by the governance and the duty of the subject to pay without demanding anything in return from the governance. That tax is compulsion and the concept of duty being correlated to right does not apply in taxation. This stand by the governance saw the law as it appears. For the first time, this study attempts to correlate the duty imposed on the subject to pay taxes to the right to the same subject to demand

¹⁷ Raymond Wacks, Understanding jurisprudence (3rd edn, Oxford 2012)

better service, amenities and development from the taxes they pay. And that it is only through completion of the cycle of rights and duties, that the governance can demand more taxes from the subject.

This research attempts to improve the law by adopting the multination standards so far in use in almost all countries that had use and still use land value taxation as their tax base assessment for purposes of arriving at the land taxes to be imposed. It advocates for the HIGHEST AND BEST use principle that has been used by countries such as New Zealand and State of Victoria that imposes a duty upon the taxing authority to improve her area of locality (in terms of amenities, buildings, facilities etc.) and make it attractive for any type of investments and land use so as to attract the highest and best rates. That each locality shall then pay their land tax as per the highest and best use as at that particular time. Chapter 2 and 4 expound more on this concept (principle) which has indeed work well in the countries mentioned above. Further, this principle has enable the countries in use to exempt from land tax all properties that are the main homes to their citizens thus guaranteeing their citizen right to housing (and ownership of the property that their homestead stands on) these countries have also established better system of collection of land tax from the commercial properties at the improved site value rate using the highest and best use principle (explained above).

The use of this theory therefore, is to make the law on land tax simpler to understand, evaluate and implement (both by governance and the subject as there will be no feeling of oppression). Make land taxation certain and precise and also give effect to the principle of taxation and land policy as enshrined in our Constitution (Article 201 & 60) as well as to give meaning to the rights to ownership of property (Article 40) and right to housing (Article 43 (1) (b)) guaranteed

in our Constitution as it seeks to balance these rights with the right of county government to collect land taxes (Article 209).

1.6.2 SOCIOLOGICAL APPROACH TO LAW

Closely related to the above theory is the sociological theory. Whilst the above theory of right focus on the individual, the sociological theory focuses on the society by recognizing the individual rights (above mentioned) in societal and/or community context in cognition of the fact that the individual rights do not operate in a vacuum but in a society (in this context: Mombasa county).

As propound by Roscoe Pound, Eugene Ehrlich and Rudolf Jhering,¹⁸ law must be for the society. That it is the society that shapes the law and societies have a right to disobey laws that goes contrary to its value. The national laws currently in place on property taxation (e.g Cap 266 and 267) were enacted since 1956 and 1986 respectively (with the later having been revised remotely in 2012). The interests they were serving then are not for today's society hence the vagueness, inefficiencies and conflicting provisions being witnessed. The Mombasa County Rating Act, 2014, though enacted recently, borrowed heavily from these acts hence the vagueness and inefficiencies witnessed therein (just like her predecessors). The societal values and principles as propound in the Constitution have been distorted by these archaic laws.

This theory therefore, gives support/effect to the dominant theory above by calling upon the society, through the powers granted to them by the Constitution to call upon the representatives they elected through parliament and county assembly to amend any such laws (as is the case herein) that goes against societal values. It also supports the disobedience of any such laws that are contrary to societal values as espoused in the Constitution. The Constitution of Kenya allows

¹⁸ Ibid

for such actions through the supremacy clause (people are supreme) and the judiciary which is meant to serve the public by allowing any person to approach the Court to have any such law(s) declared unconstitutional¹⁹; or participate in peaceful mass action to resist such laws and/or objections through the tribunals. Chapter 4 and 5 of this research will discuss this in detail suggesting and/or providing solutions within the law to have the laws amended and/or repealed to serve the society interest and rights as per the principles laid out in the Constitution.

1.7 LITERATURE REVIEW

This part provides an overview of previous research on land value taxation. Being a matter of general public interest, land value taxation has attracted the interest of many economic scholars, both in law and business. Since the focus of the study is on site value land taxation (as opposed to capital value) and valuation roll being a must document in such an exercises, the paper will give a literature review in four main subtopics being: Site value rating as a method of assessment of land tax; the Valuation Roll and its importance as source of County Revenue; the Failure of the existing land taxation regime and the reason for Mombasa County relying on national laws and abandoning her own laws. The paper will identifying the gaps in each subtopic and show the relation and distinction on each to the study and how it contributes towards solving the problems identified.

1.7.1 SITE VALUE (UNIMPROVED) RATING AS A METHOD OF ASSESSMENT FOR LAND TAXATION

Olima and Syagga in their International Journal for Research in Property Tax²⁰ wrote extensively on site value rating as an aspect of land tax in Kenya. They define land rate as a local charge

¹⁹ Article 1, The Constitution of Kenya, 2010

²⁰ Olima W.H.A & Syaggar P.M, 'Rating Systems in Kenya: Evolution, Constraints and Potentials' (1996) 2 VLIR 10

levied on landed property owned by an individual, group of individuals, company, or public authority with or without improvement for the purpose of collecting revenue (basically what appears in demand notes for rate as “unimproved site value”). They opine that taxation of property to provide local revenue is of considerable antiquity that has over the years developed to be considered the most stable and largest source of local revenue authority and its importance recognized worldwide, a view previously opined by Arlo Woolery, 1989.

According to McCluskey²¹ in as early as 1908, all townships in Kenya were empowered to introduce a rating system based on the English system on annual rental value, however, by 1920, this system was found to be inadequate and inappropriate due to lack of evidence of rent and existence of vast tracks of undeveloped land thus necessitating change. The system of site rating was then introduced following examples from Australia and New Zealand.

Gachuru M. W and Olima W.H.A in their journal on Property Tax Assessment and Administration²² opines that the reasons for the introduction/adoption of the unimproved site value were: 1) it would encourage (at least not discourage) land development and expansion of the small, little – developed towns; 2) it would prevent (or at least discourage) large land holdings for speculative purposes, especially by absentee landlords; 3) it was easy and simple to administer, especially with a limited number of trained valuers. McCluskey adds that at the time of introduction to Kenya, it was working well in South Africa, Australia and New Zealand. However, according to Gachuru and Olima²³ the extension of boundaries coupled with a steady increased in the urban population (at 6.5% p.a.) have resulted in a serious increase in

²¹ William J. McCluskey and Riel C.D. Franzsen, ‘Land Value Taxation: A Case Study Approach’ (eds) (Lincoln Institute of Public Policy 2001)

²² Gachuru M.W. & Olima W.H.A, ‘ Real Property Taxation – A Dwindling Revenue Source for Local Authorities in Kenya’ (1998) 3 XMLUI 15

²³ Ibid

responsibilities of local government to provide infrastructure and basic services, the results being that the municipal expenditure by 1996/97 growing by 23.5% pa exceeding the municipal revenues (growing by 12.5% pa) for the first time. They blamed this on corruption as they opine, valuation is unfortunately often suspect of corruption. They thus suggest valuation methods should be legislated in more details to improve uniformity of valuation and help counter corruption.

Contrary to the above literature, this study opines that an amendment to Article 209(3) of our Constitution to call for the county governments to account for the land tax collected, and amendment to Section 8 of Cap 266 and Mombasa County Rating, Act 2014 to be precise, clear and unequivocal on the base determinant of the annual rate value (with site value being the default) and borrowing from best practice in New Zealand and State of Victoria on highest and best use principle, having different tax bracket for different values of land and well and clear laid out principles on land taxations, there will be no great margin on expenditure and revenue. Indeed, New Zealand, through use of the same method, has since 2006 receiving high return on revenues just on land taxation and through use of site value. For example in 2006 – property taxes (rates) accounted for 56.1% of the revenue; in 2007 it was at 57.3% and in 2010 it went up to 92%²⁴.

²⁴ Filling the land tax void: New Zealand standpoint. Accessed at <

<https://www.business.unsw.edu.au › About-Site › Schools-Site › Documents > on 18th Sept.2019>

information also available at: Statistics New Zealand, Government Finance Statistics (Local Government): Year ended 2010 at <

https://www.stats.govt.nz/browse_for_stats/government_finance/local_government/GovernmentFinanceStatisticLocalGovernment_HOTPYeJun10/Commentary.aspx

1.7.2 THE VALUATION ROLL AND ITS IMPORTANCE AS A SOURCE OF REVENUE THROUGH LAND TAXATION

Nazalino J Mugendi²⁵ in his thesis is of the view that counties in general and Mavoko County in particular, are yielding much less from property tax (land rates) contrary to their ability. He associates this with tremendous lag in maintaining the valuation roll and the statutory valuation cycle (at least 10 years), that some counties have been sitting on the same valuation roll for over twenty years whilst others not carrying out the exercise at all. That those like Mavoko County has always been at 2% currently charging at 2.1%. He proposes that counties can realize more and better quantum of property tax revenue if they shape up their tax policy choices, administrative efficiency and good governance. That tax policy will affect tax base definition, exemptions, valuation standard, tax rates and collection and enforcement provisions, whilst, tax administration choices affects the fiscal cadre completeness, property valuation accuracy, tax billing and collection efficiency which in turn will lessen the opportunities of corruption provided that it is based on up to date value and the entire valuation list is open for public scrutiny. He also proposes constant revision of the valuation roll to be at par with the current standard value.

It is evident that much has been written on property rate taxation in Kenya and its importance in the economy with the history suggesting that the said taxation in as early as 1923 was recommended and actuated/based on the site value of the property. Though some of the writers suggest increment in these rates, their main recommendation was a change in the law to have the valuation roll done less than the ten years period and/or have counties not sit on one roll for over 20 – 25 years. Others have underpinned corruption as the reason for not realizing the fruits of the

²⁵ Nazalino John Mugendi, Property Assessment for Rating Purposes in Kenya: A Case Study of Mavoko Council (University of Nairobi, 2012)

land taxation (which they argue account for a bigger percentage of county revenue). Looking at the practice around the world, land taxation cannot be avoided. Taxation in general is the backbone of many countries' economy, stability and sovereignty hence the reason for its complex nature. However, this paper opines that as much as land taxation is necessary and of greater value to any economy of a country, we need to balance this necessity with the basic human needs to property and to housing. The study adopts the position that the basic human needs (in general) supersedes any other need as such, this basic need/must be fulfilled first to realize any other need(s) including the need for land taxes. That these taxes are paid by humans and no sound human being would prioritize land tax when he is not certain his home is safeguarded from a state whose hunger for power and revenue will render her homeless at their whims. It is the presupposition of this study that property/land taxation is necessary and has been given recognition as a right in law, however, this right, should not infringe on other rights to a point where the citizens are left destitute in their own country.

The study borrows from the New Zealand and State of Victoria property taxation that has made her laws clear on the fact that land taxation be based on ratable value of the property having in mind the annual recurrent expenditure nature of this type of taxation unlike the duty tax and capital gain tax that is chargeable ones upon land transactions by parties. Though in the recent past they have adopted the capital value of the property as tax assessment base, clear rules, procedures and principles are in place on the type of properties/land to apply the same and have adopted the highest and best use principle to aid in arriving at property tax to be charged. The countries have even put in place laws exempting from taxes homes of citizens which is to the effect that, the home, though situated in a piece of land, that land is exempted from land tax²⁶. The land is specifically specified as a “principle place of residence” or PPR. It is the focus of this

²⁶ <http://www.sro.vic.gov.au> accessed on 10th May 2019

study that nothing has been written in this important area which is the focal point of the study. The paper advocates for revenue collection through land taxation having in mind the reciprocal rights of the citizens to housing and to property which it argues, is superior to the former and should be the standard of measurement in coming up with principles of land taxation.

1.7.3. FAILURE OF THE EXISTING LAND TAXATION LAWS.

Gichuki Evanson Njaramba in his thesis²⁷ wrote on administration of county taxes. He opines that property rates have formerly been administered by the local authorities established under the repealed Local Government Act and governed by the Valuation of Rating Act and the Rating Act. He states that property taxes are unavoidable and this explains the success in collections despite unconstitutionality of the Act and inefficient systems/provisions of the Act(s) for the collection and administration of these taxes. on his part he proposed the Amendment of the Constitution in Article 260 with a view to defining the term “property rates”. That the Amendment by way of addition should read *“property rates” mean any tax imposed on land, or permanent fixtures on, or improvements to, land, or any premium attached thereto.*’ He also proposed Amendments to Article 67 (2) (g) by way of proviso to underscore the unfettered power of counties to levy property rates in their area of jurisdiction so that the National Land Commission be given the function of assessing tax on land and premiums on immovable property in any area designated by law...

McCluskey and Riel in their book²⁸ criticized the conflicting interpretations in valuation methods in the existing legal framework in Kenya. They blame this on the interpretation of Section 8 (2) of Cap 266 where in arriving at the value of the land under the Section, the valuer is allowed to

²⁷ Gichuku Evanson Njaramba, tax administrative reforms in Kenya: Identifying lessons to model a strategy for Sustainable Development of County Taxes, (University of Nairobi, 2015)

²⁸ William J. McCluskey and Riel C.D. Franzsen, ‘Land Value Taxation: An Applied Analysis (eds) (Routledge, 2005)

adopt any acceptable method of valuation. It is their argument that Section 25(1) and 26 (1) of the same Act stipulates that both public and community land should be for the purposes of assessing the contribution in lieu for rates payable be valued in accordance with principles laid down in the (this) act, which the act, as has been seen in Section 8 above does not specify methods of valuation to be used. It is the argument of this study that, this Section 8, cannot be said to have establish any principle, since no principles can be founded in a provision that is itself wanting in terms of inefficiency, ineffectiveness and vagueness. In the contrary, this Section 8 provides for a blanket rule.

The paper advocates for the Section to be declared unconstitutional. They opine that the failures in the Valuation for Rating Act, has given rise to several conflicting interpretation in valuation methods which in turn introduces uncertainty and complexity in valuation (a view shared by OLIMA, 1999). They gave examples of petrol service stations with ancillary buildings where for purposes of rating, throughput method was used for the Petrol stations whilst the adjacent plot the general area zoning and plot size was used. They opine that though valuation courts in Kenya have upheld the use of throughput method, the essential measure of annual value and not capital value should be the right measure. That the Kenyan experience is that these uncertainty in valuations as appears in the Act, introduces unnecessary disputes and costly litigations between ratable owners and rating authorities.

From the review of all the above literature, the one clear thing is that the legal framework on land rating methods (formula), which is a creature of our Section 8 of Cap 266 is and has always been the problem. It is ironical how this very piece of legislation, enacted in the very year of reform and/or adoption of the law, adopted the provisions of this Section 8 providing for valuation based on the value of the land and proposing that the value may be deduced from what

ideally the owner may have obtained/realize in selling the land, bringing ambiguity and vagueness on this very important determinant on how to arrive at the value upon which to base property tax. Mombasa County, in her Rating Act, 2014, though specifically prohibiting reliance on land value (capital) for purposes of land rates taxation, it did not provide answers as to what to rely on, bringing in vagueness (inadequacy), just like her predecessor.

This has been a concern of writers in as early as 2005 (McCluskey and Riel above), who have criticized this very provision in particular, the vagueness, imprecise, inefficiency and the inadequacy of the Act as a determinant in arriving at the value of the property tax for purposes of rates taxations (taxing method). The writers opine that the inefficiency and vagueness of the said Section 8 (Cap 266) is the very reason for unnecessary disputes and costly litigation. Unlike the writings in the literature, the focus of this paper is to critique how the inefficiency in the law, through the Mombasa County valuation roll 2016-2018 has impacted on property ownership rights and right to housing of the people of Mombasa County. It also seeks to find out why Mombasa County introduced a new legal document based on this inefficient and vague legal provisions instead of first dealing with the inefficiencies. The paper focuses on aligning these provision (through Amendments) with the Constitutional requirement on principles of taxation and land policy.

Unlike Dr. Njaramaba's writing that focused on the Unconstitutionality of the definition of rates and seeking recommendation to amend the Constitution on the definition and taking away the function/power of County government to assess rate and give the same to National Land Commission (which recommendation I do not agree with, more so given the failures and corruption in the NLC as well as need for financial independence by counties). The paper is premised on the principle of law that laws must be certain, precise and predictable and the

provision of Section 8 of Cap 266 and the Mombasa County Rating Act, 2014 goes contrary to this principle. Further that certainty needs to be created in law not only on what the valuation should be based on (method), but the percentage chargeable.

It has been established that the Rating Act (Cap 267) provides for 4% with any higher percentage being subjected to consent from the minister. We have seen counties like Mavoko being on a constant 2%. On the contrary, Mombasa County is currently at 9% with the current County Finance Bill 2018 -2019 (recently passed to law) making it a law that for residential property the percentage is 8 % and for commercial at 14%. The study opines that the law needs be settled on land taxation formula and the percentage chargeable having in mind the principle of Constitution and laws stated above to oversee development and protect the people's right to ownership of property and housing.

1.7.4 WHY IS MOMBASA COUNTY RELYING ON NATIONAL LAWS AND NOT HER OWN LAWS IN ARRIVING AT THE PROPERTY RATES TAXATION?

The devolved system of government is a creation of the 2010 Constitution²⁹. Up until Justice Ngugi's judgement in 2016³⁰, counties were relying on the national laws for their land taxation. Mombasa County, despite having enacted her Valuation laws since 2014, has not put it in use most probably due to the inefficiency and ineffectiveness of the said legislation (which shall be discussed later in Chapter 2) caused by the fact that a lot was borrowed from the national legislations albeit in parts. Therefore, being a very recent creation (2014 and 2016) it is still very young and lacking in literature. The study presupposes, that this might be the reason the County decided to rely on the national legislation in her valuation roll 2016-2018 despite knowing the

²⁹ The Constitution of Kenya, 2010

³⁰ Judicial Review 4 of 2016 Republic Vs Kiambu County Executive Committee & 3 Others Exparte James Gacheru Kariuki (2017) eKLR

illegal nature of such a conduct. Therefore, towards solving the problem, the study will rely heavily on the Mombasa County Valuation Act, 2014 and Cap 266 and its critique in particular offering recommendations that are within the law.

The study opines that land taxation is largely inconsistent (e.g. Nairobi charging less than Mombasa despite being the capital etc) for reasons that there are no clear rules to show how it has been done nor uniform rules and legal framework on how counties can handle land taxation. Due to these inconsistencies, uncertainty has creep into taxation, the land tax burden has become heavier (Mombasa County a living testimony) and compliance level will definitely be affected which will impact negatively not only on administration of this land taxation, but also on the locals many risking being rendered landless or extinct from the city for inability to afford the exorbitant rates.

The study opines that it is illegal and void for Mombasa County to rely on the formula it did in her valuation roll 2016-2018, which has resulted to the heavy tax burden on land taxation contrary to the Constitutional principles. It presupposes that reliance on the national laws by the county, is caused by the fact that the County has lagged behind in carrying out her duties to improve the site value to attract a higher site value tax, and instead, employ a shortcut to raise the value exorbitantly based on the capital value of the land. It is this paper's position that the County has no business with the capital/commercial value of the land and it is illegal to call for a residential property with zero income to pay Kshs. 1,200,000.00 every year in terms of rates³¹. Since these are imminent, real and current problems facing Mombasa County at the moment, there is urgent need to complete the study to stop the application of this illegal, absurd, exploiting and impugned valuation roll pinned on a percentage from a void law.

³¹ Mombasa County Valuation Roll 2016 – 2018, Properties in Ingiani Old Town (40 by 80 valued at 15,000,000 x8%)

1.8 RESEARCH METHODOLOGY

1.8.1 FIELD WORK

The fieldwork contemplated in the study is in regards analysis of public record through visual observation and physical perusal of various rate related documents within Mombasa County Offices and the rating tribunal.

Analysis of Public Records

This includes collection of data through visual observation and outside the school such as perusal of the Mombasa County Valuation roll 2016-2018. The Mombasa County finance bill 2018 – 2019 that has since very recently been assented into law. Analysing various rates notices demands presented from end of 2018 onwards. Analyzing area maps for various locality within Mombasa County. Visiting Mombasa Municipal County to extract data on properties so affected and to what extent and having a critical analysis of these documents to correlate them to the study and evaluate their effects and consequences in law.

1.8.2 DESK REVIEW

This include textual analysis of the case laws vis a vis statutory law and the Constitution. As already observed, the study seeks to disallow the Mombasa county valuation roll 2016-2018 as illegal; call for amendments and/or repeal of Cap 266 and the Mombasa County Rating Act, 2014, Section 8 thereof and Schedule 3 (1) to be in line with the Constitutional principles on taxation and land policy. Therefore, textual analysis of these laws is the cornerstone to this research and its importance cannot be gainsaid.

The study will also focus on textual analysis of the New Zealand and State of Victoria land taxation systems and laws in particular as best practice through which Kenya and Mombasa

County can borrow from, more so, because the Kenyan land taxation system did borrow from New Zealand, although New Zealand system has undergone several amendments to suit her people and ensure no breach of fundamental Constitutional rights. It will also help in formulation of land taxation principle as a model for the County and Kenya as a whole.

1.9 LIMITATION

This far, the study has encountered various constraints from the County Government of Mombasa to provide information. Due to bureaucracy, it has been a challenge accessing the valuation roll. Members of the public are only allowed limited perusal at Bima Towers. All persons in the county cite confidentiality when approached even for the simplest of question(s)/material.

10.0. CHAPTER BREAKDOWN

Chapter 1 is basically an introduction to the study. It contains the Introduction; Historical Background to the study; Problem Statement; Research Objectives; Research Questions; Research Hypotheses; Justification of the study; Theoretical Framework; Literature Review; Research Methodology and Limitation to the study.

Chapter II shall critically analyse the Kenyan land value taxation laws and systems from land tax base determinant all the way to enforcement measures through objection. The Chapter will then proceed to evaluate the effect of devolution on land value taxation.

Chapter III shall look into ways through which the Mombasa County land taxation laws and system violates the principle values and fundamental rights to land and housing in the Kenyan Constitution, 2010. The chapter then proceeds to call for need to balance the County

Governments' right to collect revenue without violating the 2010 Constitutional rights and principles.

Chapter IV looks into best practice from other jurisdiction such as New Zealand and State of Victoria that have and are still using the site value land tax system and have achieved greater revenue on the same without infringing on any of her Constitutional principles and ensuring their citizens retains and realizes their rights to ownership of land and housing.

Chapter V shall conclude the study and offer recommendations based on the research findings of the study.

CHAPTER 2

ANALYSIS OF THE KENYAN LAND VALUE TAXATION LAWS AND SYSTEM

2.1. INTRODUCTION

This chapter seeks to critically analyze the Kenyan land value taxation laws and systems in general and that of Mombasa County in particular and contextualize the same to the study. From the problem statement, the main problem has been identified to be the law, in particular, cap 266 and the Mombasa County Rating Act, 2014 vis a vis judge made laws. This chapter will therefore highlight the specific laws and systems within the law leading to the problem and later on offer solutions that are within the law.

2.1.1 GENERAL OVERVIEW ON APPLICATION OF LAND TAX IN KENYA

As a general rule, land tax applies to all lands in Kenya regardless (except those specifically exempted by the law) of whether or not income is earned from that land. however, the law specifically excludes some land from taxation (rates), those excluded includes: all state houses and lodges, museum(s), art galleries, botanical gardens & arboreta, veterinary quarantine, aerodromes, railway tracks, wharves, roads, public parks etc.³². Lands preserved for public purposes are also specifically exempted³³.

For public land taxation, a different law and policy applies founded under the Valuation for Rating Act (Public Land) Rules. The Act provides that, there is to be published a draft public land valuation roll, which shall be separate from the valuation roll of ratable property in the area

³² Section 4, The Valuation for Rating (Public Land) Rules), Cap 266

³³ Section 5, The Valuation for Rating (Public Land) Rules), Cap 266

of the local authority and shall be based on a system of “contribution in lieu of rates”³⁴ whereby government properties (other than those specifically exempted in Section 4 & 5 of the Act) are liable for the property tax equivalent. The wordings under the Act, is that this contribution in lieu of rates for government land is mandatory³⁵. However, since its enactment, the government and/or public entities have not been able to pay their land rates/taxes in full or at all. This non-payment and/or partial payment by government owned lands has been criticized by many international monetary institutions such as International Monetary Fund (IMF) and World Bank as a major contributor to loss of revenue by Kenya as a nation and Africa as a continent. It is for this reasons that in 1998/1999, the World Bank through her structural reform program in tax came up with the Kenya Government Reform Programme, wherein, the government has since then seek to move towards full payment of the contribution in lieu of rates³⁶. However, the success of the program is yet to be fully realized since in counties such as Mombasa County more than 53% of land taxes from government properties remain either unpaid or partially paid³⁷.

2.1.2 LAND TAX BASE ASSESSMENT (PRIVATE LAND)

Unlike the public lands above, all private lands are subject to annual rate tax payment derived from the land tax base assessment determinant found in Section 8 of Cap 266 (Now, subject to County laws). Despite holding the most crucial role, this Section 8 (Cap 266) is the most flexible, vague and stretchy Section in the entire Act as compared to any other in the world. Under this Section, the local authorities (now counties) are allowed to use an area rating in combination with either ad valorem system based on the land or both land and buildings or

³⁴ Section 3, The Valuation for Rating (Public Land Rules), Cap 266

³⁵ Ibid

³⁶ Unpublished policy document discussed by IMF and the World Bank “Policy Framework for Economic Reforms.” 1999.

³⁷ Ibid

whatever the valuer may think fit³⁸. In practice however, it is always stated in the valuation roll that the local authorities (now counties) use as their land tax assessment base the unimproved site value of the land, meaning that it is only the land that is taxed as opposed to buildings which are apparently not subject to taxation. However, due to the vagueness and flexibility in the law, many county governments use both area rating and site valuation rating with Mombasa County now also using capital value rating simultaneously having far deeper detrimental effects to the Mombasa county people's various rights as enshrined in the constitution to wit: right to housing, property , fair tax payment and administration amongst others. The subsequent chapter will discuss how and to what extent these rights have been violated by the working of these vague, flexible and stretchy laws.

This Section 8 of Cap 266 is produced herein below verbatim:

“ ...the land value shall, for purposes of a valuation roll or supplementary valuation roll, be the sum which the freehold in possession free from encumbrances therein might be expected to realize at the time of valuation if offered for sale on such reasonable terms and conditions as a bona fide seller might be expected to impose, due regard being had, not only to that particular land, but also to other land of similar class, character or position, and to other comparative factors, and to many restrictions imposed on the land, and on the use of the land, by the local authority or a town planning authority by or under any by-laws or town planning powers or the eviction of tenants (control) (Mombasa) Act, being restrictions which either increase or decrease the value of the land.³⁹”

³⁸ See the Valuation for Rating Act, specifically Section 8

³⁹ Section 8(1), Cap 266

From the definition, the tax base, which is derivative from the value of the land already presents the many stretchy, vagueness and flexibility on arriving at the land tax assessment base. Though the practice is and the valuation roll(s) categorically provides as the unimproved site value (and not the land improvements and capital value) as the tax base, the definition in Section 8, introduces the concept of capital value, i.e. that monies realized or expected to be realize if the land offered for sale. If the land, the subject matter for sale has structure, it is obvious, the sale price shall have such consideration(s), therefore, going by Section 8, the tax base, has by dint of operation of law, been escalated to include value over and above the land i.e. not just the unimproved site value. It is no wonder there is no harmony in tax base for purposes of land taxation in almost all the counties in the country. This appears to have been deliberate action by the legislature, but the implications are now far reaching to the people of Mombasa County as will be demonstrated in the subsequent chapters in this paper.

This problem is further perpetuated by Section 8 (2) which for tax base, vaguely defines the value of the unimproved land. It fails to find suitable term to define the value of unimproved land and instead, refers to the capital value the tax payer would realize from the said land if offered for sale, making no major difference from definition provided in Section 8 (1) above save that there is no mention of improvement to the land. The law has failed to give a definitive meaning to this term called “the unimproved value of the land” as a determinant/tax base to arrive at the land rates payable. It is no wonder the valuation rolls for almost all counties (save for recent one by Mombasa County (since objected to by many)) have not been revised now running to over 20 years. Instead, cities such as Nairobi, Mombasa etc seeks to add on the percentage payable to demand higher rates. It appears that any such preparation of subsequent valuation roll by any county will definitely touch on the capital value of the land (going by the law as it is) which will

definitely raise the land taxes, a problem currently faced by the Mombasa County. Indeed, the law as it is conflicting and uncertain giving rise to several conflicting interpretations in valuation methods and so many litigations across counties which has since time to date introduce uncertainty and complexity in valuations for purposes of land taxation. Though the practice brings it out clearly that the tax base assessment measure is essentially that of annual value (since land tax is a recurrent annual expenditure) as opposed to capital value, the law in its plain interpretation can be read to mean capital value is the definitive acceptable measure, and the Mombasa County valuation roll (2016/2018) that has exorbitantly increased the annual rates payable in the County to over 300%⁴⁰ is a living proof. This is notwithstanding the percentage rate which has also been increased in the new law⁴¹. The urgent need to amend and redefine this tax base assessment determinant cannot be gainsaid.

The unimproved site value rating has attracted many countries and states for reasons that it is equitable; efficient; simple to administer; can easily be determined and it discourages land speculations. Indeed, this is the reason that New Zealand, despite her laws allowing use of either capital value, unimproved site value or rental value, twelve out of her sixteen regions have settled for and always use unimproved site value and have realized a lot in terms of revenue from the use of unimproved site value (see the report footnoted in chapter 1 and 4).

However, a number of disadvantages have since been pointed on the use of unimproved site value to include: it does not totally conform to the principles of ability to pay; contributes to inequalities in rating; the process is more subjective and cumbersome. Due to these

⁴⁰ Mombasa County Valuation Roll 2016 – 2016 - 2018

⁴¹ Mombasa County Finance Bill 2018/2019 since assented into law

disadvantages and criticism, countries such as New Zealand and State of Victoria have adopted the “highest and best use” principle so that in determining the value of the land for purposes of land tax (tax assessment basis) account shall be taken of the existing use and the highest and best use which the land might reasonably be expected to be put or taking into account any other purpose for which the land could be used. State of Victoria has also come with tax bracket so that those below certain value (in aggregate) don’t pay rates at all, with each value attracting different amount of land tax.

Fisher, opines that the most important aspect to be considered in the assessment of the site value is the concept of highest and best use. He defines the concept as: “highest and best use is that kind of utilization of land which will enable it to produce, over a period of time, the highest net income⁴².”

This means that the highest and best use can change over time as external market forces change. These forces include effective demand and all its component, public tastes and standards, land use regulations (especially zoning), and competition. These forces are mainly the doings by the local authority of the area concern in improving the locality in terms of utility, amenities, facilitation of all urban and best cities needs and regulations thereby improving the site in terms of all the forces mentioned above, bringing about major developments in terms of malls, cities, business and making the place generally attractive to all manner of business and various use and utilization of the land, thus improves in value. Thus, the character of the subject property changes (from what it was originally) thereby changing its highest and best use, which automatically changes its land tax base assessment. The proponent of this concept opines that this is the reason the highest and best use is always estimated as of the valuation date. That in

⁴² Fischer E, Advance Principles of Real Estate Practice (edn, New York 1930)

other instances, the highest and best use may anticipate the market, provided the conclusion is reasonable, probate and proximate as opposed to speculative or conjectural.

They opine that the present or existing use of the property may differ from its' sites' highest and best use. However, the existing use will continue, unless and until the land value in its highest and best use exceeds the total value of the property in its existing use. As a result, the present use of an improved property is presumed to be its highest and best use unless it can be demonstrated that change is imminent through the impact of market demand (through improved facilities by the local authorities and amenities improvement of the area) or legal (land use control) forces⁴³.

This concept is a major contributor to the theory adopted by this study on rights and duties as corresponding to each other, so that each entity performance of its duties automatically lead to the improvement of the site, thus attracting the highest and best use which will give rise by dint of operation of law to demanding more land taxes in areas where substantial improvement has come up by virtue of the local authority performing her duties. This concept shall be expounded further in the comparative study chapter and chapter 5 on conclusion and recommendation.

2.1.3 THE VALUATION ROLL

As already stated, the valuation roll is the primary document in determining tax base assessment for rates purposes not only in Kenya, but worldwide. This part therefore, looks into detail the preparation process of the valuation roll according to law and its application in law.

⁴³ See Australian case of Spicer Vs Valuer-General [1963] 10 LGRA 319 where the courts stated “ the law is quite plain under the Valuation of Land Act 1916 that the unimproved value of the land must be based upon the best and most profitable potential use”. A number of other jurisdictions such as New Zealand, Jamaica and South Africa have embrace this principle in their judicial cases.

Under the Valuation for Rating Act, it is the obligation of the rating authority to ensure that a valuation roll is prepared at least once in every ten years or such longer period as the Minister of Local Government (now CEC Counties) may approve⁴⁴. The rating authority is required, before preparation of the valuation roll, to pass a number of resolutions and obtain the minister's approval. The resolutions to be passed include the appointment of the valuer, the adoption of the form of rating to be applied (whether site value or area rating value) and declaration of an area within the council boundary to be ratable area. The practice is only one form of rating can be adopted by a rating authority at any time, though, in reality, this is not what actually happens⁴⁵.

To help the rating authority arrive at the up to date value of a specific locality, the law grants power to the valuers to enter and inspect properties or call for any data that they may require to enable them carry out thorough analysis so as to arrive at the appropriate site values⁴⁶. Through this, the valuer is able to work with the information collected from planning department on all relevant development plans of the area together with sales figures available (from inspection & data collection under Section 5) which are marked on a map to give the valuer a picture of the land values in the specific town/locality. Therefore, the valuation roll when completed will show all the ratable properties in terms of:

- a) The description, situation and area of the land valued;
- b) Name and address of ratable owner;
- c) The value of the land;
- d) The value of the unimproved land; and
- e) The assessment for improvement rate.

⁴⁴ Section 3, Cap 266

⁴⁵ See for example Mombasa County Valuation Roll where though titled unimproved site value, the values reflected are of improved capital value, mixed with site value and (area rating values income properties).

⁴⁶ Section 5, Valuation for Rating Act, Cap 266

In the event that it is found that any property was omitted from valuation roll; or there is a new ratable property; or any ratable property is subdivided or consolidate with other ratable property; or any ratable property from any cause arising has since the time of valuation materially increased or decreased in value; the local authority has powers under the law to amend or vary the roll (valuation) and to cause a supplementary valuation roll to be prepared at least once in each of the years following the year of valuation to have these properties reflected/included (if any)⁴⁷.

The valuation roll is thus a mandatory document in law and the only derivative through which the tax base assessment of any land rate is established. Since it is such a sensitive and a must documents in land taxation, it follows that it must adhere to the principle of Article 201 of the Constitution, not just at the point of gazettelement, but prior. Its process must be an open, accountable and accessible process which cannot be said of the Mombasa County Valuation Roll 2018/2019 which is surrounded by lots of bureaucracy. Moreover, the roll has also gone against major principle of taxation in terms of fairness, equity, ability to pay etc and principles of land policy as enshrined in Article 201 & 60 respectively, as a result violating many constitutional provisions. This study opines that such a vital financial document by lacking the major principles in public finance, public participation and land policy as enshrined in the Constitution lacks legitimacy and the people of Mombasa County are right in rejecting the same. The subsequent chapters will discuss in details the Constitutionality and/or lack of it in the Mombasa County Valuation Roll 2016/2018; the law governing the same and the specific rights so violated by the roll and Mombasa County laws.

⁴⁷ Section 4, Valuation for Rating Act

2.1.4 THE OBJECTION PROCESS

Once the draft valuation roll or the supplementary valuation roll is completed, it is gazetted for public information to enable rateable owners not satisfied with the assessment to lodge their objections. The objections range from: inclusion of rateable property; omission of any rateable property; value ascribed in any valuation roll to any rateable property. In essence, this is an opportunity given to property owners to examine whether or not the assessment is fair and reasonable. Under the law, the valuation roll (after gazette) is available at the office of the local authority for public inspection, and any member of the public may, during ordinary business hours, inspect it and take copies or extracts from it⁴⁸. The statutory period for lodging the objection is 28 days from the date of publication of the notice in the Kenya Gazette. If after expiry of time no objection is raised, then the local authority (county) shall endorse the roll and sign a certificate to that effect. If however objection is raised, then a valuation court is to be established which shall comprise of a chairman and not less than two additional members appointed with the approval of the minister of local government⁴⁹. The valuation court is appointed for the purposes of hearing objections and determining appropriate values. Therefore, the quorum of the Court is three (3) and the decision is by a majority.

This again brings about the question of fairness and impartiality in the verdict since a majority may mean decision by the two persons appointed by the same ministry (now county government) against whom the objection is lodged.

⁴⁸ Section 9(2), Cap 266

⁴⁹ Section 12, Cap 266

2.1.5 TAX RATES

The law, under the Rating Act stipulates the forms of rating that the rating authority (county government) may adopt for purposes of levying land taxes/rates⁵⁰. These include: an area rate in urban area as per Section 5; in rural areas, an agricultural rental value rate; Section 6 allows for a site value rate by itself or a site value rate in combination with an improvement rate⁵¹.

Under this provision of the law, the rating authority is allowed to levy rates generally based on either the site value rate on its own or site value rate in combination with (assessment for) improvement rate. The Act defines Site Value Rate as the unimproved value of the land as appearing in the roll⁵² whilst the improvement rate, though not defined in the Act, reference is made to Valuation for Rating Act in its definition. The Valuation for Rating Act in defining the term above, referred to the improvement rate to mean what is left after deducting the value of the land (with improvement) from the value of the land (with no improvement – i.e. the bare land). This definition despite being vague, it is archaic, does not provide any guidance and does not conform to best practice in taxation, no wonder it has never been used in the country. Further, there is no equating the value of improvement with what the local authority has done to improve the value area of the locality and making the locality attractive for all sorts and form of investments and land use (i.e. the highest and best use principle). The nearest this is mention is in terms of Section 3 where the law stipulates that it is the duty of the rating authority to levy rates in order to enable it meet all liabilities falling to be discharged under the law⁵³.

The local authorities (now counties) are further distanced by law from any or specific responsibilities towards their locality in terms of rates received by the law providing that, the

⁵⁰ Section 4(1), Cap 267

⁵¹ Ibid

⁵² Section 6 (1), Cap 267

⁵³ Section 3, Cap 267

local authority, in arriving at the area rate, may, with approval of the minister, adopt one or more of the following methods of area rating: a flat rate; a graduated rate; a differential flat rate; differential graduated rate (all upon the area of land) and in accordance to the use to which the land is put, or capable of being put, or for which it is reserved...and such other method(s) of rating upon the area of land or building or other immovable property as the rating authority may resolve⁵⁴. All these in essence are pinned specifically to the rate payer and any improvement per se he/she might have put on the land. Nowhere in any of the Acts dealing with land tax is the local authority called upon to exercise the highest and best use (as in New Zealand, State of Victoria, Jamaica and other countries that have moved away from laying duties squarely on the rate payer). It is no wonder no justification has been laid over the years as to why any land taxes should be raised, and more so, with Mombasa County raising hers to over 300%.

Under the national law, the percentage rate charged was fixed at 4 % irrespective of the methods used (tax base assessment adopted) to arrive at the land rate chargeable unless a higher percentage has been approved by the minister⁵⁵. With exception of Nairobi (that charges the highest at 13% (industrial), and Mombasa at 9% residential and 13-14% industrial), the rest of the country tend to be uniform with others like Machakos a times going as low as 3-2%. The law does not provide any remedy to tax payer to verify whether indeed the consent of the minister was obtained for the increment or not.

On issue of the land rates payments procedure, the law is to the effect that the rate levied shall fall due on the first (1st) day of January in the financial year for which it is levied and shall become payable on such day in the same financial year as shall be fixed by the rating authority⁵⁶.

⁵⁴ Section 5, Cap 267

⁵⁵ Section 6 (1) and (2), Cap 267

⁵⁶ Section 15, Cap 267

The amount and the day of payment are to be made public by the rating authority by giving at least 30 days' notice⁵⁷. Once this notice has been given under Section 15 above, the duty falls upon all/every liable person(s) for such rate to pay the amount of the rate assessed at the offices of the rating authority or any such place so prescribed⁵⁸ failure to which the authority (rating) shall charge a simple interest at the rate of 3 per cent (3 %) per month or any such other rate as the minister shall by notice in the gazette prescribe⁵⁹ though such interest, is not to exceed the principle amount of the total rate owing⁶⁰. The same law also gives a relief to the ratepayer by allowing him discount of not more than 5 per cent or any other percentage as the rating authority may, with approval of the minister determine, if the rates are paid before the day on which such rates becomes payable⁶¹.

Under Section 17 of the Rating Act, if the ratepayer fails to pay the rates and interest within the prescribed time, the rating authority (local authority/ now county government) may make a demand in writing on the ratable owner demanding for the rate payment together with any interest that has accrued within 14 days of service of the written demand notice. Failure to comply, empowers the rating authority to take legal proceedings in Court against the ratepayer to secure payment of such rate and interest. Section 19 provides that the total sum due is secured by a charge over the landed property and the rating authority, as a decree holder, may apply to the High Court by Originating Summons to order the sale of such land to recover the amount of rate plus interest due. The time limit for bringing such action is within 12 years from the day upon which the rates become due and payable. Alternatively, the law empowers the rating authority to recover the unpaid rates from tenants or occupiers of the ratable property by issuing a notice

⁵⁷ Ibid

⁵⁸ Section 16 (1), Cap 267

⁵⁹ Section 16 (3), Cap 267

⁶⁰ Section 16 (4), Cap 267

⁶¹ Section 16 (2), Cap 267

requiring them to make all future payments of the rent directly to the rating authority until such a time that all the unpaid rates plus any accrued interest have been paid⁶².

Again, the principle of fair land taxations and shared responsibility is completely lacking. The scenario is purely of the ratepayer duties laid out clearly with clear enforcement measures on defaulters to an extent of right to sale granted to the rating authority in the event the ratepayer fails to pay within the stipulated time period and/or his/her right to income from the property lost to the local authority (county) without any right in law for the ratepayer to demand anything in return. This right seems to be an absolute right with no exceptions nor proviso.

This is an imminent danger and threat to the Mombasa County people who have been subjected to illegitimate valuation roll based on void law the resultant effect being rate increment to over 300% that many locals cannot afford, thereby a real threat to their loss of home and property since even the county law has no detail enforcement measures, making the likelihood that the county will rely on the national legislation for enforcement. Further, the time limit for objection is unrealistic given the requirement is only that the information be published at the Kenya gazette. It is public knowledge that very few Kenyans have access to the Kenya gazette with some not even aware of its existence. Therefore, many may and/or do actually miss out the information on this important vital financial document that is central to their livelihood.

The study opines that it is time the law be relooked into in terms of making available and accessible public documents of national or county importance not to limit the publication to only the Kenya gazette, but also to appear in 2 major newspapers of countrywide circulation as well as announcements in TVs and radio stations. This will be in line with Article 201 of Kenyan Constitution 2010.

⁶² Section 18, The Rating Act, Cap 267

2.2 THE EFFECT OF DEVOLUTION ON LAND TAXATION

After the Constitution 2010, Kenya adopted a devolved system of government as a key feature in the administration and functioning of the 2010 Constitution. It is for this reasons that Chapter 1 of the Constitution provides that the sovereign power of the people is to be exercised at both the national and county level⁶³. Key amongst issues under consideration was the impact of devolved system of government on our current tax regime, more so, land tax, which was initially under the local government that the 2010 Constitution has done away with in place of counties.

A look at Chapter 11 of the Constitution is to the effect that the government at the national and county levels is distinct and interdependent and they shall conduct mutual relations on the basis of consultation and cooperation. Meaning that the form of devolved governance envisage by the Constitution is that which is consultative and cooperative. And on matter of taxes, it combines self-governance and shared governance. In that we have self-governance at the county level and shared governance at the national level⁶⁴. Article 209 is the main provision on taxation and it grants exclusive rights to exercise the power to charge or levy certain taxes to either the national or county government, with the major taxes left in the domain of the national government. In particular, it provides that taxes such as income tax, value added tax, custom duties (and other duties on import and export goods) and excise tax are exclusively to be imposed by the national government.

By dint of the Constitution exclusively categorizing these taxes as accruing only to the national government, it means the revenues from these taxes belongs to the country as a whole, hence the shared governance concept addressed above. Whereas, under the same Article, in clauses 3 (a),

⁶³ Article 1 (4), The Constitution of Kenya, 2010

⁶⁴ See Chapter 11 of Constitution and Article 201, 202, 203 & 209 of the Constitution, 2010

(b) and (c): property tax, entertainment tax and any other tax or duty that counties are authorized to imposed by an Act of Parliament are left under the exclusive jurisdiction of counties (previously local authorities). This means that the power to impose property rates (land taxes) is expressly vested on counties. A county may only impose these property rates (and the entertainment taxes) on property or state within its territory. Unlike the national government revenue above, the revenue raised by the counties through these land and entertainment taxes accrue to the respective county government providing the service (hence the concept self-governance).

Though specifically granted the power to levy land taxes under Article 209 (3), there is a proviso under Article 209 (5) which calls upon the county government, in imposing the taxes under Article 209 (3), it shall not prejudice the national economic policies, national economic activities across boundaries or the national mobility of goods, services and capital or labour. It is the presupposition of this study, that the Mombasa County Valuation roll 2016-2018, completely violates this provision. The specific instance of contradiction/violation shall be discussed in details in chapter 3 below.

2.2.1. ADMINISTRATIVE AND LEGISLATIVE GUIDELINES ON HOW TO ADMINISTER LAND TAX AFTER DEVOLUTION UNDER THE 2010 CONSTITUTION

Though land tax (property rates) was specifically devolved under the 2010 Constitution, no specific administrative and legislative guidelines were provided as to how to legally and administratively levy these taxes.

For the said reasons, many counties relied on the provision of Section 8(2) of the County Government Act as read together with Section 7 (1) of the sixth schedule of the Constitution in

continuing use of the national legislation (The Rating Act and The Valuation for Rating Act) to perform their executive functions as defined in Section 34 of the County Government Act⁶⁵. However, these safeguards of the law were meant to ensure smooth functioning of the County Governments in transition as the counties await making their own laws on matters of finances in regards to taxes specifically so devolved. It is for these reasons that Joel Ngugi J lamented in his ruling of 2017⁶⁶, how Kiambu County has until this late in the day not come up with her own legislations on property tax and still relies on Section 8 (2) of the County Government Act to levy tax based on national legislations. The judge fumed against the notion of the county taking advantage of the transition allowed in the law to use national legislation temporarily for smooth running of the counties being adopted as the long-term escape route for inaction by County Governments. The County was given 30 days within which to come up with her legislation on property tax or declare reliance on national legislation illegal.

The above holding, coupled with the Constitutional principles on public finances under Article 201 providing that any money bill/public finance (for either county or national government) (and indeed as is the general legal principle that any legislations whatsoever) must go through the county assembly (for counties) with the attendant procedural safeguard for public participation; openness and accountability. Makes the property rates Act, being such kind of legislation, a subject of a must enactment by the counties and as a matter of urgency. Secondly, the most important object of devolution under the 2010 Constitution is to recognize the right of communities to manage their own affairs and to further their development⁶⁷, to which by enacting their own legislation to manage their affairs, amounts to giving the people of the county

⁶⁵ See sixth Schedule of the Constitution, 2010 Section 7 thereof on use of existing laws and Section 8 (2) and 34 of the County Government Act on use of existing national legislations in transition.

⁶⁶ Republic Vs Kiambu County Executive Committee & 3 Others exparte James Gacheru Kariuki & 9 Others [2017] eKLR

⁶⁷ Article 174 (d), The Constitution of Kenya, 2010

their right to participate in their own governance by giving views on the county legislation through legislative process.

Appreciating the above provisions of the laws and the right of the people of Mombasa County to participate in their own governance, the Mombasa County, in 2014, came up with her own Mombasa County Rating Act, 2014. Section 2 makes the Act as of general application to all lands in and within Mombasa County including public land as defined and envisaged in Section 25 of the Valuation for Rating Act; however, rates may be imposed only on ratable property⁶⁸. The Act adopts the forms of rating as provided for in Cap 267. It provides under Section 4 that: for the purposes of imposing land taxes, the county assembly may use one or more of the following forms of rating: an area rating in accordance with schedule 1; an agricultural rental value rate in accordance with schedule 2; a site value rate or an improvement rate in accordance with schedule 3. Subsection (2) provides that the county assembly may adopt different forms of rating for different rating areas⁶⁹. Again, we see the Act (law) permitting use of more than one form of rating for purposes of arriving at the base assessment of land rates payable.

Unlike the Valuation for Rating Act that empowers the valuer to use the value of the land (amongst other methods) at arriving at the site value rate for purposes of land taxation, the Mombasa County Rating Act, 2014 explicitly prohibits the use of the same (value of the land)⁷⁰. In the contrary, the Act at schedule 3 only recognize unimproved site value as the method to be used at arriving at the site value rate for rates tax payment purposes. The Act joins in the ambiguity, elasticity and flexibility of her predecessor (Valuation for Rating Act) on this special provision which is a key determinant as to how to arrive at the base assessment rates for

⁶⁸ Section 2 (1) & (2), Mombasa County Rating Act, 2014

⁶⁹ Section 4 (1) & (2), Mombasa County Rating Act, 2014

⁷⁰ Schedule 3, Mombasa County Rating Act, 2014

purposes of land tax. Since it just provides what should not be used (i.e not to use the value of the land) but does not provide what to use instead. Mini reference is made to value of unimproved land, which is not defined and reference is made to Valuation for Rating Act for purposes of definition⁷¹. More so, despite this express prohibition on the use of the value of the land, a look at the Mombasa County Valuation roll 20016-2018 reveals clearly that the value assessment used to arrive at the rates stated therein (over 300%), were from the value of the land and capital derive therefrom and not the unimproved site value (whose meaning still is a mystery)⁷².

This is a clear indication that the Mombasa County Valuation Roll 2016-2018 is not a product of her own county rating Act but rather the national legislation on property tax. This is despite the fact that at the preparation of the roll (2018) and its publication (2018) Ngugi J judgements (quoted above) was already out making such reliance on national laws for purposes of property taxation illegal. This paper seeks to answer the question why Mombasa County decided to abandon her own legislation (which is what is the law) and adopt an illegal law as her basis in arriving at the site value rate to impose land tax in her 2018/2019 roll. The paper focus on the question whether the so imposed exorbitant land tax (the valuation roll 2016-2018) based on the illegitimate law is legal/valid not only in terms of it following the defunct law, but also in its violation of major principles of taxation and land principles as provided in our Constitution 2010 as well as its breaches on fundamental rights guaranteed in the said Constitution. Chapter 3 will provide some answers whilst others in the recommendation and conclusion.

⁷¹ Schedule 3 (3), Mombasa County Rating Act, 2014

⁷² See Mombasa County Valuation Roll 2016 - 2018

The Act is further wanting in terms of time for payment of such property rates, in particular Section 8 of the Act provides that, the county government can impose half a year rate as falling due from 1st January to June of that year contrary to Cap 266 and 267 that provided for a year (annual) payment of rates which is also the standard practice internationally⁷³. Under the law, the county government is empowered to impose the half a year rates for purposes of changing from a calendar year to the financial year. This introduces ambiguity in such charging as it does not come clearly when will/can such scenario occur and what are the limits? It also does not answer the question if charged half year, what happens to the remaining half of the year? It thus brings ambiguity not only in terms of base rate assessment for purposes of arriving at the value rate to establish the tax to be imposed, but also the period on which to be charged.

It brings in likelihood of double taxation within a single year over same piece of land, and again on a very high rate. This is made worst by the provision of Section 12 which gives the county government power to impose whatever interest rate they deem fit for the defaulters of rate payment or those who had delayed. Unlike Cap 266 and 267 which had capped the interest rate at 3%, the Mombasa County Rating Act leave it wholly at the discretion of the county assembly. The discount provision witness in her predecessor (the Rating Act) (at 5% for those who pay early) is not reflected anywhere in the county Act.

2.3 TAX RATE UNDER MOMBASA COUNTY RATING ACT, 2014

Unlike her predecessor that had two (2) legislations. One dealing with tax rate and another tax base assessment. The Mombasa County adopted one Act, being the Mombasa County Rating Act, to which under her Section 5 it provides that: “rates may be imposed by the Act providing

⁷³ See Section 8 (c), Mombasa County Rating Act, 2014

for county finances or by such Acts as the county determines⁷⁴”. It is on this basis that the tax rate is provided for under the Mombasa County Finance Bill, 2018/2019. Under the Finance Bill, the 4% and need for the consent of the minister to charge higher than the prescribed percentage has been done away with. The Bill provides for a fix percentage of 8 per cent for residential and agricultural property and 14 per cent for commercial and industrial property⁷⁵. Not only has the assessment base percentage rate went higher in double but also agricultural property that had always had zero rates (no rate payment) are now required to pay same percentage (8%) as residential property. The people of Mombasa County have been pushed to the core with the new laws on property tax and this paper seeks to find a solution in line with the Constitutional values, principles, and rights having regards to international best practice to see what Kenya and Mombasa County can adopt to better the inefficiencies in the law(s).

2.4 CONCLUSION

It is the conclusion of this chapter that devolving the land rates has been a detriment to the people of Mombasa County. No reprieve has been experienced by the people of the county and it is time the law comes to their aid. Many a family risks being rendered landless and homeless due to the many violations in the Act. The need for Amendments and/or repeal of the Act(s) and the bill cannot be gainsaid. Objectives 2 and 3 has also been tested with the valuation roll 2016-2018 being found to be invalid/illegal and the reasons for abandoning county legislation and adopting the national legislation despite the illegalities in the conduct explained.

⁷⁴ Section 5(1), Mombasa County Rating Act, 2014

⁷⁵ Item 974, 975, 976 and 977 of the Mombasa County Finance Bill 2018/2019

CHAPTER THREE

WAYS IN WHICH THE KENYAN AND MOMBASA COUNTY LAND TAXATION SYSTEM VIOLATES THE PRINCIPLE VALUES AND FUNDAMENTAL RIGHTS IN THE CONSTITUTION

3.0 INTRODUCTION

This chapter seeks to analyze and expound on the Constitutional implications of the problems in the Kenyan and Mombasa County land value taxation laws and systems as laid out in chapter 2 above. As already found out, there is a problem in the law, specifically Section 8 of Cap 266 and Section 4 (1) (c) as read together with schedule 3 of the Mombasa County Rating Act, 2014. As a result of this problem in the law, the Mombasa County Valuation Roll 2016 – 2018, which is a product of these inefficient laws, has had a great impact on the Constitutional principles in Article 60 and 201 and the Constitutional rights guaranteed in Article 40 and 43. This calls into question the Constitutionality of Section 8 of Cap 266 and Section 4 (1) (C) as read together with schedule 3 of the Mombasa County Rating Act, 2014. This Section discusses the Constitutional breaches perpetuated by these inefficient laws (Section 8 Cap 266 and Mombasa County Rating Act, 2014). It also seeks to bring out the conflicts within the Constitutional provisions, that is Article 209 on tax as compulsory pay vis a vis Article 201, and 60 that brings out a socially and economically friendly Constitution. The study sees this as a major problem that needs to be reconciled. The subsequent chapters offer solutions from best practice and recommendations that has worked elsewhere and are within the law.

3.1 THE EFFECT OF THE CONFLICTING CONSTITUTIONAL PROVISIONS AND THE INEFFICIENCIES IN THE KENYAN AND MOMBASA COUNTY LAND

TAXATION LAWS ON THE PRINCIPLE VALUES AND THE FUNDAMENTAL RIGHTS GUARANTEED IN THE CONSTITUTION

The Kenya land and taxation governance system, fashioned within the British conquest of territory, was not meant to be equitable and all inclusive. The colonial government majorly designed it to expropriate land for the politically powerful minority and facilitate European settlement and capitalist colonial development. This social, political and economic mischief has led to problematic allocation of land in the country with the resultant effect being land access in Kenya is manifested with inequalities and often associated with political disempowerment and oppression. This necessitated the effort to overhaul the country's legal, administrative and institutional arrangements not only in terms of land and tax policy, but in almost every other economic, social and political aspect of the country. the 2010 Constitution, is the document that saw these major changes as shall be expound later in this chapter.

It also saw the implementation of land law and policy reform such as sessional paper No. 3 of 2009 on National land policy (though not the focus of this study); new Constitutional provisions (Chapter 5 of the Constitution of Kenya 2010 – to be discussed in detail below) and new laws around land registration and titles, protection of public lands and urban planning, laws on land taxes and limitation thereto (Article 209); laws on public finance and powers to create revenue (Article 201, 209) amongst others. These laws and institutions created out of them reflect an ambitious attempt by government both at national and county level to reorganize existing land and tax governance system to disperse power and bring land and tax issues into a more open and realm of public reasoning.

This is in line with the reasoning of this study that the main reasons for introduction of taxes (whether land tax or other type of taxes) are to: 1) raise additional revenue to bridge the financial gap; 2) promote economic growth; 3) expand employment opportunities; 4) simplify the tax system; 5) make goods and services more accessible to the poor; 5) have the tax collected reinvested into the county or country as an obligation to the governance to enable the county or country realize all the other objectives. It is for this reason that this study disagrees with the sitting of Article 209 (3) of our Constitution that seems to denote that tax (including land tax) is a compulsory payment that does not necessarily involve the use or derivation of direct benefits from services, regulation or goods⁷⁶. The study adopts and recommend the New Zealand and State of Victoria approach on the highest and best use principle to impose obligation to the governance from land tax collected to elevate their locality to the highest and best use to justify demand for taxes and achieve the objectives of taxation as laid out in this study.

Indeed, as early as 1970's Adam Smith in his *The Wealth of Nations* identified four canons or principles of taxation as follows: -

- 1) Taxes should be levied on individual according to their ability to pay as reflected by income;
- 2) Taxes should be certain as to amount and condition of payment;
- 3) Taxes should be payable at a time and in a manner convenient to the taxpayer;
- 4) Taxes should be collectible at a low or economical cost⁷⁷.

The above is a historical prove that taxation, worldwide, is often always governed by specific principles/tenets, to name but a few: principles of certainty, neutrality, simplicity, efficiency and

⁷⁶ See Article 209 (3) of Kenyan Constitution 2010

⁷⁷ Smith, A. (1778-79) *An Inquiry into the Nature and Causes of Wealth of Nations*, 2nd ed. W. Straham and T. Cadel, London, generally.

economy. As per Boreham (1971) these principles, more so, the principle of certainty, enables the taxpayer to know what taxes are applicable to him. It protects the taxpayer from being subjected to the arbitrary decisions of the taxing authorities. Other principles such as Neutrality allow taxes to be applied equally on the subject matter. Simplicity calls for the tax system to be one that is capable of being understood easily by persons subjected to it and to promote convenience to taxpayers. It is a supporting hand to the principle of certainty above. The principle of economy on the other hand, calls for all tax systems to be mandatorily economical to collect and with minimal compliance costs. It cushions a tax system to be equitable and to promote economic growth and stability⁷⁸. Therefore, for a tax system to be said to be feasible, fair, just and economical, it has to comply with all these principles/canons.

However, despite the importance of these canons, over the time, they have become outdated and left to serve agrarian economies. Most of the principles such as simplicity is no longer valued and lacking in many jurisdiction, including Kenya and Mombasa County. Some have justified the deviation on account that the inventory of taxes was quite limited during the times of Adam Smith's canons and that now taxation entails a dynamic of various harvest thus the canons cannot form the basis of modern tax principles or reforms, this study disagrees with the sentiment. On the contrary, the study is of the view that Adam Smith's canon still form a good principle in tax reform. Principles such as certainty and economy are and will always be relevant. The Mombasa county valuation roll and any modern-day tax reform measure fails because of ignoring some of these principles. Therefore, the study does not take these canons for granted and adapt them for use where relevant and to seek recommendation to the legal regime in land taxation as it stands.

⁷⁸ Boreham, G.F. (1971) Contemporary Economic Thinking, Holt, Rinehart & Winston of Canada Ltd, Toronto & Montreal, P. 338 and 339

These Constitutional reforms also had an impact on the inefficient laws in Section 8 of Cap 266 and Section 4 (1)(c) as read together with Schedule 3 of the Mombasa County Rating Act, 2014 (land tax base determinant). In that by employing these laws, the Mombasa County Valuation Roll 2016-2018 found itself not only to be in violation with the Constitutional principles in Article 60 and 201, but also the Constitutional rights guaranteed in Article 40 and 43. The study seeks recommendation to declare these Sections unconstitutional and call for them to be repealed as a matter of urgency.

3.2. THE PRINCIPLES AND VALUES ON LAND TAXATION IN THE KENYAN CONSTITUTION 2010

Just like many countries that have abandoned the Adam Smith's canon of taxation, Kenya is not left behind. To begin with, neither the Kenyan Constitution nor any piece of legislation in Kenya has laid out principle of taxation. The closest we get to the principle is Article 201 that generally addressed principles of public finance. Two principles come out from the Article, those found in Sub Article (b) (i) that is: burden of taxation shall be shared fairly (here we see the principle of fairness: albeit vague as it does not come out clear whether fairly is ability to pay or fairly means fairness in terms of responsibilities between governance and the governed) and Sub Article (d) and (e) that is: public money shall be used in a prudent and responsible way and that financial management shall be responsible, and fiscal reporting be clear. This is evident of principle of efficiency. Over and above these two principles; others to wit certainty; neutrality; simplicity and economy is vividly lacking.

It is the focus of this study that to address the land taxation problems facing the Mombasa County, these principles must be reinforced in our Constitution. That the beginning of failures in

taxation is doing away with these main principles especially certainty and economy. One should know for sure how much land tax (rates) is required of him and certainty as to what to expect as increment in the subsequent year(s). The Mombasa County by exorbitantly and abruptly increasing the land tax to over 300% (i.e. properties paying Kshs. 30,000.00 to 40,000.00 a year in tax now required to pay Kshs. 1, 200, 000.00 every year) not only goes against principle of certainty, but also those of Article 201 (b) (i) on fairness in taxation as well as principles of economy and efficiency to the people. It amounts to robbing the people their right to housing and to property.

The second principle applicable in the study is the principles on land policy as provided for in Article 60 of the Constitution. From this Constitutional provisions, we see shared principles with that of taxation (public finance) being principles of equity and efficiency. However, Article 60 has gone ahead in better provision than Article 201 calling upon security of land, equitable access to land, transparency, cost effectiveness (economy) and many more in upholding the right to land in Kenya. Indeed, most of the Adam Smith's canons are pronounced in the land principle than in the principle of taxation. Perhaps our land history as elaborated at the beginning of the chapter has a lot to do with this, but non the less, this is commendable and a good starting point to Kenyans and people of Mombasa County to address the land tax issues that has since posed imminent threat and danger to the Mombasa peoples' right to land. Going by these principles, the Mombasa County valuation roll 2016/2018 is void in the face of the law. Not only has it breached all of the above-mentioned principles, but also gone against principle of taxation and violated many rights in the Constitution as shall be demonstrated later in this study.

More so, Sub Article 2 calls upon implementation of the land policy principles through a national land policy developed and reviewed regularly by the national government and through

legislation⁷⁹. A look at the land tax legislations, both at county and national level, and more so, Mombasa County land tax laws makes it clear that the provision of this sub article was never followed. The legislation is a mockery to the principles enshrined in this Article and it is time the same is declared unconstitutional, especially the part dealing with tax base assessment, valuation rate and duration of land taxing in Mombasa County. Article 1 of the Constitution grants the people the right to resist such laws either directly, or through their democratic leaders or through the judiciary to have the laws declared Unconstitutional and void to that extent⁸⁰.

The third principle is the principle of public participation. This principle is given prominence in the Constitution of Kenya 2010. It is one of the principles found in Article 10(2) on national values and principles of governance that specifically calls for public participation, patriotism, national unity, sharing and devolution of power, the rule of law and democracy. Indeed, giving self-governance power to the people and to enhance people's participation in the exercise of the powers of the state in decision making directly affecting them is one of the main objectives of devolution as provided for under Article 174 (c). Article 196 provides that a county assembly shall conduct its business openly, and hold in public, all its sitting and those of its committees. It is supposed to facilitate public participation and involvement in the legislative and other business of the assembly and its committees. Public participation is therefore one of the key devolved functions and principle and the two arms of county government must involve the public in their key decision-making process and all public documents. However, despite several Constitutional provision emphasizing this principle, the people of Mombasa never saw its applicability in the valuation roll 2016/2018 nor in the finance bill 2018/2019 recently assented into law. The first

⁷⁹ Article 60 (2), The Constitution of Kenya, 2010

⁸⁰ Article 1 (2), 3 (c), The Constitution of Kenya, 2010

they learnt of these vital public finance documents was at gazettelement which again only the elites and educated got to know of the happenings⁸¹.

Bureaucracy surrounding the process made it information known to the few. As stated in chapter 2, publication only at the time of gazettelement does not amount to public participation. Moreover, very few Kenyans have access to the Kenya gazette. Therefore, public forum, grass root participation and announcement in the local radio stations and Tvs and newspapers of nationwide circulation is a must. Indeed, the Constitution has made public participation in all matters of development and key decision making and documents and legislative process at county level as mandatory⁸². In the case of *Robert N. Gakuru & Others Vs Governor of Kiambu County & 3 Others* [2013] eKLR⁸³, the High Court in Nairobi declared Kiambu County Finance Act, 2013 illegal because of lack of public participation. *Odunga J* held that the County Assemblies ought to do whatever is reasonable to ensure that as many of their constituents in particular and the Kenyans in general are aware of the intention to pass legislation and where the legislation in question involves such importance aspect as payment of taxes and levies, the duty is even more onerous⁸⁴. I hold that it is the duty of the county assembly in such circumstances to exhort its constituents to participate in the process of the enactment of such legislation by making use of as many for as possible such as churches, mosques, temples, public barazas, national and vernacular

⁸¹ See the various complaints lodged at Bima Tower awaiting hearing by the valuation court as regards the valuation roll; the Mombasa County Rating Act, the Finance Bill 2018/2019. There is public outcry as they never got to know such happenings were taking place in the county assembly, and even after gazettelement, only a few got to know.

⁸² See Article 1; 10 (2) (a); 118; 119; 174; 232 (1)(d) and paragraph 14 of part 2 of the fourth schedule of the Constitution of Kenya 2010; ...to establish modalities and platform for public participation in governance of the county...

⁸³ <http://kenyalaw.org/caselaw/cases/view/92660> (accessed on 3rd June 2019)

⁸⁴ Ibid

radio broadcasting stations and other avenues where the public are known to converge disseminate information with respect to the intended action⁸⁵.

The court thus declared Kiambu County Finance Act, 2013 to have violated the Constitution and therefore null and void. The principle of public participation is therefore one of the best ways the Constitution has allowed the citizenry to engage the County government. It is a sad reality that despite this important principle lacking in Mombasa County valuation roll 2016/2018, no one had Petition the Court to declare the valuation roll, the finance bill nor the Mombasa Rating Act unconstitutional, thus null and void to that extent. It appears, the people of Mombasa County, though empowered, they may not know their rights and thus are unable to hold the county government accountable and demand for better service delivery and participation in important matters of finances. The research urgency is imminent and civic education a necessity.

3.3. THE RIGHT OF COUNTY GOVERNMENTS TO COLLECT LAND TAXES

The county government right to collect land taxes is a derivative of the Constitution. Article 209 grants the counties the exclusive rights to impose property rates; entertainment taxes and any other tax that is authorized to impose by an Act of Parliament⁸⁶. Article 210 provides that only taxes and licensing fees provided in legislation may be imposed, varied or waived, meaning the County government powers to impose taxes is only limited to entertainment and land tax and Article 209 generally (as such the only expressly authorized taxes are entertainment and land).

As propounded by Bird, R.M. for a tax to qualify as a totally county tax, these five distinct conditions must suffice:

- a) The county can decide whether to levy the tax or not;

⁸⁵ Ibid

⁸⁶ Article 209 (3) (a) (b) and (c), The Constitution of Kenya, 2010

- b) It can determine the precise base of the tax;
- c) Can decide the tax rate;
- d) Administer (assess, collect, enforce) the tax; and;
- e) Get to keep all the revenue they collect⁸⁷.

As discussed in chapter 2, the County governments, more especially Mombasa County, has since been able to satisfy all the above-mentioned requirements with the most recent being assent into law of her finance bill that explicitly lays out the tax rate for all types of properties in the County. Though there still exists some reference to definition and other minor details to the national legislation on land tax, the county exercise self and independent control over all land taxation. The answer is thus partly affirmative, that land tax, has been to more than 90% made subnational (county responsibility), however, the same cannot be said of entertainment tax, but since it is not the focus of this study, we shall not dwell much on it.

In conclusion therefore, this study finds both the Constitution and legislation have assign the land and entertainment taxes to the county governments, and empowers the national assembly, for purposes of the future, to assign any new taxes to the counties. of key note is that, assigning of any such taxes to the counties, depends on how responsibilities of spending have been assigned. So that where the tax assigned is a direct provision of the Constitution (as is in Article 209 (3), then such consideration is deemed as settled. However, in our case, these taxes are simply conjecture. The Constitution does not define and delineate them. They may be open to diverse interpretation and the land tax legislation does not seem to offer any better solution. It is for this reason that most Counties have seen the safest way is to follow tradition as to what and how those taxes have been taken to mean in the past and imposed, though now under a different

⁸⁷ Bird R,M (2011), "Subnational Taxation in Developing Countries: A review of the Literature", Journal of International Commerce, Economics and Policy, Vol 2. No. 1 (2011) 131 – 161. P. 144

regime. Unless we have a complete overhaul of the law on this important aspect, land taxation, especially in terms of tax base assessment will always be a major problem and counties will witness less and less valuation rolls with majority being rejected by the people just like Mombasa County.

3.4. CONSTITUTIONAL RIGHTS VIOLATED BY THE LAND TAXES IMPOSED IN MOMBASA COUNTY

The study opines that the main reasons for coming up with the principles of public finance (taxation) and land policy in the Constitution is so as to give effect to the economic rights enshrined in the Constitution. These rights have been identified as:

- a) Right to property;
- b) Right to housing;
- c) Right to fair tax payment; and
- d) Right to fair tax administration

One of the objectives of devolution recognized under Article 174 is the objective to promote social and economic development and the provision of proximate, easily accessible services throughout Kenya⁸⁸. Indeed, these social economic rights are a function of both national and county government.

A) THE RIGHT TO PROPERTY

This is a right guaranteed under Article 40 of the Constitution. The Article makes it a right for every Kenyan either individually or in association, to own and acquire property of any

⁸⁸ Article 174 (f), The Constitution of Kenya, 2010

description in any part of the country with exception to non-citizens who have separate provision under Article 65.

Sub Article (2) prohibits Parliament from enacting laws that permits the state or any person to arbitrary deprive person(s) of any of their property or of any interest in, or right over their property; to limit or restrict their enjoyment of their property or any right accruing there under; and that if at all any deprivation is to take place, then it must be in accordance with sub article (3).

From the foregoing, right to property is a guaranteed right under the Constitution with the exceptions expressly provided for under the same Constitution. Therefore, anything done outside the precinct of the Constitution amounts to arbitrary deprivation of ones right to this fundamental right with a right of action and/or claim in law. Sub Article (2) specifically prohibits Parliament (by extension County Assembly) from enacting any laws that permits state or any person to arbitrary take away this right from her citizen. The land taxes imposed by the Mombasa County through her valuation roll 2016/2018 based on the national law (Valuation for Rating Act) instead of her own laws, (which are equally vague, void and inefficient) which has increased the land taxes to over 300% and at a very high percentage is equivalent to arbitrary deprivation of the people of Mombasa County right to ownership of property. Many already risks being rendered landless for inability to pay these exorbitant land taxes. Though land tax tribunal has been formed, her impartiality is wanting as the simple majority are from within the same County government, further as already stated in this study, the Courts are not the best of forums to settle economic disputes.

This therefore calls for imminent and urgent look into these laws. A motion need be introduced into county assembly to look into the illegalities and breaches of the land taxation laws and the valuation roll as a whole, not to mention the finance bill that now taxes agricultural land at same percentage as residential land. These rights seek to be extinct from the people of Mombasa County if no immediate urgent action is taken.

B) RIGHT TO HOUSING

Closely related to right to property is right to housing. Under the 2010 Constitution, this is provided for under Article 43 (1) (b), the Article guarantees every Kenyan a right to accessible and adequate housing⁸⁹. Indeed, it is in line with this right that Article 209 (5) provides that counties taxation and other revenue raising powers must be exercised in a way that it does not prejudices national economic policies, national economic activities or national economic mobility of goods, services, capital or labour⁹⁰.

The Mombasa County Valuation Roll 2016/2018 together with the Mombasa County Finance bill 2018/2019 are a great threat, infringement and violation of the right to housing. These legal documents are self-defeating of the right to property and housing discusses above as they make these rights untenable. It is the focus of this study that for these rights to be realized, the law on land tax value assessment (the basis for coming up with valuation roll) must be amended. If the amendments are cautioned well, there need not be amendments to the finance bill 2018/2019, save maybe on issue of agricultural land being taxed at same rate as residential urban land, when initially they attracted zero land taxation.

⁸⁹ Article 43 (1) (b), The Constitution of Kenya, 2010

⁹⁰ Article 209 (5), The Constitution of Kenya, 2010

C) RIGHT TO FAIR TAXATION AND FAIR TAX ADMINISTRATION

These are not expressly laid out rights in our Constitution; rather, they are inferred from the provisions of Article 201 of the Constitution⁹¹. The Article connotes the function of public finance as that of promoting an equitable society particularly lays emphasis on: a) taxation burden be shared fairly; b) the revenues raised nationally be shared equitably amongst the national and the county government and that c) expenditures should promote equitable development of the country. Though the provisions are a bit vague, it clearly brings out the concept of fairness in payment of taxes, the ambiguity is to the term fairness as no reference is made to fairness to who? Is it to the relationship between the governance and the subject or subjects amongst themselves so that the more a subject has the more he pays, or locality of the land etc. Non the less, the ambiguity still calls for fairness with the other subsection calling for fair tax administration.

From the Mombasa County valuation roll 2016/2018, based on the defunct law base assessment calculator used therein, we see very high amounts demanded for rate, some properties previously paying Kshs. 30,000.00 – 40,000.00 now called upon to pay Kshs. 1, 200,000.00⁹². This is a direct breach to this provision of the law. No fairness in whatever angle can be inferred or evidenced from such an increment.

It is the stand of this study that, the Mombasa County Valuation Roll 2016/2018, in spite being void, it is of great prejudice to the people of the county and arbitrary to land economic rights, policy and principles enshrined in the Constitution.

⁹¹ See Article 201 (b), The Constitution of Kenya, 2010

⁹² See the Mombasa County Valuation Roll, 2016/2018

3.5. THE MOMBASA COUNTY FINANCE BILL AND HER IMPACT ON VIOLATION OF THE CONSTITUTIONAL RIGHTS AND PRINCIPLES

Matters of taxes and finance are always influenced by the finance bill/Act. It is therefore of importance that the tax issues in the finance bill are addressed in this chapter. Finance bill can simply be defined as a bill that contains proposals to the Parliament or County Assembly to amend or introduce taxes in case of national government or fees or charges of county government to raise monies to finance the budget deficit. It may also contain proposals to enhance the administration of the existing laws for raising revenue⁹³.

County revenue finance bill normally has two main functions:

- 1) To provide clarity on legal basis for the county government to continue collecting fees, charges, or rates that were being collected by the local authorities;
- 2) Raising funds to finance the budget gap. Done through variation or imposition of previous rates or new fees and charges.

The Mombasa county, in exercise of this her mandate, did come up with her finance bill 2018/2019 (since assented into law). Though the bill made it clear the percentage chargeable in terms of land rates (that is 8% for residential and agricultural land and 14% for commercial) and justification made was that this was for purposes of raising funds to finance the budget gap. This study opines that such measures violate the Constitutional principles on land policy and tax and land and economic rights guaranteed in the Constitution (already discussed above). More so, since the tax base assessment adopted was already so high raising the land tax to over 300%, as thus raising the percentages in the bill, makes the taxes way too exorbitant in contravention of

⁹³ Omami Hillar, ICPAK Report on 'Taxation at the County level, A review of the County levies, charges and taxes' (December, 2017)

principle of fair taxation, equitable access to land, right to land and right to housing. It is the recommendation of the study that as much as the county has this right, it should balance the same with the Constitutional rights and principles that it has breached. That either the finance bill supersedes with the percentages based on the old valuation roll, or both the new laws and legal instruments on land tax be abolished to come up with a roll that favours and address all the Constitutional principles and rights.

3.6. THE NEED TO BALANCE THE COUNTY GOVERNMENTS' RIGHT TO COLLECT REVENUE WITHOUT VIOLATING CONSTITUTIONAL RIGHTS AND PRINCIPLES

The need to collect taxes both at national and county government level is very vital and fundamentals of any democratic society. Indeed, no state can run a democracy well without taxation as government revenue is essential in expediting economic growth and development which is the backbone of each and every economy. Implementation of effective tax policy and laws is therefore the most important instrument by which resources are marshalled in nation(s). Specifically for property/land tax, according to the 2001 world bank paper, it accounted for 34 percent of total own source tax revenue for municipalities and at an average, property rates in Kenya accounts for 20% of the total recurrent revenue for local authorities (now counties)⁹⁴, therefore, property tax is as well an important revenue source for both county and national government.

It is for these reasons that taxation, in many jurisdictions, is the only known practical manner for collecting resources in order to finance public expenditure for goods and services. Even the loans

⁹⁴Mbote K. Patricia, World Bank Report on, ' Kenya Land Governance Assessment Report' 27th June 2016 <http://document.worldbank.org/.../119619-WP-P095390-PUBLIC-7-9-2017-10-9-20-KenyaFinalReport-6pdf> accessed on 3rd June 2019

borrowed by governments, are eventually to be paid through tax. As a result, most jurisdictions, in their legislations, define taxes as the compulsory payments that may or may not benefit the taxpayer in terms of government goods and services received. This is the sad state of our Constitution which has adopted the same concept in Article 209. The Article only makes obligation to collect taxes by both national and county government without anywhere in the Constitution making a correlated obligation for provision of goods and services to the citizenry from the taxes so collected⁹⁵.

Despite the Constitution making taxation, including land taxation as a compulsory pay without expecting anything in return, the same Constitution provides a socially and economically ideal land value rights and policy and other Constitutional principles that calls for accountability, equity, just, fairness, and certain fundamental values that must be observed. These principles and rights are laid out in Article 60, 201, 40 and 43 of the Constitution (as already enunciated) and are so vital and fundamental just as much as the rights to collect taxes are⁹⁶.

It is thus the focus of this study that the tax concept adopted by Article 209 of the Constitution cannot stand the test and need of the principles enunciated in Article 201 and 60 of the Constitution and the rights guaranteed in Article 40 and 43 (1) (b) of the same Constitution. That these principles and rights calls for the taxing authority to be fair, accountable and responsible for the revenue collected and ensure that the exercise does not contravene these principles and rights. The study opines that the right to collect taxes is so fundamental and essential but in so doing, this right or obligation should not infringe on the citizens right to ownership of property and of housing and should not go against the land policy and taxation principle.

⁹⁵ See Article 209, The Constitution of Kenya, 2010

⁹⁶ Article 60, 201, 40 and 43, The Constitution of Kenya, 2010

That the Mombasa County Valuation roll 2016/2018 only concentrated on the right and/or obligation of the county to collect taxes and completely overlooked the principles and the rights as discussed above. This study opines that such documents (the valuation roll) cannot stand the force of law and is void and illegal from the very beginning. The document not only contravened the policy and principles in Article 201 and 60, but also those in Article 10 and many others on public participation. Time is ripe for Article 209 to be amended and have the right to collect taxes, and more so land taxes be balanced with the constitutional principles in Article 201 and 60 and the rights guaranteed under Article 40 and 43 less the people of the Mombasa County risks being rendered homeless and landless by oppressed tax law provision and legal documents with such a danger risking spreading to other parts of the country.

The Constitution has failed the people of Kenya as regards the above fundamental provisions that affect fundamentals lives of Kenyans. Chapter 4 and 5 will offer recommendation and practice from other jurisdiction through which a balance may be found as regards the Constitutional rights and the Constitutional principles discussed above to properly serve Kenyans and the people of Mombasa County without violating other Constitutional rights and principles. This is over and above the Amendments suggested in the chapter.

3.7. CONTEXTUALIZING THE KENYAN LAND VALUE TAXATION AND TAXATION GOVERNANCE

Land valuation for taxation purposes has been undertaken in Kenya since colonial days. It has ever since been carried out at two levels, national government and local/municipal authority, now (since promulgation of the Constitution 2010) the county government⁹⁷. At the national level we have the stamp duty and capital gain tax as at the time of land transaction. These are

⁹⁷ See Article 209 of Kenyan Constitution, 2010

taxes imposed on property acquisitions either through purchase, inheritance, lease or any other transfer of interests in property.

Whilst stamp duty tax has been there since independence, the capital gain tax was introduced in January, 2014 and is computed on the additional value of the property net of the cost of initial acquisition and costs incurred to improve the property. In essence, all these taxes on land to the national government, just like rates payable to the county government, are based on the market value of the land. Unlike the land rates which apparently ignores the development and/or improvement on the land, the stamp duty and capital gain taxes applies both developed and undeveloped value of the land upon transfer⁹⁸. The valuation is undertaken mainly by valuers from the ministry in charge of lands and the taxes collected by Kenya Revenue Authority⁹⁹. The value is assessed using the three principal valuation approaches, that is; the income approach, the cost approach and the sales comparison approach. Each of these approached simulates the thought process of participants in the real estate market in a property exchange transaction to arrive at market value¹⁰⁰.

On the other hand, land rates are levies imposed by county government previously on land classified as ratable mainly in urban areas and urban fringes with rural and agricultural areas not subjected to rating tax. However, with recent enactment of Mombasa County Rating Act, 2014, agricultural areas are also subject to taxation, at almost similar exorbitant rate, and at the same percentage rate as residential urban property¹⁰¹. Land value taxation in terms of land rates has been the focus of this study from the very beginning, as such, much has been discussed in the

⁹⁸ See the Stamp Duty Act, Cap 480

⁹⁹ Ibid

¹⁰⁰ Supra fn. 94 pg. 66

¹⁰¹ See the Mombasa County Rating Act, 2014 and Mombasa County Valuation Roll 2016/2018. The previously chapters also discussed this in detail.

previous chapters, therefore, the focus here will be on some specific highlights on the law and practice. According to the law, the tax basis for land rates just like the other taxes on transaction on land (stamp duty and capital gain) is the market value of what the property would exchange based on a willing seller willing buyer exchange within a reasonable marketing period¹⁰².

The provisions of this Cap 266 as the determinant of the tax base are more confusing with one part limiting it to the unimproved market value, and the other, allowing use of improvement and/or any suitable method of valuation the valuer deems fit¹⁰³. The Mombasa County Rating Act, 2014, is even more wanting, as it specifically prohibits use of the market value of the land as the determinant of tax base, but it does not provide what is to be used instead¹⁰⁴. Valuers have thus over time use the capital market value of the land having in consideration the improvements, locality, zones etc with areas such as agricultural land that were previously not taxed in terms of rates, now subjected to land rates taxes¹⁰⁵.

This has led to rejection of many valuation roll, with Nairobi roll being rejected in 2014¹⁰⁶ and Mombasa valuation roll 2016/2018 (with more exorbitant values than the one for Nairobi) attracting several objections pending determination at the Bima Towers through the tribunals. Over and above the problem with the law above, transparency and public participation completely lacks in the preparation and presentation of the valuation roll as well as the Mombasa County finance bill 2018/2019 (now assented into law). Land value taxation governance is thus vividly lacking in Mombasa County and this study calls for an urgent action to bring it forth to

¹⁰² Section 8, Cap 266

¹⁰³ Section 8 (2), Cap 266

¹⁰⁴ Schedule 3, Mombasa County Rating Act, 2014

¹⁰⁵ See the Mombasa County Rating Act, 2014 and the Mombasa County Finance Bill, 2018/2019 (now law)

¹⁰⁶ Supra fn 94 pg 65

the County and have the people of Mombasa County enjoy their rights as guaranteed in the Constitution and in line with Constitutional principles in Article 60 and 201.

The general justification for taxing is that it is linked to service provision. This link is not apparent as there is hardly any report given by government agencies outlining how taxes collected are used to provide services and which services were provided. The focus of this study is that this link between taxation and service provision and associated efficacy needs to be examined and given force of the law to facilitate an assessment of the value for money and to imbue accountability in the tax collection process. Article 209 of our Constitution need be amended to caution tax obligation with obligation on the taxing authority to provide goods and services to improve their locality to the best and highest land use to give flesh to the provisions of principles of public finance and land policy in Article 201 and 60 as well as the rights under Article 40 and 43 (1) (b) of the Constitution. Despite the property tax reform strategy being carried out under the Kenya Local Government Reform Program (KLGPR) that ended in 2012, transparency and accountability in land valuation and taxation is still a challenge¹⁰⁷.

Property owners to date do not know what valuation approaches are adopted and the rationale behind the variable considered. This has led to doubt regarding the objectivity and fairness of the valuation process. Property owners also question the basis of land taxation on the basis of equity and justifiability and will not voluntarily comply. This is in spite a very socially and economically friendly constitution that we adopted with appealing principles. The paper opines that the various objections and rejection of the exorbitant values are justified and the valuation rolls ought to be withdrawn with laws amended on how to arrive at the land values for purposes of property taxation. Relying on the capital market value without any obligations on

¹⁰⁷ Supra fn 94 page 63

accountability, transparency, equity and fairness on the part of the taxing authority on land tax cannot continue to be the norm as it violates the appealing principles and rights enshrined in the same Constitution. That the rightful procedure in arriving at the tax base for purposes of land taxation, is to base it on the site value of the area based on the highest and best use of that particular area as improved in terms of goods, services, capital, and various improvements by the county government, the capital market value of the land should be left to realm of stamp duty and capital gain tax. The principles outline in the Constitution will also go well with this supposition.

3.8. LAND VALUE TAXATION GOVERNANCE

As noted above, land valuation and taxation play a major role in land governance. However, over and above the law, land value taxation is also crippled by weak governance in its administration. As already laid out in previous chapters, the law on land value taxation is very flexible, elastic and accommodating both in terms of tax base assessment, tax rate structures, valuation techniques, etc. and many governances in administration have abuse these flexibilities in the law to their advantage and at the detriment of the governed. No wonder there is always resistance in all land tax regimes within the country. Mombasa county has made it worst with her valuation roll 2016/2018 that has taken the values to another level with the resultant effect being that the locals feel completely oppressed on account that they are made to buy their property at millions every year, or a times half a year¹⁰⁸ as a result of not only flexibility in the law, but also poor and weak land value governance administration.

The provisions on exemptions have also been abused by the level of discretion exercised by the governance in administration. They have always abused the discretion by exempting land tax on

¹⁰⁸ Mombasa County Rating Act, 2014 that now allows the rates to be payable half a year on account of new valuation roll that has raised the value to over 300%. See also the Mombasa County Valuation Roll 2016/2018.

their own contrary for the purpose for which the discretion was allowed. A good example is in 2004, where there were reports in the local dailies that the then minister of Finance has waived payment of stamp duty by a fellow cabinet colleague on a property transfer to his company¹⁰⁹. There are also many unreported transactions where exemptions are indicated to have been given without objective criteria¹¹⁰. This was when Cap 266 and 267 were applicable. Mombasa county has made the discretion even wider in her Mombasa County Rating Act not only in terms of waiver, but also in terms of penalty to be imposed on the defaulters exposing the people of the county to more abuses.

The dispute settlement mechanism is also very bias, it is constituted as a three bench with the majority decision adopted as the judgement of the Court. Amongst the three, only one member is appointed from judicial officer or an advocate of the High Court, the other two are appointees from the county¹¹¹. This automatically gives the majority to the same county government to which, her legal documents is the question for determination before the Court. No impartiality can be guaranteed in such a scenario and biases are evident.

Bureaucracy surrounding valuation roll is another major problem in land value taxation governance administration. The valuation roll is the most sensitive document in land value taxation as its main purpose is to revise the valuation figures higher. It is thus of vital importance that the principles enshrined in Constitution on land, finance and public participation (accountability and transparency) are followed to the latter in this process. However, despite this awareness and the law making it clear that the process of fixing and revising valuations should

¹⁰⁹ Supra fn 94 pg 64

¹¹⁰ Ibid

¹¹¹ See Mombasa County Rating Act, The Valuation for Rating Act Cap 266 and Rating Act Cap 267 as the county Act is not so explicit on her provision and many parts reference is made to Cap 266 and 267. Whether that is legal and valid is another legitimate question following Justice Ngugi judgement discussed in chapter 1 and 2

be made open to the members of the public and that they are fully sensitized and empowered to engage in the process¹¹², this has never happened in Mombasa county or any county engaged in the process. This lack of transparency and accountability in the land taxation and valuation process creates discretionary practice leading to corruption. Valuers may be compromised to reduce value of the property or in stamp duty valuation of developed property not to report any value of development. Decision makers may be compromise to waive taxes or to avoid severe enforcement mechanisms.

The law provides that any person may inspect the valuation roll¹¹³. However, tax payers are not sensitized on accessibility. Moreover, the valuation rolls are poorly kept with the one in Mombasa county tainted with bureaucracy making them inaccessible. They are poorly maintained and are in a deplorable state that inhibits their potential use by members of the public. They are also not updated regularly. The study opines that not only should the law be amended, but governance administration on property tax need be relooked at. That there should be clear provisions on exceptions and exemption to minimize the exercise of discretionary powers, corruption is a real problem in land value taxation governance and must be urgently and adequately addressed. There should be clear provisions on public accessibility of valuation rolls and the mode and media for storage and accessibility. This will also help curtail corruption on land value taxation governance and realization of the principles and rights enshrined in the Constitution as propagated by the study.

¹¹² See Cap 266 and Cap 267

¹¹³ See the Rating Act, Cap 267

3.9 CONCLUSION

In conclusion therefore, the study finds that the problem not only lies with the law, but also land governance. As such, in looking to amend the law and solutions within the law, land taxation governance should also be addressed and given the due consideration it deserves. Otherwise, solution in the law only might lead to half solving the problem. The chapter has also proven objective 1 and 4 of the study. It has brought out the Constitutional violations perpetuated by relying on the impugned national and county land value taxation laws and the need to declare the said laws unconstitutional.

CHAPTER FOUR

ANALYSIS OF THE LAND VALUE TAXATION SYSTEM IN NEW ZEALAND AND STATE OF VICTORIA

4.1. INTRODUCTION

In this part, the paper focuses on the analytical review of the land value taxation systems as utilized in the two countries (New Zealand and Australia (specifically: State of Victoria) with a view to finding out the emergent trends and issues and how the countries have tackled the same. Based on these emergent issues and solutions, a number of conclusions and recommendation will be drawn for Kenya and Mombasa County in particular to adopt and learn from where necessary.

4.1.1. REASON FOR SELECTING THESE COUNTRIES

The first and foremost reason is that, these countries, just like Kenya, levy some form of 'land/site value tax' with State of Victoria having site/land value tax as the major form of land taxation. The paper will discuss each country individually and the extent to which the practice is conducted in each. The countries also possess existing knowledge based on past and ongoing research and provide an insight on developed versus developing country. Geographically, the countries have the advantage of comparison to small (New Zealand) versus medium-sized (Kenya) and large countries (Australia-by specifically choosing State of Victoria that applies same land/unimproved site value tax just like Kenya). Countries like New Zealand have undergone various local government reforms in terms of her land taxes and statistics shows that there has been improvement over the years with each reform undertaken on property tax, increasing in her per capita, and land tax has taken over as the main source of revenue for local authorities in New Zealand. For example, in 2007, property tax accounted for 57.3% of revenue whereas in 2006 the percentage was at 56.1. In 2010, it had jumped to 92% (percent) of the total

taxation revenue for local government¹¹⁴. Both countries have a long history of utilizing land value taxation.

It is the pre-supposition of this study that based on these selections, it will be possible to provide answers to research questions and objectives such as: is the local government (now counties – in Kenya) accountability (in fulfilment of her duties) a greenlight to a working land taxation system and the key to make this regime workable and attract and gain local revenue as in the selected countries? How does land taxation affect right to housing and right to ownership of land and how is Mombasa County (and Kenya as a whole) to balance these rights? Can a land value based taxation system generate revenue adequate for an ever-changing need of the public based service? What are these pressures exerted on land value tax systems to migrate to a capital improved system? In the sphere of property assessment, can land value taxes adapt to development?

Though the countries selected are former British colonies, it does not by itself, explain the introduction of land value taxation in the said countries. Research shows that these countries, and many developing countries (including Kenya) embraced the land value taxation system as an attempt to encourage development and to reduce land speculation. The two selected countries embraced the system and benefitted from it, though pressure from urbanization forced the movement to embrace capital value and annual rental value system, they still maintain the land value taxation system with some states majorly employing this system, especially in state of

¹¹⁴ Filling the land tax void: New Zealand standpoint. Accessed at <

<https://www.business.unsw.edu.au › About-Site › Schools-Site › Documents > on 18th Sept.2019>

information also available at: Statistics New Zealand, Government Finance Statistics (Local Government): Year ended 2010 at <

https://www.stats.govt.nz/browse_for_stats/government_finance/local_government/GovernmentFinanceStatisticLocalGovernment_HOTPYeJun10/Commentary.aspx

Victoria and some major states in New Zealand as the New Zealand laws on land taxes¹¹⁵ allows usage of either for as long as it adheres to the principles of taxation (which are majorly the Adam Smith's principles already discussed in chapter 3).

The selected countries are therefore of vital importance to the achievement of this paper's objectives and recommendation especially on the main principle of taxations needed and the need to balance the right of the county governments to collect land taxes vis a vis the rights of citizens to land, housing and information as regards all taxation matters affecting all the above mentioned rights, including the right by the county to collect land taxes.

4.2 ORIGIN AND HISTORICAL DEVELOPMENT OF LAND TAXATION SYSTEM IN NEW ZEALAND

On colonization, the British colony gave the New Zealand local authority (in 1844) the power to tax land for the purpose of raising revenue. The embraced system was the annual rental value, which was similar and/or identical to the English system of rating. However, given that New Zealand was still a developing country (then) land was most likely to be readily bought outright rather than rented. The system was thus ineffective leading to adoption of the 1896 Rating on Unimproved Value Act which made the Unimproved Value System the third option to land taxation by the local authorities¹¹⁶. In the same year, the Valuation of Land Act was also passed which for the first time made a clear definition of unimproved value and improved value with the improved value defined as the independent created value and the unimproved value as that value created by the community and the value of the land itself in its original condition¹¹⁷. No

¹¹⁵ see the Local Government (Rating) Act, 2002, New Zealand

¹¹⁶ William McCluskey, Arthur Grimes & Jason Timmins, 'Property Taxation in New Zealand' (2002), Lincoln Institute of Land Policy

¹¹⁷ See the 1896 Valuation of Land Act, New Zealand

connotation was made to the capital value of the land (as is the case in Kenya (Cap 266) and Mombasa County Valuation Roll 2018/2018). In 1970, the unimproved land value was replaced with the term “land value” as the basis for rating valuation which is still being used to date. The land value system has been the only/dominant system in use in land taxation in New Zealand for over fifty (50) years up until the 1980s¹¹⁸. In 1985, due to growth in urbanization, there was a noticeable swing towards the use of capital improved value and this saw the enactment of the 1988 Rating Power Act which though also provided for both improved and unimproved value as the assessment method for land taxation, the local authority could switch anytime to capital value or annual value rating system without any reference to the ratepayers¹¹⁹ (which is the case with the Kenya Cap 266 and Mombasa County Rating Act, 2014 by failing to define/direct what to use in absence of capital value of the land). The act was thus criticized for lacking clarity and consistency and being overly prescriptive. To address these concerns in 1996 a review of the Act was initiated and in 2002 the Local Government (Rating) Act 2002 was adopted to replace the 1988 Act.

4.2.1. HAS THE NEW ZEALAND 2002 ACT DELIVERED?

The 2002 Act has been praised by many for developing an all-inclusive, consistent and accommodating structure of funding powers for local authority councils¹²⁰. The Act relates to and provided for powers to set, evaluate and accumulate rates to fund the local government activities¹²¹. The prime intention of this legislation was to streamline and make simple the existing rating power to meet the main local authorities demands. The Act provided local authority with remarkably broad and additional pliable recourse as to how they can extend

¹¹⁸ Supra fn.116

¹¹⁹ Supra fn. 116

¹²⁰ Supra fn. 116

¹²¹ The New Zealand Local Government (Rating) Act, 2002

answerability for rates over ratepayers in their jurisdiction. It employs Adam Smith's canon of Simplicity, Efficiency, Economy, Flexibility and Fairness in land taxation.

Unlike the 1988 Act, the 2002 Act allows local authority to use either unimproved site value, capital value, or annual rental value, but before adopting either, public consultation must take place and the local authority is not allowed to shift from one system/method to the other without engaging and consulting the rate payers¹²². The Act also calls upon the local authority to account for the rates so collected and lay out all the expenditures in a transparent process laying out all the services done to the ratepayers in the financial year i.e. it calls for both revenue policy and financing policy by the local authority¹²³.

In summary, the 2002 Act had three (3) main purpose:

- 1) The design of the taxing power (by each local authority) must have specific regards to the general principles of taxation, such as efficiency, economy, fairness and equity. The local government is obliged to state the financing of both operating and capital expenditure (the revenue policy and financing policy stated above). Meaning, the local authority are obligated to relate funding/financing plans and funding ability so as to create a transparent process for payment of council services. The aim is to find out who fringe benefits from a specific service (is it the community, group or an individual) so that it could form some harmonization for council policy, select the financing tool(s), and subsequently estimate/analyze how much of the cost of service is to be catered for by the community and/or individual. In summary, payment of rates/land tax was linked to the costs of services provided by the local authority. So that the higher the services and

¹²² The New Zealand Local Government (Rating) Act, 2002

¹²³ Ibid

upgrading of the area to the highest and best use as at that particular time, translates to how much rates/land tax was payable and what land value assessment method to employ and why, with wider consultation carried out with the rate payers and prior notification made on any decision to move from a particular method of land valuation to the other.

- 2) To furnish/allot local authorities with pliable powers to place/lay, evaluate, and garner rates, however, the same must reflect decision made in an open and consulting process failure to which, the new measure will not take place¹²⁴.
- 3) To impart open undertakings and particulars to make sure ratepayers can recognize/point out and understand their answerability for rates. For example, each local authority is to have a long-term fiscal master plan which covers a ten (10) year period and comprise of details on the services the council advocates to deliver, the cost of those services, how they will be funded and information on the overall financial position of the council. The council is then to give annual report that sets out her performance and its overall financial position¹²⁵.

Indeed, the success of New Zealand as to enable it gain 92% (percent) in property tax as evidenced in her 2010 report (quoted above in the study) is as a result of implementation of the 2002 Act as read together with the 1974 Local Government Act on local government financial management strategy. In spite the fact that save for the four main cities (being Auckland, Wellington, Christchurch and Dunedin) that utilizes the capital value based rating system, land value rating system (same system called for in the Kenyan and Mombasa County legislation) is still the predominant rating system throughout the county with Hamilton, the heart of rich

¹²⁴ Supra fn. 116

¹²⁵ Ibid. see also, the New Zealand Local Government Act, 1974

farming district, with largest population and currently established as the country's fourth largest city, overtaking Dunedin, continues to utilize a land value based rating system. Kenya, and Mombasa County in particular can achieve this much without infringing on her peoples right to land, housing and information/transparency if only these principles (which many already exists in our Constitution) were adopted, implemented and county government made accountable for breach of any and our Constitution to clearly pin obligation to provide all local authority services to the counties as a pre-requisite to payment of rates. It is high time this right to collect taxes is pinned to the duty to provide services from the taxes so collected. New Zealand has achieved high revenue through land tax just by instilling these principles, Kenya and Mombasa County can achieve the same.

4.3. LAND TAXATION IN THE STATE OF VICTORIA

As already stated, the paper focus on the two countries both in terms of similarities (already discussed above) and difference. The difference being that whereas geographically New Zealand is a small country, Australia is a big country as compared to Kenya which is middle size yet the two have both achieved big in terms of property tax. Also Victoria, just like Mombasa County (and Kenya in general) embraces land/site value as the taxable value system for purposes of land taxation. New Zealand on the other hand embraces a cocktail of all the three types of valuation with strict principles on how to apply the same. Kenya and Mombasa County, despite her legislations vaguely providing for land/site value, it embraces both site value and capital value in the same vague manner and without any clearly established principles.

The study settles on the State of Victoria as the chosen state in Australia for reason that it is the 2nd largest division in Australia in terms of population and home to over 5, 866, 337 (more than 4

times the population of Mombasa County and a good comparison to Kenya as a whole)¹²⁶. It is one of the states in Australia that embrace/employs the land/site value system of land value taxation and has done quite well using the said system¹²⁷this is equally the system in Kenyan and Mombasa County legislations. It is thus of well comparison to the study.

According to Mangiوني, reliance on land/site value as the land taxation system of choice has paused a lot of challenges in increased urbanized locations. This is largely due to lack of vacant land sale as the origin of prime/main proof for determining land value. As a result, some countries, internationally have moved to reliance on improved property sale and/or capital value. This has led to extra layer of complications which needs accounting for “transparency” ‘consistency’ and ‘simplicity’ (which is lacking; e.g. in recent Mombasa County valuation roll and the Act) and increase force for the adoption of alternative bases of value for the assessment of recurrent property taxation (internationally)¹²⁸. The absence of these three principles of good tax blueprint coupled with the inability of valuers to articulate how land has been resolved from improved value and accounting for the revenues so collected from the same have raised questions as to whether land remains the most suitable base on which to assess the property tax in highly urbanized locations. As such, it is clear that land taxation is continually under challenge and almost-always in terms of the base on which it is assessed. Countries need to choose carefully their base assessment and ensure all principles of taxations are observed in whatever base assessment method they chose. In this regard, the State of Victoria has adopted the highest and best use principle in arriving at her tax assessment base in line with the principle of “good tax design”. Hence in the case of *Spencer v Commonwealth* (1907) the Australian Court held that

¹²⁶ <http://www.worldatlas.com>

¹²⁷ Vince Mangioni, ‘Defining the Basis of Value in Land Value Taxation’, (2014), a refereed paper presented at the 20th Annual Pacific Real Estate Society Conference in Christchurch, New Zealand.

¹²⁸ Ibid

the standard used in defining value as the key to an economically efficient recurrent land tax in Australia, is that all bases of values, be it capital improved value, annual rent value or land/site value are assessed on the same footing, that is the highest and best use and not existing use¹²⁹.

It is therefore a policy in State of Victoria, since land value is the determinant of recurrent land taxation, the valuers must first of all define the land's highest and best use before the add up value of improvement can be resolved in a simple and transparent manner and better the economic efficiency of the tax. A structure for determining the highest and best use of land therefore need be in place which will ease the implementation and harmonization of a recurrent tax on land. This is the practice across the whole of Australia¹³⁰.

According to Fisher, the most essential aspect to be observed in terms of assessment of land or site value (no matter what method is used) is its highest and best used which he defines as: "highest and best use is that kind of utilization of land which will enable it to produce, over a period of time, the highest net income¹³¹.

This means that the highest and best use can change over time as external market forces change. These forces include effective demand and all its component, public tastes and standards, land use regulations (especially zoning), and competition. These forces are mainly the doings by the local authority of the area concern in improving the locality in terms of utility, amenities, facilitation of all urban and best cities needs and regulations thereby improving the site in terms of all the forces mentioned above, bringing about major developments in terms of malls, cities,

¹²⁹ Ibid

¹³⁰ Barry Diamond, 'Land Tax in Victoria: Current State of Play and Future Directions', (2019), pwc available at <http://www.pwc.com.au> accessed on 18th Sept. 2019. Also available in the paper by Mangiolini above.

¹³¹ Fischer E, Advance Principles of Real Estate Practice (edn, New York 1930)

business and making the place generally attractive to all manner of business and various use and utilization of the land, thus improves in value. Thus, the character of the subject property changes (from what it was originally) thereby changing its highest and best use, which automatically changes its land tax base assessment¹³². The proponent of this concept opines that this is the reason the highest and best use is all the time evaluated as of the date of valuation. That in other instances, the highest and best use may predict the market, as long as the conclusion is reasonable, probate and proximate as opposed to speculative or conjectural¹³³.

They opine that the current or present use of the property may differ from highest and best use of the site. The existing use will continue, however, unless and until land value in its highest and best use exceeds the total value of the property in its existing use. Therefore, the present use of an improved property is presumed to be its highest and best use unless it can be demonstrated that change is imminent through the impact of market demand (through improved facilities by the local authorities and amenities improvement of the area) or legal (land use control) forces (the Spence Case above confirms the same).

Thus, South Africa in her case of: *Minister of Water Affairs v Mostert* found that the highest and best values afford most satisfactory evidence of a fair market because it illustrate how circumstances have affected the minds of purchasers and sellers¹³⁴.

Indeed, the highest and best use principle conforms to the principles of “good tax design/principle” resulting in a simpler and more transparent tax while maintaining its economic efficiency. Australia has been able to ripe much from land taxes just by use of this principle,

¹³² See the Article by Fischer and paper by Mangoini

¹³³ Ibid

¹³⁴ South African High Court, 1966

more so, in states like State of Victoria that employs/embraces the land/site value taxation system, Kenya, using the same system, and applying the highest and best use (therefore calling upon county government to account for the taxes collected and refrain from the current principle of tax (in our Constitution) (being tax as a duty to pay without a corresponding right to services and value improvement of the site/land from the county government) will achieve much in land tax just like these countries and without infringing on other constitutional rights to land, housing amongst others.

4.4. ANALYSIS OF THE STATE OF VICTORIA LAND TAX LAWS

The law governing land taxation in Victoria is the Land Tax Act of 2005. The Act addresses tax rate and is the substantive law on land taxation. On the other hand, the Valuation of Land Act 1960 (herein VL Act) deals with issues of tax base assessment (i.e. valuation and determinant of land tax payable). Under the Land Tax Act, the land tax is payable annually only on taxable land. the unique feature of this tax system is that it specifically exempts an owner's principal place of residence from taxation thereby promoting and ensuring the right to housing for her citizens is always guaranteed¹³⁵. Other tax exempted are: land with taxable value below \$250,000 (principle of economy and ability to pay); land used solely or primarily for primary production purposes; and; land used for charitable purposes¹³⁶. For exemption number one (taxable value below \$250,000) to apply, all the lands owned by the rate payer must be taken into account to get an aggregate and not just one parcel of land¹³⁷. The land tax is then assessed on all taxable land of which the taxpayer was the owner as at the midnight on 31st December immediately preceding that tax year. Any other land not falling in the exemption by the Act is taxable.

¹³⁵ The State of Victoria Land Tax Act, 2005.

¹³⁶ Ibid

¹³⁷ Ibid

4.4.1 LAND TAX RATE IN VICTORIA

As already stated above, the law applicable in determining the tax rate payable in State of Victoria is the Land Tax Act, 2005. Under the Act, there are various types of tax rates chargeable being: general rates; surcharge rates for trust; special land tax rates; general absentee owner surcharge rates and surcharge rates for absentee trust¹³⁸. In determining the general tax rate payable, the Act calls for the local government to have an aggregate of all taxable land held by the owner and each taxable value of the land(s) held by the owner attracts different tax rate. The figures below show the variance in tax rate depending on the value of the land:

Total taxable value of landholdings	Land tax payable
< \$250,000	Nil
\$250,000 to < \$600,000	\$275 plus 0.2% of amount > \$250,000
\$600,000 to < \$1,000,000	\$975 plus 0.5% of amount > \$600,000
\$1,000,000 to < \$1,800,000	\$2,975 plus 0.8% of amount > \$1,000,000
\$1,800,000 to < \$3,000,000	\$9,375 plus 1.3% of amount > \$1,800,000
\$3,000,000 and over	\$24,975 plus 2.25% of amount > \$3,000,000

For the land hold in trust, the Land Tax Act provides a different tax rate regime that generally is higher than the general land tax rate shown in the figure above whilst the taxable land value is lower. The tax burden is thus higher than the general tax. As such, the law allows the beneficiaries of certain trust to be and/or register as the “owners” of the land for purposes of land

¹³⁸ Supra fn. 130. Also see the State of Victoria Land Tax Act, 2005

tax (termed as notification regime) so as to reduce the land tax rates to that of general rates. The figures below illustrate the rates payable vis a vis taxable land value under trust regime:

Total taxable value of landholdings	Land tax payable
< \$25,000	Nil
\$25,000 to < \$250,000	\$82 plus 0.375% of amount > \$25,000
\$250,000 to < \$600,000	\$926 plus 0.575% of amount > \$250,000
\$600,000 to < \$1,000,000	\$2,938 plus 0.875% of amount > \$600,000
\$1,000,000 to < \$1,800,000	\$6,438 plus 1.175% of amount > \$1,000,000
\$1,800,000 to < \$3,000,000	\$15,838 plus 0.7614% of amount > \$1,800,000
\$3,000,000 and over	\$24,975 plus 2.25% of amount > \$3,000,000

The other type of tax rate is the absentee owner surcharge: As has been expounded in the study, one of the main reasons for adopting land or site value (unimproved) as the preferred method of land base assessment for purposes of determining land tax rate payable was/is that it prevents (or at least discourages) large land holdings for speculative purposes, especially by absentee landlord. The state of Victoria took this to another level by specifically providing for measures to prevent the same in her legislation and in 2015, she amended her Land Tax Act, 2005 and introduced the absentee owner surcharge into the Land Tax Act, 2005 targeting absentee owners and assessing taxable land to a surcharge amount, originally set at 0.5% for the 2016 land tax assessment year;

1.5% for the period 2017 – 2019 and 2% from 2020 and beyond making Victoria the broadest land tax surcharge regime for foreign/absentee owners as compared to any other Australian jurisdiction¹³⁹. The surcharge is not restricted to residential property/land but applies to all Victorian land other than exempted land under the Land Tax Act, 2005.

Further, unlike other Australian jurisdiction, Victoria, provides the broadest definition to the term “absentee owner” for land tax purposes to include: a natural person absentee, being an individual who is not an Australian citizen or resident and who does not ordinarily reside in Australia and was absent from Australia on 31st December in the preceding year or for a period of at least six months (in aggregate) in the preceding year; an absentee corporation, or an absentee trust. An absentee corporation is pinned on “absentee controlling interest” so that the absenteeism is assumed to exist if the absentee can control the composition of the board; are in a position to cast or control the casting of more than 50% of the maximum number of votes that might be cast at a general meeting; or holds more than 50% of the issued shared capital. An absentee trust has an even strict definition in that even a single absentee beneficiary is sufficient to make the trust an absentee trust¹⁴⁰. The only exemption under the law is the removal of the “absentee person” from having control of the company (under the absentee corporation) or to remove the absentee trustee or beneficiary from holding interest in the trust as an absentee beneficiary¹⁴¹.

Unlike Mombasa County that has two tax rates applicable being 8% for agricultural and residential and 14% for commercial, the Land Tax Act, 2005 of Victoria has different rates for different values taking into account the ability to pay with the lands falling below \$250,000 not

¹³⁹ Supra fn. 130

¹⁴⁰ Ibid. Also see the Victoria Land Tax Act, 2005

¹⁴¹ Victoria Land Tax Act, 2005

subject to land tax at all and all owners place of residence specifically exempted from land tax. This is a policy that has in mind the tenets/principle of taxation from efficiency, economy, equity, fairness, certainty, transparent amongst others. Also, to ensure it benefits from the tax assessment regime embraced (site/land value taxation) it has introduced the absentee surcharge land tax which attracts different rates and to which Victoria has been a major beneficiary. Mombasa County can implore these laws into her laws to ensure it still gains more taxes from land tax and at the same time upholds the rights of the people of Mombasa County (Kenyan citizens) to land, housing, information and proper land taxation based on internationally recognized tax principles.

4.4.2 LAND TAX BASE ASSESSMENT IN THE STATE OF VICTORIA

The law governing land tax base assessment in Victoria is the Valuation of Land Act 1960 (the VL Act). Under this law, the tax base assessment or the taxable value is to be calculated from the land/site value which Section 2 of the Act defines it as: “ the sum which the land, if it were for an unencumbered estate in fee simple, might in ordinary circumstances be expected to realize at the time of valuation, if offered for sale on such reasonable terms and conditions as a genuine seller might be expected to require, and assuming that the improvement (if any) had not been made¹⁴². In contrast with Kenyan definition of the value of the land (whether site or not since the provision is vague). This provision, despite some similarities with Kenyan Section 8 of Cap 266, it is precise as to what it is defining: being site value. It precisely excludes the capital value of the land (by providing in the end:and assuming that improvement (if any) had not been made. And pins the value to that which is expected to realize at the time of valuation, with the reference to sale being only at what the seller expect to require from the land. If Cap 266 and the Mombasa

¹⁴² Section 2, Valuation of Land Act 1960 (State of Victoria)

County Rating Act, 2014 had adopted this definition, the illegalities, infringement of rights and breach of taxation principles will not have been an imminent, pertinent issue harming the people of Mombasa County at the moment.

The provision of this Section 2 of the VL Act also has the advantage of standing the test of time, thereby being in line with the highest and best use principle in use in Australia as a whole and State of Victoria in particular. Indeed, the definition in Section 2 has made “relevant date” be something realizable and achievable in Victoria with valuation since 1960 being carried every after two (2) years by either the relevant municipal council or the Valuer-General of Victoria (VGV). This biennial valuation made sure the site value was subject to review from time to time keeping in check the local authority to determine whether it is delivering service and working towards making the site value better than it was two years back. In January 2018, the VL act was amended requiring the VGV or municipal council (until 2022) to conduct annual valuation from the year 2020 to enhance accountability by the municipal council and ensure optimum realization of the highest and best use by always upgrading the site value. On the same note, the municipal council are allowed to opt to conduct the annual valuation only until the year 2022 whereupon valuation will be the sole responsibility of the VGV¹⁴³. This enables counter-checking by the government bodies involved in land taxation and valuation be undertaken by full time experts employed for such jobs under VGV.

4.4.3 THE OBJECTION PROCESS TO SITE VALUATION IN VICTORIA

Under the VL Act, any person aggrieved and/or who disagrees with the site value of land on their land tax assessment for land tax purposes, are entitled to lodge an objection. The objection must be lodged within two (2) months following service of the notice of assessment. The objection

¹⁴³ Supra fn. 130

must be lodged with the Victorian State Revenue Office (VSRO). The Commissioner is then required to forward the objection to the valuation authority that caused the valuation to be made. The valuation authority would then consider the objection in detail, and this process can often lead to open discussion between the aggrieved taxpayer and the valuer to arrive at an agreed value of the land.

Contrary to the Kenyan system, their objection is more of negotiation and consultation with a resultant outcome that will fit the parties to the dispute. This is in line with the economic principle espoused in the study arguing that economic disputes are best resolved outside the court room as they may have far reaching implication on other economic and non-economic issues (such as human rights or even sovereignty in terms of foreign investments and Courts not being experts in economy etc.). However, in case of a deadlock, one party will be left injured since the law is silence as to what is the next process to take. Non the less, contrary to the Kenyan process, the Victorian process has in many instances reached an amicable solution mostly in favour of the tax payer. In the contrary, the Kenyan process is filled with bias and impartiality based on the composition of the tribunal, with the majority being from the same county government against which the objection is raised, the result being, the tax payer is almost always the loser (the paper already discussed this issue in chapter 2).

This will provide a good beginning for Mombasa County (and Kenya in general – since the dispute process is still wholly under the national legislation) to emulate and mold the system to best suit Mombasa County people and their need. For example, to have an Appeal body in case of a deadlock.

4.5. CONCLUSION

It is the conclusion of this chapter that Kenya and Mombasa County can borrow a lot from the two chosen states' best practice to improve in her tax governance and administration. The selected countries have been able to yield much in terms of land taxes, with New Zealand having been able to transcend to developed country and having over 92% of her revenue emanating from land taxes. Indeed, Kenya and Mombasa County can achieve the same if they follow and assimilate the culture, principle and land taxation governance employed by the two (2) states. This chapter is of critical importance and provides an answer to the research question: can Mombasa County (County governments as a whole) balance their right to collect taxes and the rights of their citizens to ownership of land, housing and information/tax transparency whilst maintaining the land policy and land taxation principles as enshrined in the Constitution.

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

5.1. CONCLUSION

Despite the Kenyan and Mombasa County land taxation laws providing that their land taxable value is equal to unimproved site/land value for purposes of land taxation. The reality is that the Mombasa County Valuation Roll 2016-2018 is not in any way equal to unimproved site value as its taxable value and as enunciated in the law. This is mainly caused by the fact that the law is vague coupled with weak principles in taxation making the county governments play around with the same to the detriment of her citizens. The two countries chosen as best practice to emulate provide an elaborate system of a cocktail valuation system and a strict land/site value system, which Kenya and Mombasa County has apparently borrowed from. However, a close look at the laws, policy and the government systems of the two countries vis a vis Kenya is evidence that Kenya and Mombasa County only borrowed in patches and piecemeal and left the most crucial parts being the principles behind the systems followed and the precise, certain and clear provision of the laws on issues of land taxation.

Indeed, both Victoria and New Zealand adhere to strict principles of land taxations and the highest and best use principle (accountability by the leaders for the taxes paid) with clear laws establishing institutions and provisions on how to ensure the law is implemented to the later and deliver result. Kenya and Mombasa County lacks in these principles and clear, precise provision of the law on taxable value for purposes of land taxation amongst others the resultant effect being the people of Mombasa County risk to lose their land, housing and livelihood in general come end of financial year 2019/2020 as the rates currently reflecting do not in any way align with the taxation and land policy principles and the rights associated not only in the chosen

countries in comparison but also the Kenyan Constitution (right to land, housing, and economic empowerment).

The study has therefore proven its hypothesis that the inefficiencies and conflicts in the laws (Cap 266, Mombasa County Rating Act, 2014 and the Constitution Article 209 vis a vis Articles 60, 201, 40 and 43) are the reason for the exorbitant land taxes levies on Mombasa County citizens and as a result, various Constitutional principles and rights have been infringed and violated. The study therefore seeks to disallow the Mombasa County Valuation Roll 2016-2018 as illegal and the national law (cap 266 – Section 8) and county law (Mombasa County Rating Act, 2014, Section 4(1)(c) as read together with schedule 3) as unconstitutional and calls for amendments of these laws and the Mombasa County Finance Act 2018/2019. The second hypothesis has also been established as a fact: that is, if the inefficiencies in the law are addressed, then Mombasa County will come up with a legitimate legal document that promotes the rights in Article 40 and 43 and the Constitutional principles in Article 60 and 201 of the Constitution of Kenya, 2010.

Over and above inefficiencies in the land value taxation laws, transparency and accountability is also wanting in inefficiencies in the laws providing for the same. To begin with, the Kenyan Constitution clearly provides for the right to information and public participation especially on all issues of taxation. However, the same is not followed up by legislations on how far the transparency should trickle down to the taxpayer. As per the law, publishing in the Kenyan gazette on any land taxation issues is arguable enough and in compliance with the Constitution.

However, the local taxpayers to whom these laws and gazettements relates do not have access to the Kenya gazette. Some do not even know of its existence. There is need for this information to

run to the local radio stations and TV stations as well as all news paper of nationwide circulation to ensure the principle of transparency and public participation is upheld. No legal provision calls for public forum and sensitization on issue of land tax, a good example being the people of Mombasa county only came to know of the changes in their land tax and new land rates when presented with the demand letters for land tax in April/May 2019, the few educated knew upon gazettelement of both the finance bill 2018/2019 and the valuation roll 2016-2018.

The Kenyan Constitution also lack in accountability by the very nature of her Article 209 that specifically terms taxes (whatever type) as the obligation to pay in absence of rights to account by the government (both county and national government). This is the major failure of our tax regime, more so, land tax. All the states that have realized economic growth and a shift from developing to developed countries call for accountability by the government of the tax collected. New Zealand and Victoria achieved the much it has because of the accountability nature of their tax systems and the laws. No matter how big reforms we make as a country, if the Constitution and our laws does not call for the public office holders to account for the taxes collected (through which in land tax, will be to demand the services and improvement of sites to the highest and best use etc), then no matter how much land tax (or whatever tax) is collected, the Kenya citizens and Mombasa County in particular will continue to suffer and lose all their human rights from land, housing, economic rights, information and public participation etc. without a realizable ending.

Indeed, the study has confirmed its theory of right and duties as correlating and immediately one fails, then the objective of this study will not be fully realized. The second theory has also been proven by the calling for amendments of our laws and our Constitution as it is now, if at all Kenya were to achieve and realize the tireless yearly collected taxes and let her citizens,

including Mombasa County people in particular to realize their right to ownership of land, housing, public participation and the county government to fully realize her right to collect land taxes.

5.2. RECOMMENDATIONS

1) The very first recommendation is Amendment to Article 209 (3) of the Kenyan Constitution, 2010 that depicts tax (including land tax) as a compulsory payment that does not necessarily involve the use or derivation of direct benefit from service, regulation or goods and adopt the New Zealand and State of Victoria systems and taxation principles that calls for accountability by the local/municipal (county) government for all the tax collected so as to upgrade their site value annually to the highest and best use to realize more in terms of land taxes. The very essential services previously offered by the counties to wit: water, garbage collection, street lightning etc. have all been privatized. There is no justification for the Mombasa county to demand more. Amendment to Article 209 (3) will ensure each carries their duty, improvement of site value and better collection and economic growth of not only Mombasa County, but all counties in Kenya, hence national economic growth.

2) Adoption of Adam Smith's principle of taxation, more so: principle of economy, certainty, efficiency, equity, simplicity, neutrality, accountability and transparency. Need to amend Article 201 of the Constitution to incorporate these principles. Had these principles been in place, the Mombasa County could not have come up with the Valuation Roll 2016-2018 and raise the rates payable to over 300% and at the same time come up with Finance Bill (now Law) 2018/2019 again raising the tax rate percentages and still satisfy the provision of Article 201, 40, 43, and 60 of the Constitution. The infringement of these rights in Article 40, 43, and 60 all come up as a

result of lacking of the taxation principles stated above under our Article 201 of the Constitution. Amendment to Article 209 (3) and 201 will also improve on land tax governance. This shows how crucial and urgent the Amendments to Article 201 and 209 (3) are needed.

3) To help achieve in these principle, the study recommends adoption and embracing the highest and best use concept as a policy measure to enable the county government realize their full potential by putting the tax collected to proper use and improving in the site value to the best and highest use every year so that with each year, more justification is in place to warrant revision of the land tax in equity and economical value with people being notified periodically and made to reflect and see the need for the piecemeal increment due to increase in value and use. There is need of a legal obligation on valuers to embrace and take into consideration the highest and best use and clearly state what the implications are for the value of the property in comparison, rather than just a mere valuation of the existing site improvements, conditions and use of the property.

4) Amendments and/or repeal of Section 8 of Cap 266 and Section 4 (1)(c) as read together with Schedule 3 (1) of the Mombasa County Rating Act, 2014 as regard taxable value to have a clear, unequivocal and a certain law on the core determinant of the taxable base value and amount to be taxed for purposes of land taxation. The study has already (previously) recommend these Sections be declared unconstitutional. Other than lack of principle to land taxation, the flexibility and uncertainty of these laws on the core determinant of taxable value has been a core problem.

Counties/local government have abused and misused this flexible law, using discretion to get away with high taxes with no accountability and depleting the very annual source of their revenue. Amendment or repeal to these laws is the only way to streamline them with the

Constitutional principles of taxation, land policy principles and the rights guaranteed in Article 40 and 43. The amendments to these laws are long overdue.

5) Over and above Amendments to Cap 266 and Mombasa County Rating Act, 2014 the Mombasa County Valuation Roll 2016-2018 must be completely abolished and disallowed in its entirety for being not only void and illegal, but also criminal in nature seeking to defraud the people of Mombasa County.

6) Still on discretion. Section 12 of the Mombasa County Rating Act, 2014 must be amended to put capping on interest rate. Contrary to Cap 266 and 267 that cap the interest rate for defaulting at 3%, the Mombasa County Rating Act, 2014 has no limit and left it completely at the discretion of the county assembly. The danger of discretion has already been seen in Section 8 of Cap 266 above and the County legislation Schedule 3(1). It is not prudent to allow such discretion again, and more so, where the implication on the rights to land and housing are so dire as is the case herein. Furthermore, the practice internationally is that on matters of tax, discretion must be exercised cautiously and be minimized as much as possible and even the bare minimum allowed, must be guided by clearly established principles, especially if implication to economy and peoples' rights is highly at stake as is the case herein. The County Act can retain the 3% capping as was the case in Cap 266 and 267.

7) Need to Amend the Mombasa County Finance Act, 2019 as regard the rates payable. Agricultural land cannot be put at the same rate as residential (8%) given the nature of the Kenyan economy and how much is ideally realized from the said sector. Further, there was no justification for the increment from 4% to 8% of the residential tax rate. Even Nairobi, the capital city does not charge such high rate for residential property as the implication on the right to

housing especially is so very high. Justification need be made and the study recommend adopting the State of Victoria general tax rate where there is special rate for each tax bracket in line with principles of economy, equity, simplicity and efficiency. The tax payer principal place of residence should be subject to the least of taxes. Commercial property should equally have the ranging with each property bracket attracting different taxes.

Levying a blanket land tax is detrimental to those businesses coming up or limping. A point to note is that higher land taxes leads to lose of property which in turn makes the county lose out on future taxes and deteriorate in economy. Promoting private industry and stable homes and clear principles of taxation with clear, precise and unequivocal laws on land taxation is the first key to any vibrant economy, and unless Mombasa County and Kenya as a whole realizes this, taxes will not bring the fruits it ought to in light of economic development.

8) The valuation roll, being a vital sensitive and a must document for purposes of land taxation, it must adhere to the provisions of Article 196 of the Constitution not just at the point of gazette, but from its preparation and through each and every process.

9) Generally, all communications on public finance matters such as land tax must be included in at least two (2) newspapers of nation-wide circulation, must be announced regularly in local TV and radio stations both in national language and vernacular dominant in that particular area. The traditional (to date) requirement to publish in Kenya gazette only must come to an end. Property owners (not only in Mombasa County, but almost Kenya as a whole) to date do not know what valuation approaches are adopted and the rationale behind the various considerations made for certain valuation to be adopted as opposed to the other. This has led to doubt regarding the objectivity and fairness of the valuation process. The recommendation therefore will be a

milestone towards addressing this core issue. This will be in line with Article 196, 174(c), 201 and 10 of the Constitution of Kenya, 2010.

10) Enforcement Measures: the study proposes amendments to Section 12 of Cap 266 (the County laws have no provisions on enforcement: they can adopt from the recommendation) that calls for valuation Court composed of 3 members, 2 coming from the county government. As already discussed in the paper, this propagates injustices and impartiality as the majority will always rule in favour of the county (their employer). The taxpayers have never gotten justice from this system. The study recommends adopting the State of Victoria system of involving the revenue authority whereupon the commissioner general will appoint the party to deal with the dispute and consultation and negotiation ensued between the parties. The Act can then have an Appeal structure in case of a deadlock or disagreements between the parties at the consultation level. This will be more or less the same way other tax disputes (other than land taxes) are already being resolved in the country. This will ensure impartiality, justice and maximum benefit in the economy as a whole.

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