

THE IMPACT OF LAND REGISTRATION
UNDER THE REGISTERED LAND ACT
(CAP 300, LAWS OF KENYA) ON THE
EMBU CUSTOMARY LAND TENURE.

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PREFACE

A lot of literature has been produced on land Registration¹. But little has been written on the impact of such registration on customary land Tenure. This has been in reference to the Registered Land Act² and its impact among the Kikuyu and the Kisii.³ Nobody has attempted to show what sort of land tenure existed among the Embu prior to the introduction of the R.L.A. which now governs all that land in Embu District which has been registered under it, and the impact which such registration has had on Embu customary land tenure. My aim in this dissertation therefore is to examine Embu customary land tenure in relation to African customary land tenure generally, see whether it was actually communal as interpreted by the British and then discuss the implications of the application of the R.L.A. on land which was formerly held under Embu customary land tenure. This will entail an examination of the applications of sections 27 and 28 of the R.L.A. by the courts and also a general examination of some of the work done under the Land Control Act (L.C.A.) Cap 302 laws of Kenya, which goes hand in hand with land registration. The objectives adduced for the introduction of land Registration will also be examined to see how far they have been realised or whether the R.L.A.^{Ca~} be rightly described as a futi/piece of legislation. /le

This dissertation has four chapters. Chapter one is a general examination of African customary land tenure. In it I have attempted to show the nature of the Africans interest in land and why the British were obsessed with the idea that African customary tenure was communal in nature. I have therefore looked at different customary land rules that existed in various African tribes in order to see if they were compatible with the British conception of communal land tenure.

In Chapter two I have discussed Embu customary land tenure. I have shown that customary land tenure among the Embu people does not have a marked difference from that of the rest of African tribes and can rightly be described as communal though not communal in the British sense.

Chapter three consists of the Historical Background of the R.L.A. It is a discussion of how customary land tenure was replaced by statutory land tenure and the various methods which the British used in trying to impose on the African the English land tenure. This chapter includes both ^{the} political and economic motives that were adduced for the introduction of individual land tenure although in actual fact the British were disguising their political motives in a welter of good economic objectives which were hoped to follow from individualization of land.

Chapter four is an examination of the R.L.A. and its application. The nature and extent of the rights which it purports to confer are discussed and the impact which the rigid enforcement of such rights on the registered proprietor has on persons who according to customary law would have a claim on the same piece of land. In this chapter I have shown how the courts have found it difficult to give strict application to the provisions of the R.L.A., and how this has resulted in various attempts to evade and sometimes ignore those provisions in favour of customary law. All this is a result of the conflict which exists between statutory land tenure based on individual ownership and customary land tenure based on communal or group ownership. I have also attempted to show how the R.D.A has almost become a dead letter because most of the economic objectives that were hoped to result from its application have not been achieved satisfactorily if at all. This can be said to be partly because of trying to build land registration on customary land tenure forgetting that the two are incompatible and cannot work together and partly because of the insufficient and inefficient work of the whole registration mechanism. One can concede, however, that the British have achieved the political objective although not as they had perceived it originally. Registration has benefited the British imperialism in that colonialism has been followed by neo-colonialism and Africans are concentrating on the registered land instead of the unjust political economic institutions inherited.

My most sincere and heartfelt gratitude for the successful production of this work go to the following: Mr. J. L. A. Osiemo, the Acting Resident Magistrate in the Embu Law Courts, for allowing me to peruse ~~through~~ the court files and records and his assistance in so doing; the clerks in the said registry for kindly assisting me in looking for the case files from the many confusing piles of files; the Land Registrar, Embu District, for allowing me access to the Land registry records and those staff members in the land registry whose kind assistance helped me to go through those records; the A.F.C. Manager in Embu, Mr. Saina Ernest; the Provincial I.C.D.C. Officer, Mr. William Murungi and the Co-operative Officer, Mr. Kibwika for kindly and patiently listening to and answering my questions in regard to the nature of their work. Without these peoples' help, I would not have been able to carry out the research work which forms the basis of this dissertation.

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CHAPTER ONE

GENERAL EXAMINATION OF AFRICAN CUSTOMARY LAND TENURE

The term tenure is generally used to describe that relationship which exists between man in society and that precious, essential but scarce

"gift from God to all his living things to be used now and in future",⁴

namely land. Concepts such as ownership, right and possession have been used by western writers to indicate individuals interest in land. Here the individual⁵ refers to the man in a capitalistic society.

In dealing with any problems concerning land, it is very important that one understands the basis of land holding⁶ because this may help to indicate the rights which a particular individual holds over a particular piece of land. Thus it has been said⁷ that the expression - "ownership" when used in reference to land is a multi-referential word. Implicit in it are all sorts of bundles or amalgamas of rights (including privileges and powers) and duties over land primarily against persons.

In Kenya, among the Africans, different concepts and degrees of ownership of the western type are recognised by the different customary laws that exist in the different tribes and societies. But this fact did not interest the British who were only interested in knowing whether customary law recognises absolute ownership⁸ of land by the individual as in their capitalist society. When they came to learn that in most tribes title to land was vested under the highest group head, they concluded that African jurisprudence does not recognise absolute ownership in land in general and individual ownership in particular. This was not a great discovery since the philosophies of life of Africans and Europeans were and have always been different.

The issue regarding the nature of the African's interest in land arose when the colonial government attempted to expropriate land occupied by Africans. After holding that no ownership of land exists under customary laws, they proceeded to define rights of Africans over land as tantamount to rights of squatter or tenant at will or licensee of the crown.⁹ This is partly because they did not understand the African concepts of land ownership and in their attempt to do so, they used alien (English) terminology to describe African customary tenure forgetting that the two are a result of different philosophies with different modes of production and

"trying to identify the two is as futile as is misleading",¹⁰

and partly because their racism which had roots in Darwin's theory of evolution which theory was applied to Africans made them not accept the fact that such insecure interests in land as existed under customary land tenure could exist in a human society.

Although the British did not understand the true position of African customary land tenure, they were not far from being right when they described it as communal. To a large extent it can be said that land under customary law was held communally in the sense that no individual could claim absolute private ownership over a piece of land. The true position of native customary tenure was spelled out in the case of *TIJANI v. THE SECRETARY, SOUTHERN NIGERIA*.¹¹ The applicant, as head of the Oluwa family was claiming compensation under the Public Land Ordinance 1903 on the basis of ownership of the lands. In the judgement it was observed that

"land in the Native land law belongs to the community, the village or family and never to the individual. All members have equal rights to the land but in every case the Chief or headman of the community or village or head of the family has charge of the Land and in loose mode of speech is called the owner. He is to some extent in the position of a trustee and as such holds the land for the use of the community or family. He has control of it and any member who wants a piece of it to cultivate or build a house upon it goes to him for it. But the land so given still remains the property of the community or family. He cannot make any important decisions of the land without consulting the elders of the community or family, and their consent

must in all cases be given before a grant can be made to a stranger. Where we find individual owners this is due to the introduction of the English ideas. Except where land has been bought by the present owner, there are very few Natives who are individual owners of land."

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An examination of some customary rules among various tribes will show that what was held in the above case was the general position in many African tribes and societies.

In most tribes, land was vested either in the head of the family or in the chief, neither of whom had the power to alienate the land. Where land was vested in the chief, the individual had the right to enjoy what we may call usufructuary rights. In the kinship group he had a right to cultivate the land together with his family as long as he and his family lived. During the early stages of these societies, the usufructuary rights could not be alienated.¹²

In a tribe like the Jibana-Wanyika a member of the tribe had only the right to use the land occupied by the tribe, as is shown by the fact that if a member became a Mohammedan, he was to some extent ousted from among his pagan fellows and had to give up his rights to use land occupied by the tribe and settle among his co-religionists. This was because they did not want any influence of the Mohammedan law of individual holding of land which could be destructive of the communal rights and customs of the tribe.¹³ Thus in the case of MULUWA GWANOMBI AND OTHERS (REPRESENTING THE JIBANA TRIBE) v. ABDULRASOOL ALIDINA VISRAM,¹⁴ a person purported to sell land to the defendant which he alleged had been acquired by his father from the Jibana by purchase and settlement. In a suit by the Jibana claiming their land, it was held that the Jibana have no title to land by their own custom either collectively or individually, but only a right to use land which is in the occupation of the tribe. They cannot therefore confer title on a would be purchaser either from the tribe or from individual members of the tribe. A sale of trees or mortgage of trees with right to take the fruits was said not to convey a title to the land on which the trees stood (the original buyer in this case had bought the coconut trees that stood on the farm). Thus a stranger to the tribe could only occupy such land with permission granted by the elders which could be withdrawn at any time.

In Nigeria, land was controlled by the chief. He was like a trustee for the tribe in regard to the land - a joint owner with the people. He had no power to exercise any proprietary rights without the co-operation of his people. This is why on these assumptions it was maintained that

"every acre of land is the property of some family, tribe or individual, including forest and swamp." ¹⁵

The owner could only sell the produce of the land and not the land itself.

In some Districts, the system of land redemption was observed, e.g. Fort Hall (Murang'a)¹⁶ and there could be no outright purchase or leasehold of land. If a person wanted to acquire stock to meet some customary obligation such as the payment of bride price or compensation for the commission of an offence, he could negotiate the sale of his usufructuary rights over the land for a given number of goats on condition that the land was redeemable by him on the repayment of the purchase price at any future date. The purchaser thus accepted the land as security for a loan to a friend in need. The right to purchase had first to be offered to the clan elders and only if none of them was willing to buy could he sell outside the clan. Even in such a case the clan elders could redeem the land to prevent it from passing permanently outside the clan.

Although it was believed that in some tribes there were formal land sales, e.g. between the Kikuyu and the Wanderobo, this was not actually a sale of the land i.e. the soil, but of the right of occupation and cultivation. The idea that land could be sold was quite alien in the mind of the African. Thus in *KIMANI v. KIOI*,¹⁷ Maxwell J. was able to hold that the plaintiffs had inherited land from their father who had originally bought the land many harvests before 1899, but that expressions such as "'he bought the land', 'he owns the land', 'the land is his', etc mean nothing more than that "a man has according to native custom paid for, inherited or otherwise acquired the rights of occupation and cultivation over a certain area of land which are his to use until he abandons them either directly or indirectly".

What this background to African customary land tenure tells us is that the Africans interest in land has to be viewed against the mode of production that existed in Africa and the philosophy of life that went with it. Africans were either cultivators, pastoralists or hunters whose life was largely communal.¹⁸ With the coming of imperialism however, the capitalist mode of production was introduced and this forced Africans to treat land as a commodity that could be owned by the individual and be bought and sold.

The practice in many tribes after the introduction of the colonial rule was that if a person wanted to sell a parcel of land in which he had the usufructuary rights, he had first to obtain permission of the family head, as in the Kikuyu tribe.¹⁹ This was the position in Nyanza. Thus in *ANDIEMA BASAKEYI v. WEKHWELA*²⁰, where Andiemba purported to sell land without the consent of the family, it was held that he had no capacity to alienate what was family land without the family's consent.

In the kinship group, some forms of tenancy was recognised. This tenancy was different from that conceived by the British because the customary tenant was not supposed to pay any rent and normally did not have any fixed time limit. Rather it was a mere permissive user of land owned by others and these rights were perpetually determinable. It was clear that no occupation of land owned by another with or without the owners licence or leave could ever ripen into ownership and oust the title of the original owner or his heirs.²¹

The reasons why land was so treasured were very similar in many of the tribes. Among the Kikuyu, land was believed to be owned not only by the living but also by the dead. The tribe was said to be the trustee of the deceased and therefore if the land was sold, it would be infringing rights of the deceased. The Kikuyu thus feared the evil spirits of the dead. Also to the Kikuyu, land was the only means of subsistence. So the idea that a family could be deprived of its only means of subsistence had to be guarded against.

A form of alienation could therefore only take place if, for instance, a tribe was defeated by a neighbouring warring tribe and dispossessed of its land, e.g. Kikuyu and Maasai.²²

The Jibana on the other hand believed that they are children of one mother, the "earth". A supreme being, the sky spirit sends rains to fertilize their mother earth. Since all are children of this mother, all members of the tribe have an equal right to benefit by using that portion of the earth in the occupation of the tribe. No member of the tribe therefore has any right to alienate a portion of that land. To them, land belongs to God and the right to use it is common to all the members of the tribe.²³ Thus it can be said that to them, the only way by which an individual can realise a good life is by sharing this gift from God and only in this way can he live happily.

Nyerere²⁴ expressed similar views when he says that land could not be alienated because it belonged to God and to the future generation. Each person was entitled to make use of the land in order to satisfy his human need. Each individual had a right to life and he could not live without also having the right to some means of maintaining life. Thus he says that the Africans right to land was simply the right to use it and he had no other right to it nor did it occur to him that he could claim it.

From this general examination of African customary land tenure, it is clear that African Tenure was not communal in the sense of tenure in common. The true position could be said to be that although Africans did not recognise private ownership of land, they did have individual rights over the clan or group land, but these were subject to the rights of others over the same piece of land and they fall short of absolute ownership in that they were limited by a number of restrictions and subject to controls based on group or clan protection. The fact that a person could have an undisturbed right of possession or occupation of the family or clan land means that some form of ownership was actually recognised.

The individual under communal ownership enjoyed more security of tenure than the individual in the absolute ownership since neither draught nor trade depression could affect the land holders security, each person being entitled to cultivation rights in the communal or family land. He had no money rent to pay as a condition of remaining in possession if he was a tenant and where there were tribal dues, these were easily modified if bad harvests occurred.²⁵

CHAPTER TWO

CUSTOMARY LAND TENURE AMONG THE EMBU

Having examined African customary tenure in general my intention in this chapter is to see how that background fits into Embu customary land Tenure. In other words, how far can it be said that the Embu people held their land communally as conceived by the British? To answer this question it is necessary to go back to the early stages and examine the methods that the Embu people used as a means of acquiring land and how they held that land after acquisition.²⁶

The Mbeere and Embu are two Bantu tribes who live in the Eastern Province of the Republic of Kenya to the southern slopes of Mount Kenya. The Embu tribe occupies the North part of Embu District while the Mbeere tribe occupies the Southern part.²⁷ An outsider will not easily distinguish the two but to the "Muembu" and "Mumbere"²⁸ they are two distinct tribes. They are believed to have different origins and their geographical boundaries are distinctly marked. In this chapter I will confine myself to the Embu tribe since this is where all the land has been registered as distinct from Mbeere where land adjudication is still going on.

The Embu people had two ways of acquiring land, namely, acquisition by hunting and acquisition by an axe. The first method preceded the second since it was used before people came to learn that life could be earned through cultivation.

1. ACQUISITION BY HUNTING (Kuuna na Mutego)²⁹

It is believed that this was the first and earliest method of land acquisition. People at this time did not know how to cultivate. It became particularly useful during the great famine called "Myaraganu" scatterer, meaning that people were forced to leave their homes to go and live in the caves so as to have easy access to the animals, hunting being the only way left for them by which they could keep themselves alive.

By this method of acquisition, a person would put up a trap, usually by digging a hole. He could dig up as many holes as he could. Digging was done following the animals trail so that on their way back, the animals could fall in the holes and thus be trapped. Wherever a person dug these holes, all that land surrounded by the holes became his and nobody could go to dig his own holes on the same land. Even if the first person to dig the holes went away, the land still remained his and nobody else could lay a claim on it. The practice was that people would gather in a group, usually by clans go deep into the forest, but each person would set up his own trap in a particular area.

What I deduced from this information is that what the person actually owned was not the land itself but the right to hunt on that ground. People used to talk in terms of their hunting grounds but not their lands, for the land per se had no value.

2. ACQUISITION BY AN AXE (Kwana na Kathanwa)³⁰

This system of acquisition can be said to have replaced by hunting. As people became more and more enlightened, they came to learn that life could be earned through cultivation. Since all land was covered with trees and forested, they resorted to clearing portions of the forest using axes and planting crops. A person could clear several pieces of land in different places. Once a person cleared a piece of the forest, it became his and even if he happened to leave it bare, it still remained his so long as it could be seen that a person had once made a first clearance on it.

Like in the acquisition by hunting, acquisition by an axe used to be done collectively but in clans. It was called "Kwana rware". Men of one clan would gather and decide a particular place which they thought could be fertile. Each individual would then choose a particular portion from the group chosen area and clear it. Thus all the portions would be in one area but owned by different individuals though belonging to one clan. This is why during the consolidation stage, people belonging to one clan were found claiming land rights in almost the same place.

Planting was also done collectively by the women of the same clan. On germination men would similarly gather in clan groups to go and protect the crops from destruction by wild animals and birds, a process called "kurira". They went in groups for security reasons in case wild animals became fierce.

From this, it can be said that people began to view land as something valuable, not in terms of money but as something worth keeping for subsistence purposes. If an individual could claim to have had rights over certain pieces of land, it can be said at this stage that a kind of individual ownership less than that of an absolute proprietor did exist in the early stages of land acquisition among the Embu. As we are going to see shortly, this individual claim accrued only to the head of the family (he is usually the person who first acquired the land) and not to any subsequent claimants, e.g. the heirs.

Because of the collective nature of the work, lands used to be known by clans and houses e.g. "This land belongs to 'Kithami' (name of clan) but to the house of 'Kamwocere' (name of the head of the family)." Thus even if a person went and cleared a portion of land all alone, the land would still be said to belong to his clan but to his house.

Although the first acquirers could lay individual claims on the land, still the land was not seen as belonging to that individual but to the family and the clan. This reflected itself more when it came to the system of inheriting and subdividing the land.

INHERITANCE

After acquiring a piece of ground, the head of the family cultivated it together with his wives. He would divide it among them in equal shares. On becoming of age, each son got a share of his mothers land and sometimes the father would give them part of his land. If the sons were too many and the land small, they would accompany the father to go and clear another piece of ground which he would divide among them.

This the sons would cultivate together with their wives.

If the father died before dividing the land among his sons, the elder son assumed the role of the head of the family. He had to divide the land in the same way as the father would have done.

Unmarried girls were also entitled to a share of the father's land if they remained unmarried or if their husbands divorced them according to the recognised customary divorce. Sons of an unmarried woman were also entitled to a share of the grandfather's land, so too were sons of a divorced woman if no dowry had been paid. But before children of a divorced woman could get a share of land, the husband had to take an oath called "Kaurugo" swearing that he does not and will never want the wife back again.

LAND TRANSACTIONS

The idea that land could be sold was not in the minds of the "aembu"³¹ especially during the early stages. Two reasons can be attributed to this :- (a) land was plentiful and so if a person wanted land, he had only to go and clear a portion in the forest and (b) to the muembu, land belonged to the family and not to the individual although the individuals used to have separate shares. Thus the elder son could not sell any piece of land, even his own share, nor could the other sons sell their shares unless they were in great difficulties. Usually the need for disposing of the land concerned payment of goats or sheep, for example, if a son wanted to get married and he had no goats or sheep with which to pay dowry. In such a case, his brothers would either help him solve his problem or advise him to sell just a small piece of the land, but rarely was he advised to sell. What happened in practice was that all work, including even marriage, was done collectively. If one brother wanted to get married, he would be helped to pay dowry by the others. If the father was alive, he is the one who usually gave out goats and sheep for the dowry. The other members could not however refuse with consent if they found that the sale was necessary.

The idea that land could be sold came as a result of land being acquired such that there was nowhere where one could go and clear and claim first clearance, coupled with the introduction of the colonial land policy and capitalism. This was accelerated by the increase in population. Even at this stage, only the "Muumi" (first acquirer) could sell the land without being accountable to anybody.

During a sale transaction, elders of the clan would be called and "uuki" - honey would be cooked. The honey was poured on the ground to mark the boundary of the land being sold from the rest. Once a piece of land was sold, the sons could no longer claim it as heirs for now there was clear evidence that the land had ceased to belong to their father. But generally speaking, land sales rarely occurred until the introduction of land registration.

There was nothing like leases, mortgages or charges under Embu customary law. A person could borrow land for cultivation. The borrowers were called "Avoi". They usually came during famines from the neighbouring tribes mostly from Mbeere and Ukambani, places which up to today have scarce rainfall. The borrower was given a place to cultivate with no payment as consideration for the cultivation rights. He had only to bring honey in a container called "kithembe". The honey was to serve as a sign of good intentions. If intimate friendship developed between the family and the borrower, he could be "born" into the family and become as one of the family members. For him to be born he had to slaughter a he-goat to be eaten by the family and then give to the family some agreed number of cows, sheep and goats. He would then be given a share of the family's land. But the land so given still remained part of the family's land so that he could not deal with it at his pleasure.

MARKING OF THE BOUNDARY

As population increased, it was found necessary to have boundaries so as to curb any land disputes that were apt to arise.

blew?

This was done by planting what the aembu called "ikingi cia duiiri" or "nduma ya njogu" or yet still another kind of plantation called "kirigi". But the most everlasting plantation which used to be planted was called "kamatharathare". A council of elders would be called and the boundaries determined after which the plantations would be planted. The elders were there to act as witnesses in case any dispute as to ownership arose. If there was any dispute an oxen was slaughtered to be eaten during the determination of the dispute. To prove ownership of land, a party had to trace the person who had first acquired it and show that he had inherited the said land from him or prove that he had bought it. The parties were asked to take an oath if they were sure that what they were saying was true. Taking of an oath was regarded as very sacred act and it was believed that if anybody took it falsely, bad luck would befall him and his family and this usually happened in one way or the other. So rarely did anybody swear on oath if he knew he was not telling the truth and so disputes were very rare.

COMMON PLACES

These included :- (a) places for public meetings called "Matiri" which no person had a right to cultivate. They were left out even at the time of adjudication and registration; (b) Dancing grounds. These were located in places where land had been acquired but the owners could not prevent public members from holding dances there. These lands were claimed by the owners at the time of adjudication; (c) rivers, salt lakes and fighting grounds. The fight^{ing} grounds had no owner and during adjudication they were allocated to the "Gatavi" and "Ngua", the biggest clan in Embu.

When the Europeans came, they tried to negotiate with the aembu so that they could sell them land. Because of the close tie that existed between the individual and the clan, the aembu replied that land belonged to the clan and not to the individual and nobody had a right to alienate it. This is what the Europeans interpreted to mean that land belonged to the community and that there was no individual ownership of land under Embu customary tenure. This was in a way true because in the latter stages no individual could actually claim ownership of land to the exclusion of other members of the family.

But it falls short of communal³² ownership as perceived by the British in that each individual within the family group had rights in a particular piece of land.

The position among the aembu can be said to be that during the early stages, a kind of individual ownership existed which with the extension of the kinship group as population increased, resulted to family ownership and clan ownership. This to some extent can be described as communal ownership. There were so many restrictions as regards land disposition that even if one can be said to have held a definite piece of land within the family land, he could not think of alienating it without leave of the other family members and when serious need arose to warrant a sale. Even when such need arose, it was not the practice to sell outside the clan. Thus the idea of a foreigner (Englishman) coming to buy land was very repulsive to the muembu who thought that the European wanted to carry the soil with him.

From this examination of Embu customary land tenure, it can be seen that Embu customary land tenure did not have a marked difference from the rest of Africa, or, to come nearer home, from the rest of Kenya.

CHAPTER THREE

BRITISH IMPERIALISM AT WORK

We have already seen in chapter one that African customary land tenure can be generally described as communal because of the mode in which land was held. As we have seen in chapter one this was also the position in Embu prior to the coming of the Europeans. The position has however changed drastically since the declaration of Kenya as one of the British Protectorates in 1895. Land today is governed by various enactments one of them being the R.L.A. the subject of this dissertation.

This chapter deals with the history of the R.L.A. It shows how African land tenure evolved from communal ownership to individual ownership which the R.L.A. purports to confer. I have confined myself to the British dealings in land in the interior of Kenya as distinct from the ten miles coastal belt. This is because Embu District, with which I am specifically concerned, is located in the interior and the ten mile coastal belt has a different history.

The concept of individual ownership came with the British in the 19th century although it was not until in the latter half of the 20th century that it was introduced to the Kenya Africans.³³ As we shall see, the reasons for its introduction were both politically and economically geared but before coming to that, it is necessary to have a clear picture of what the British meant by individual ownership.

The English concept of land tenure was that of the "fee simple estate". This to them meant absolute ownership of land. It is the largest estate known in English law. It was completely unlimited in scope and duration and the grantee could use it in any way he preferred subject only to laws passed by the crown as to how land should be used.

To the British, land was a commodity, a property. It could be owned, bought, sold or mortgaged. The owner could farm it, build on it, or even neglect it on his own free will. He could lend it to anybody who was willing to him rent for the use of it. He was not impeachable for any waste. In other words he enjoyed the whole interest in the land.

The boundaries were well defined to mark the extent of each holding. Where land was not owned by the individual or community, it was considered as ownerless or vacant and title to it accrued to the sovereign.³⁴

On coming to Africa, the British tried to fit this concept into African Land Tenure. They wanted to know if Africans had any established rights in land tantamount to individual ownership or whether their lands were owned by a sovereign somewhere. After long inquiries and observations, they realised as we saw in chapter one that their concept of land ownership was quite different from that of the Africans. They found no well defined boundaries to mark a particular piece of land from the other. A tribe like the Kikuyu which practised shifting cultivation allowed some lands to lay fallow while their owners cultivated somewhere else. A pastoralist tribe like the Maasai had vast areas for grazing. To the British, all these areas seemed vacant and ownerless. They therefore came to the conclusion that Africans had no rights of ownership to land and that what they had was only occupational or usufructuary rights. This conclusion was accelerated by the fact that when they tried to negotiate any land sales with the African tribes, they were told that the lands could not be sold because they belonged to either a family, group or community and that no individual had any right to alienate or dispose of it.

Why were the British so interested in knowing whether Africans had any established rights in land? To answer this question, I will divide the whole period of British imperialism into three phases all of which will show British imperialism at work.

PHASE ONE 1895 - 1899

During this period, the British did not know what rights they had in regard to African land.

Among the many reasons why the British wanted to assume jurisdiction over East Africa in the 19th century was the desire to control Kenya for its agricultural potential.

The British saw in Kenya a source of raw materials, i.e. the tropical products for their industries and also a market for their surplus goods. For this reason, the settler economy had to be made to work in Kenya somehow. For it to work, British settlers had to be attracted. They were the only ones who possessed the necessary knowhow of exploiting the natural resources and facilitating Kenya's economic development. The settlers could not come unless they were promised land with indeafeasible titles which could guarantee them security of tenure. The British were at a fix. If African land was communally owned, how were they going to acquire land for the settlers? Sales proved impossible or very difficult to conclude, yet land for the settlers had to be got at any cost. The problem during this period was thus one of acquiring land for the European settelrs. Some legal means had to be sought of acquiring land rights in Kenya.

In 1897, the Indian Land Acquisition Act of 1894 was extended to Kenya to allow compulsory acquisition of land for the railway, government buildings and other public purposes.³⁵ In the same year a set of land Regulations were promulgated to provide land for settlers. These permitted the Commissioner to offer certificates of occupancy for 21 years, later extended to 99 years. These Regulations were said to be for the maintenance of peace and good order.

PHASE TWO 1899 - 1959

The methods mentioned above were found to be inadequate since they did not provide the security of title which the settlers wanted. Only few settlers applied for grant of such land. Such a situation could not continue. Other means of acquiring land had to be devised. By 1899, it had also began to be accepted that Kenya was to be a white man's country.

The period between 1899 - 1959 was therefore one in which an attempt was made to make Kenya a white man's country. As regards land it meant dispossessing Africans and giving it to Europeans. It also meant pacifying Africans so that they might not shake the colonial economy.

This period saw the passage of a number of ordinances all designated to acquire land for the British and protecting the British economy. These ordinances, as we are going to see, led to insecurity on the part of Africans which insecurity could have led to rebellion as actually happened in 1952.

In 1899, the legal advisers advised the British government that the declaration of a protectorate enabled it to claim sovereign rights over unoccupied lands.³⁶ Occupation was evidenced by physical occupation or actual residence. Any land thus unoccupied reverted to her majesty as crown land and it could be granted to individuals in fee or any other term.

In 1901 and 1902 orders in council were passed giving effect to this legal advice. The Crown lands ordinance of 1902³⁷ passed under the 1902 order in council enabled the crown to assume title to waste, unoccupied or uncultivated land and alienate it to the European immigrants. Crown land was defined as

"all public lands which for the time being are subject to the control of her majesty by virtue of any treaty, convention or agreement, or her majesty's protectorate, and all lands which may hereafter be acquired by her majesty under the lands Acquisition Act, 1894, or otherwise howsoever." 38

Such land could be either sold or leased by the Commissioner on such terms and conditions as he thought fit subject only to directions of the Secretary of state.³⁹ The term public was not defined. Thus the colonial administrators were left with power to assume title to and alienate any land in the protectorate.

A lot of difficulties arose from the dispossession of Africans from their lands. This led to a feeling of insecurity on the part of the settlers. To guarantee them legal as well as judicial security, Africans were grouped in reserves far removed from European settlement.⁴⁰ Any land found useful for European settlement was to be set aside for their exclusive use, actual or prospective. The aim of the creation of African reserves in 1904 was thus to secure land for European occupation. The native reserves were however not free from alienation for British settlement if this was found necessary.

In 1915 another crown lands ordinance⁴¹ was passed. It confirmed the extent of power which the protectorate government had over land. Crown lands were re-defined to make it clear that they included land occupied by natives and land reserved by the governor for the use and support of the members of the native tribes. All native rights were held to have disappeared by virtue of the 1915 ordinance which now vested the reserves in the crown.⁴² Although land so reserved for the natives could not be sold, leased or disposed of unless it was no longer needed for the occupation of the natives, this was only in theory and gave no legal security to the Africans because any reserve could be reduced if needed for Europeans settlement. Africans thus remained tenants at will of the crown. Power of leasing was extended from 99 to 999 years.

The establishment of reserves disrupted patterns of land use and land holding among the natives considerably.⁴³ This led to a feeling of insecurity as regards land rights. In 1926 it was felt that it was necessary to guarantee some security of tenure. In 1924, the Armsby Gore Commission⁴⁴ had been set up to look into the apprehensions of the natives in the reserves and make recommendations as to how they could be guaranteed security of tenure. It recommended that rights should be clearly defined in areas where there was considerable European settlement.⁴⁵

Following the commission's recommendations, the 1930 Native Lands Trust Ordinance⁴⁶ was enacted. All reserves were declared native reserves for ever though still remaining crown land. Administration of the reserves was placed under Native Lands Trust Boards who were supposed to represent native interests. Natives were not to alienate any land in the reserves. The governor could still grant leases and licences and set apart land for certain purposes.

In 1932, the Carter Land Commission⁴⁷ was appointed to look into the needs of the native population in respect to land and whether they should hold land on tribal or individual tenure. The Commission recommended that security for all races should be provided for by making sure that African reserves were secure and free from encroachment by European settlers and other non-European races.

This was given effect by the 1939 Native Areas Order in council and Highlands Order in council which set up boundaries for the Highlands and the native areas. This still gave no legal title to the Africans especially the Kikuyu who continued to demand titles in the reserves.

The colonial government at last realized that something had to be done about the overcrowding and overstocking in the reserves. Social and economic changes had to be effected in the reserves by encouraging African agriculture. The 1930 world wide depression had hit the settler economy so hard that it was left in disarray. Encouragement of African agriculture would help in reviving the settler economy.

A state of indecision prevailed between 1939 and 1952 as the British tried to see the actual problem lay. At first population pressure was said where to be the problem. Resettlement and betterment schemes were introduced but these too could not solve the problem.

At last the problem was seen as one of land tenure. It was said that African land tenure (a) encouraged fragmentation in that there were situations where one could be found having several pieces of land in different areas, thus cutting down on returns to labour and time; (b) was conducive to incessant land disputes. Since land was communally owned but individually allocated, it was difficult to say exactly where one had been allocated. With such land disputes, there could not be any long term capital investment. Customary land tenure was therefore said to be an insecure basis for generating agricultural credit which was essential if agricultural development was to be effected; (c) encouraged sub-division of holdings through the system of inheritance which was pluralistic in nature, thus leading to units of sub-economic size. What was required was therefore a system of individual ownership of land where each person could be identified with a piece of land. particular

Three stages were recommended, namely, adjudication, consolidation and registration.

These stages however were not implemented until later for the administration had first to be satisfied that these measures would solve the problem. The administrators feared that land tenure reform would cause a lot of discontent.

Before the declaration of a state of emergency, land was thus regarded as a necessary measure of agrarian reform. It was hoped that the enhanced economic development and social progress would serve as a reinforcement and justification for the maintenance of the status quo.

In 1952, at the outbreak of mau mau, it was realized that tenure reform could be used for political advantage by creating and consolidating an African landed middle class who would identify themselves with land so much so that they would not be interested in the mau mau. Agricultural experts formulated a system which embodied this political reality - The Swynnerton Plan,⁴⁹ aimed at developing African land. "Politically" Swynnerton concluded, "the greatest gain will be a content and stable community all round". It was assumed that the basis of money lending for agriculture was land which would act as security.⁵⁰

To reform African land Tenure, legal basis was essential in order to prevent any interference with political agitators who might return from detention and undo the work already done or prevent any extension of the programme.⁵¹

Consequently, in 1956, the Native Land Tenure rules⁵² were promulgated and applied to the emergency districts of Kiambu, Nyeri, Fort Hall (now Murang'a), Keru and Embu. These set the principles and procedures of land reform and served as a block to any litigation that might interfere with the programme. To facilitate the process, the 1957 African Courts (suspension of land suits) Ordinance⁵³ was enacted to bar all land litigation in areas to which the 1956 rules applied. Thus aggrieved landlords or dispossessed peasants had no way in which they could air their grievances.

In 1957, the working party on African land Tenure⁵⁴ was formed. It was to recommend a substantive legislation of the whole programme of land tenure applicable to all native lands.

It was to advise on the nature and form of title as well as matters regarding control and registration of land transactions. It recommended that title should be absolute except for matters of succession and that such land should be taken out of the scope of the Native Land Trust Ordinance, hence free from the control of the Trust Boards.

Ownership of up to five people was recommended as a safeguard against fragmentation. As regards control and registration of land Transactions, measures similar to those obtaining in the Highlands under the 1944 Land Control Act were recommended.⁵⁵

The East African Royal Commission⁵⁶ had found that maintenance of both tribal and racial barriers as existed were incompatible with the development of a modern economy. The Highlands Order in council was not giving the Europeans the security they had hoped for. It therefore recommended that Africans with farming ability be allowed to possess land in the Highlands so that a single rural economy could be created.

The colonial masters by this time had also realized that independence was inevitable and that colonial rule would not continue. So there was a need to create a situation whereby even if independence was granted, the status quo would still be maintained as far as the colonial economy was concerned. If Africans were allowed to hold land on the same footing with Europeans, on the coming of independence, the Europeans would be assured of security of their lands.

Following the recommendations of the working party and the East African Royal Commission, the 1959 Native Lands Registration Ordinance⁵⁷ and the 1959 Land Control (Native Lands) Ordinance⁵⁸ were enacted and instructions on registration completed. Ownership was to be established by proving long occupation to the satisfaction of the traditional authority.

By Section 33(3) every land owner named in the adjudication register was to be registered as the "freehold" owner of the land concerned.

By Section 37(a) registration of the freehold title to any land was vested in the person registered as proprietor on estate in fee simple in such land together with all interests and privileges belonging or appurtenant thereto.

By virtue of Section 89(1) suits after registration were precluded. No court had power to rectify first registration even if fraudulently obtained.⁵⁹

The Registration Bill also made provision for the recording of any interest, lease, right of occupation, charge or by virtue of native law and other incumbrances affecting Land whether by custom or otherwise. Customary tenancy however was not recognised as an overriding interest.

The Bill was also to recognise the work done by the 1956 Land Tenure Rules which was placed beyond legal challenge.

The effect of the Bill was said to be to defeat all existing rights and interests under customary law unless expressly shown on the Register.⁶⁰

The Land Control Act was closely modelled on the 1944 Control Ordinance applying in the Highlands. Its purpose was to control all dispositions in registered land including transmissions by way of succession except where no subdivisions were involved. Divisional Boards were subsequently set up for purposes of granting or refusing consent to such transactions, e.g. the Board could refuse consent if its effect was to vest land in more than 5 persons Appeals lay to the Provincial Board whose decision was final and conclusive.

Towards the end of 1959, proposals were made to end racial exclusiveness of the Highlands. Racial restrictions on land sales were to be eliminated. Restrictions could be imposed only to prevent quality land from passing to persons not equipped to farm it effectively or productively.⁶¹

At last the colonial masters had succeeded in imposing the colonial economy into Kenya and allowing Africans to have a share in its working. The question which remained was to see how this comprehensive system of land registration and control would work.

PHASE THREE - 1960 - 1977

This was the period of replacing colonialism with neo-colonialism. As far as land was concerned, land consolidation and registration had to continue even after the granting of independence. As Gary Wasserman quoting A. Mohiddin says,

"Independence was granted on the basis of the continuation of the system and not of its destruction".⁶²

Economic arguments were adduced for the continuation of the European economy. It was necessary to retain the large farming system and the European farmers because; as was said, the economy depended on the European agricultural system. Any change in the agricultural system would result in African unemployment and a drop in foreign investment.⁶³ Thus the economic arguments favoured the preservation of the economic and political status quo. Although much emphasis was put on the development in the African areas, this was an attempt to draw Nationalist attention away from the white Highlands.

The post colonial government accepted the colonial government views. This can be seen in the 1966-70 and 1970-74 Development plans. In the 1966-70 plan, it was reported that registration and appropriate consolidation of holding stimulated increases in efficiency and output far out of proportion to the cost of the process.

Having accepted these arguments, the government in 1961 repealed the 1959 land control ordinance and the 1944 land control ordinance replacing them by separate transitional provisions. These were in turn repealed in 1963 and replaced by a single set of transitional provisions which survived up to 1967, having been accepted as desirable by the post colonial government.

In 1967, a new set of substantive Control Act⁶⁴ was passed under which the land market is presently regulated. Despite these changes the basic principles and administration structure in the 1944 and 1959 ordinances still remain.

The 1959 Registration Ordinance underwent a similar transformation. Its provisions were repealed and re-enacted in a new comprehensive statute, the Registered Land Act, which now provides the basic substantive registration law for all land formerly held under customary law.

By 1968, there were four systems of land laws, namely, the Land Consolidation Act; the Adjudication Act; the Land Control Act and the Registered Land Act,⁶⁵ a comprehensive system of law to cater for the whole country.

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CHAPTER FOUR

STATUTORY LAND TENURE V. CUSTOMARY LAND TENURE

In chapter three we have seen how the British succeeded in switching the African mind from customary land tenure to statutory land tenure as provided by the R.L.A. What remains now is to examine the implications and effects of land Registration on customary land tenure among the Aembu, together with the social economic reasons that were adduced for its introduction in order to see how, if at all, they have been achieved.

Consolidation and Registration of land were designed to end the uncertainty of customary law and provide an indefeasible system of registered titles guaranteed by the state.⁶⁶ To this effect, Sections 27 and 28 were incorporated in the R.L.A. Their effect would appear to be that the registered owner is made the absolute proprietor in respect to the land so registered in his name, his title being subject only to the provisions contained in the R.L.A, namely, any incumbrances noted in the Register and any other overriding interests. These include charges, leases and any conditions and restrictions. Section 30 sets out the overriding interests that do not require registration. It is important to note that customary rights are not included in Section 30 as being among the overriding interests, thus implying that customary claims are of no legal effect unless noted on the register.

The Kenya High Court^{has} tended to follow and apply the above named Sections religiously even where it has been proved that a customary claim exists. Two cases clearly illustrate this. In *ESIROYO v. ESIROYO*,⁶⁷ the plaintiff was suing for an injunction order to restrain the defendants from trespassing on land which was registered in his name. The defendants were the natural sons of the plaintiff and as such were entitled to certain portions of the plaintiff's land according to Luhya customary law. The judge accepted the defendants' contention that the land was ancestral land which the plaintiff had inherited from the defendants' grandfather and that therefore the defendants were entitled to inherit the land, this right having not been forfeited according to the recognised customary law obtaining in Luhya land. Even so, Kneller J. held that he could not take into consideration customary rights because the matter had been taken out of the purview of customary law by the provisions of the R.L.A.

By registering the plaintiff as the absolute proprietor, the rights of the defendants under customary law had been extinguished by virtue of Section 28 which confers upon the absolute proprietor

" * a title free from all other interests and claims whatsoever, subject to the lease, charges and encumbrances shown in the register and such overriding interests as are not quoted in the register' ".

There were no incumbrances noted on the register in respect to the plaintiff's land and since customary rights are not among the interests listed in Section 30 as overriding interests, Kneller J. held that the plaintiff's land was free from any claim.

In this case we see persons who according to customary law would have a share of land being denied that right simply because somebody's name has been entered in a book. The question is, where do such people go? One of the reasons for introducing the L.C.A. was to prevent rural indeptedness of a peasantry unused to the freedoms and responsibilities of individual land tenure and prevent people from being led destitute through sales of land.⁶⁸ Is this not what the strict application of Section 28 R.L.A. is exactly doing?

Similarly, in *OBIERO v. OPIYO*⁶⁹, the same court had reached the same conclusion as in *Esiroyo's* case. The defendants here were sons of the plaintiff's co-wives. The plaintiff was claiming an injunction order to restrain the defendants from trespassing on her land which was registered in her name. The defendants on the other hand claimed to be the owners under customary law and to have cultivated the land from time immemorial. They further contended that the plaintiff's registration had been obtained by fraud. Bennet J. held that he was not satisfied that the defendants had any rights to the land under customary law, and that even if they had, those rights had been extinguished when the plaintiff became the registered proprietor, her land being free from any incumbrances and therefore free from all interests and claims.

He further held that as the defendants did not attempt to prove the allegation that the plaintiff had obtained the registration by concealment or false representation of material facts, he was not satisfied that she had obtained it by fraud or mistake. But that

" even if fraud had been proved, the plaintiff's title was indefeasible as it was a first registration."⁷⁰

The social effect of these two cases is that the security of tenure which had been afforded by customary land tenure is now gone. Instead of land serving the needs of the family if not the community as a whole, some of the family members now have to be at the mercy of the registered proprietor. They have to almost kneel down to him lest they be evicted from the land and remain landless.

Among the Aembu, it was very rare that a father could be heard to have disinherited his son or refused him a share of his land, yet this is what is happening because of the introduction of the R.L.A. According to customary law, if a son seriously wronged his father, all he had to do was to slaughter a cow for the father as a sign of repentance, an act called "kuruta nthinjo". The elders would speak to the father and the son. The son had to promise not to repeat the wrong again and that serious consequences would follow if ever he did so. With the coming of the R.L.A., the strong ties that existed between the family and ancestral land have now been considerably weakened if not completely broken as shown by the above two cases. Fathers nowadays do not care whether their sons have got land or not.

Only in one reported case has the Kenya High Court held a different view in regard to a customary land claim. This is in the case of *MAGUTHU v. MAGUTHU*.⁷¹ In that case, Madan J. held that the plaintiff held the land under a customary trust which was inherent in the Kikuyu customary law. This holding was based on the view that it is contrary to the Kikuyu custom that a father during his life could give away land belonging to him to one son only to the exclusion of others.

He thus said that there was no need to register the defendant as trustee for he was registered as the eldest son of the family in accordance with the Kikuyu custom.

It is clear in this case that the judge was trying to evade the unjust consequences that are brought about by the rigid application of the R.L.A., and in particular section 28. In no other reported case however has the decision in MAGUTHU v. MAGUTHU been followed.

Although some people might argue that the recent decisions in OBIERO v. OPIYO, and ESIROYO v. ESIROYO show that the High Court will not easily depart from the strict application of the R.L.A., it is important to note that in none of the above two cases was MAGUTHU v. MAGUTHU referred to. The decisions in those cases can therefore be said to have been reached per incuriam.

It is also worth noting that the two cases were decided by English judges who are oriented according to the English way of life. A judge's interpretation is judged from or directed by the sensitivity of the area he comes from. The English world being the individual property world as shown by their concept of the fee simple owner, Kneller J. and Bennet J. interpreted the R.L.A. in the light of their fee simple owner disregarding any other factors that might have influenced the registrations. They ignored the fact that they were applying a new concept of ownership to people whose concept of property ownership was quite different from theirs. They were imposing notions of private property on a society still communally oriented. This is because they were still suffering from the colonial hangover. The superior courts had been introduced to serve as instruments of colonial policy which was opposed to the traditional patterns of economic activity and social relationships upon which was founded the systems of customary law, the sole aim being to transform the economy and administer the territory to fit most effectively into the world capitalistic system.⁷²

On the other hand, Madan J. who decided *MAGUTHU v. MAGUTHU* was well acquainted with the African way of life. Being once a Minister for Asian affairs, he had been quite involved in Kenya's political life. He took the view of most African judges especially those in the lower magistrates courts. These magistrates are well versed with the African customs, Eg, they know that a son is entitled to a father's share of the land. As such, when they are adjudicating over a dispute concerning land, they look at the provisions of the R.L.A. in the light of customary law and where the two conflict, they tend to make customary law prevail.

Embu is one of those tribes where customary rights still linger in the minds of some people. Consequently, magistrates are faced with much difficulties in trying to uphold the provisions of the R.L.A. Legally they feel bound to apply the law as it is but socially they feel that the needs of the people must be met. An examination of two cases will illustrate this.

In civil case No. 6/74, the plaintiff was seeking an eviction order to evict the defendant, his son, from his land for threatening to do harm to him and other members of the plaintiff's family and damaging his crops. The son contended that the plaintiff had ignored him during demarcation and had not given him a share of the land when giving the other sons because he was small. But now he was married with children and had no land. Faced with the conflict between a customary claim and the provisions of the R.L.A., the Resident Magistrate ordered that the defendant should remain on the land so long as he does not interfere with the co-operation of the family, and in default, he should be evicted, thus in a way striking a balance between the two. In delivering the judgement, the court took into consideration the fact that the defendant was the legitimate son of the plaintiff.

In civil case No. 10/75, the magistrate ignored section 28 and gave effect to a customary claim. The defendant was the registered proprietor and the plaintiff was his son. The defendant had told the plaintiff to be cultivating on his land but had later given it to another of his sons. He now wanted to evict the plaintiff.

The plaintiff was praying for a vesting order vesting half of the defendant's land in him. The Resident Magistrate ordered that half of the defendant's land be vested in the plaintiff.

From these two cases, we see how even the courts in Embu try to evade the social consequences of the legal effects of land registration. This is because of the awareness that land belongs to the family and not to the individual, and that even if it might be registered by the name of one person, he is said to hold it in trust for the family, just as it was held in MAGUTHU v. MAGUTHU. Thus unless the father has given each son a share of his land, the land he owns is said to belong to him and his sons.

The same conclusion as above can be deduced from the working of the land Adjudication Committee. The Committee, being made up of elders well versed in customary law carried on adjudication in accordance with customary law. They determined who the head of the family was and then registered him or the eldest son as the registered owner. According to the understanding of the family, he was not being registered so as to be the exclusive owner but as a sign that the land belonged to that family so that an outsider would not claim it. To them, it was quite clear that what was being registered was family land and the elders were well aware of this. I do not think that it was explained to them that the registered owner would become the exclusive owner to the exclusion of all other family members, for if this was done, they would have seen^{to} it that the land was sub-divided. It is only now that the registered owners have come to realise what registration actually means. As a result, they have begun taking advantage of its legal effects so as to evict persons who are also supposed to be owners of the same land. From this, it can rightly be argued that as land Registration is informed by African customs, as held in MAGUTHU v. MAGUTHU, land under the R.L.A. is held under customary law and that therefore MAGUTHU v. MAGUTHU was correctly decided. Proprietorship to the African is unheard of, trusteeship being the rule as can be deduced by my two cases. It can also be argued from this reasoning that it was not necessary to include customary interests in Section 30 as being among the overriding interests since their inclusion is ensured by the very process of registration.

Although the Act thus purports to declare one as absolute proprietor, from my illustrations, it can rightly be said that the security so envisaged is not well guaranteed since social considerations still continue to shape the courts' decisions. It can also be argued that although the R.L.A. purports to change customary law both in law and practice, it does not do so since the courts do all they can to evade its provisions or ignore them all together where they conflict with a well recognised customary law. My recommendation would be that the courts should ignore sections 27 and 28 so far as the land in dispute concerns a customary claim and where the land happens to have been registered during the early stages of consolidation, since this is the time when registration was being informed by customary law. Sections 27 and 28 should only apply to those people who acquire land either by sale or through a court's order and not to those who inherit ancestral land since as regards ancestral land, there will always be people entitled to inherit the title.

It was hoped that tenure reform would provide the basis for an agrarian revolution. This was hoped to come in the following ways :-

- (1) Consolidation of scattered fragments was to curb fragmentation and thus cure sub-economic parcellation creating land units of economic size sound for agricultural develop. This was to facilitate the planting of cash crops and rapid improvement in the technique of farming.
- (2) The issue of indefeasible titles was to provide security from litigation which was said to be prevalent under customary land tenure thus cutting down returns to labour and time. People could spend the time spent in settling disputes in developing the land.
- (3) Individual titles would guarantee security of tenure. This would make land a marketable commodity freely transferable and chargeable as security for raising credit for agricultural development.

These intentions, as they stood were very sound if only they could be practicable. An examination of what has been taking place in Embu will show that these intentions have not been fully realized if at all.

FRAGMENTATION

To prevent fragmentation, the working party recommended ownership of up to five people as co-proprietors or division of the land into five shares provided that they are not below a certain minimum size, and compensation to be paid to those heirs who did not obtain the land by those who obtained it.⁷³ These recommendations were incorporated in Sections 101 and 120 of the R.L.A.

To a certain extent, the system seems to have worked well in Embu within the past few years of registration. According to the Annual Reports an average of 43 successions were registered each year from 1971 - 1975, and from January to November 1976, 78 successions were registered, thus showing that the number is gradually increasing. This does not mean that only 43 proprietors die in Embu each year, but it shows that Embu people are becoming more and more aware of the need to register transmissions as the 1976 data shows. The reason I can adduce for this willingness to register is that land in Embu has not as yet become so scarce as to entail subdivision to a very small unit. On the other hand, few cases involve succession of more than five people, so there is no risk of any of them being dispossessed of his share in case of registration. I only came across one case where 2 people had been registered as co-proprietors and this did not even involve succession. The sons are also aware of the fact that with a title deed, one might be lucky enough to be advanced a loan. Since such registration does not involve any dispossession, they see no reason why they should not register. However, with the increase in population, it remains to be seen whether the percentage will be higher or lower as years go by.

My data above however does not mean that there are no cases where transmissions are not registered. Time did not allow me to do any research on this. It is therefore difficult to find out the number of such cases if any. But the fact that my discussion above indicates that land is still held under customary land law may help to suggest that there may be such cases.

Despite the fact that the Embu people have responded quite well in regard to registration of deaths, fragmentation on the ground is still going on. In polygamous families, each wife is still given a separate share of the land on which to cultivate which is not registered in her name. Those sons whose fathers are still alive and who have not as yet been given separate shares continue to cultivate on their father's land together with their wives, unless they have got money with which to buy separate land. Thus although the register may show that the land is viable for agricultural development, this is not the position on the ground. The Land Control Boards contribute to this fragmentation by the fact that they are not concerned with economic acreage when granting consent to land transactions. This, coupled with the fact that there is no minimum acreage unit means that a person can buy as much land as possible in many different places, thus increasing fragmentation.

It cannot be denied that to some extent consolidation and registration has facilitated the planting of cash crops in Embu District. Although a few people had started growing cash crops before consolidation especially coffee, this was not on a large scale. The increase can be adduced to registration, not because loans are easier to get with a title deed, but because institutions such as the Co-operative Societies are more willing to provide essentials such as fertilizers and seeds to be repaid by money from sale of other crops, not necessarily cash crops e.g. potatoes and maize. Most of the payment however is made from sale of coffee since almost every land owner has got coffee trees. The co-operative societies cannot do this unless the crops are planted on registered land. With such institutions willing to provide seeds and fertilizers, cash crops like tea, pyrethrum, tobacco and sunflower are now gaining market in Embu District.⁷⁴ This can be shown by the fact that the government built the Kianjokoma Green Tea Factory which was unfortunately closed down because the output exceeded the demand. However, although cash crops are grown, this is not on a very large scale as compared with subsistence crops with which most of the people are interested in. Consequently, not enough land is spared for them.

Consolidation may be said to have brought about improvement in the technique of farming in that a person is able to take care of his crops well if they are in one place without having to move from one place to another. But this per se cannot bring any improvement if a person does not have the necessary farming equipments. Only the few people who are lucky enough to get loans to buy farm implements can make rapid improvements in their farms and this is not so in Embu where almost 99% depend on hand labour. This may be one of the reasons why cash crops are not grown on a very large scale.

It can thus be seen that consolidation and registration has not succeeded in stopping fragmentation as was expected and the improvement in agriculture has been minimal.

LAND DISPUTES

Land disputes were not very prevalent in Embu before the introduction of the R.L.A. and where they arose, the elders easily resolved them. Land disputes can actually be said to have been brought by the introduction of the British rule with new concepts of land holding which forced the Africans to try to identify themselves with a particular piece of land. Land was supposed to serve the family and this is why we find that even a "Muvoi" (borrower) was allowed to cultivate on the land without any valuable consideration.

However, even if we accept that customary land tenure was conducive to incessant land disputes, has registration of titles in any way succeeded in lessening such disputes? It is true that with the introduction of consolidation, titles were necessary so that each person's parcel of land could be well defined. Without registration, many cases would be needed to establish a claim. But land disputes often arise from different angles all connected with the working of the registration machinery.

The 1972 - 1976 data will show that land cases in Embu have actually increased and seem to be still increasing.⁷⁵

<u>Year</u>		<u>Number of cases</u>
1972	-	19
1973	-	42
1974	-	44
1975	-	49
1976	January to November	63

Most of these cases involved either a prayer for a vesting order; return of the purchase price or an eviction order to evict the defendant from the land in dispute, and most of them naturally concern customary claims.

In some cases, parties agree on a land transaction. The seller accepts the purchase price and spends it, but when the time comes to go to the Land Control Board for consent, he fails to appear. So the buyer resorts to the court for return of his money or a vesting order. In other cases, the Land Control Boards refuse to grant consent even where the seller has received the purchase money. If the seller has used the money and has none with which to refund to the buyer, the buyer goes to court. If transactions like these took place according to customary law, there would be no dispute at all so long as the transaction was entered into in presence of some elders as witnesses. Thus in one case⁷⁶ the magistrate ignored the fact that the Land Control Board had refused to grant consent and ordered that the defendant (seller) give to the plaintiff 2 acres of his land as a final settlement of the claim.

The unjust and unfair consequences brought by registration and the subsequent discretionary power of the Land Control Boards in granting consent which would not otherwise arise if customary law applied are well illustrated in Embu civil case No. 3/74. In that case the defendant bought land from the plaintiff despite the Land Control Board's refusal with consent in 1963. The parties agreed that none of them would change his mind. The defendant paid Shs. 2,000 and took possession and occupation of the land and thereby built a house worth Shs 6,526/40 and an unfurnished kitchen worth Shs 1,068.

The plaintiff attempted to sell the same land in 1974 and so the defendant went to the land registry and cautioned the land. The plaintiff sued for an order that the defendant remove the caution from his land. The land was still registered in the plaintiff's name. Relying on Section 6(1)(a) of the Land Control Act, the Resident Magistrate held that the transaction was void for want of consent and ordered the defendant to remove the caution with immediate effect. The plaintiff was to refund Shs 2,200 to the defendant.

The question posed by this case is, since the defendant would have to vacate the land, where does he go? what happens to his house and kitchen worth Shs 6,526/40 and Shs 1,068 which would have to be demolished. The plaintiff is not legally bound to compensate him for the houses or any improvements which he has done on the land. Section 7 L.C.A. provides only for recovery of money or any valuable consideration paid, which in this case is only Shs 2,200.

It is interesting and surprising to note that in the above case the magistrate excused the parties from the penalties imposed by Section 22 of L.C.A. on parties who do anything to further a voidable transaction, on the ground that the parties entered into the transaction in 1963, but he could not excuse them from the unfair consequences of Section 6(1)(a) L.C.A.

Lack of effective organised machinery for registration also increases land disputes. In the case of PETER NYAGA v. NJIRU GIDEON, a 1976 case, the defendant bought a piece of land from a third party; but the new parcel numbers given by the Land Control Board were not registered since the surveyors had not come to survey the land despite the fact that the defendant had paid them the necessary money and had been issued with a receipt. Taking advantages of the fact that the register had not been altered, the plaintiff transacted with the third party for the sale of a piece of land which included part of the defendant's land and it is only when the defendant saw the surveyors with the plaintiff coming to survey the land that he realized that part of his land had been sold. The plaintiff was now seeking an order to evict the defendant from his piece of land.

The magistrate understood the facts and despite the fact that the Land Control Board had given consent to the second transaction, it ordered rectification of the register because this was a clear case of fraud. But it was a fraud which had been brought about by the inefficiency of the surveyors.

A lot of fraud has also resulted from the legal effect of land registration and this has led to a lot of land disputes. A lot of people in Embu have impersonated the registered proprietors and have been able to obtain the land owners' title deeds as a result. The result is that a lot of people's lands have been sold or charged. In practice Notes No. 79700 /148 of 16/9/75, it was said that this was a result of similarity of names which make it easy for the fraudulent person to impersonate the registered proprietor. While this could be the case, the position in Embu is that it has been very easy in the past for one to change his names. A person would go to court accompanied by some witnesses (whom he has conspired with) and swear an affidavit, changing his name to correspond with that of the fraudulent proprietor whose land he wants to steal. After that he would go to the Land Control Board for consent and then the change of name would be effected on the land register. Courts hence have tried to curb this by insisting that the person who wants to change his name should come accompanied by his sub-chief or chief who knows him well by both names before he can be allowed to swear an affidavit.

With so many land disputes, it is impossible to develop the land for most of the time is spent in court. I would therefore say that one of the aims of land reform, i.e. to prevent incessant disputes, has not been achieved and much remains to be done on the whole machinery set up if disputes are to be stopped or at least minimised.

LAND AS A MARKETABLE COMMODITY

One of the aims of individualization of land was to make land a marketable commodity freely transferable so that the owner can dispose it, charge it or lease it at his own free will.

From the working of the Land Control Boards, it has been observed⁷⁷ that in granting consent the Boards are more interested in preserving the traditional rules and principles than in facilitating land development as envisaged by the tenure reforms. Traditional rights of access and inheritance continue to determine the farmers freedom of disposition despite express provisions that the Boards may take into account family matters only if they consider it necessary, taking into consideration that the registered owner is not subject to considerations and duties based on customary law unless they amount to overriding interests.⁷⁸ Thus they were warned not to intervene on behalf of customary law prejudice so as not to frustrate a transaction which in other respects would be for the good of the country.

The Embu North Land Control Board seems not to have been impressed by this warning. The Land Control Board Minutes show that the Board does not grant consent to a transaction if any member of the family objects to the transaction. Thus in one case⁷⁹, an application was deferred because sons of the applicant did not agree to it. In other cases⁸⁰, applicants were asked to bring either all sons or the son's wife to the Board, or the application refused because the applicant had many children and in future they would face difficulties and hardships for lack of enough land.

However, the commonest ground for refusal seems to be based on whether the applicant has any other land on which to settle.

If he has no other land, as the Board notes, this would lead to poverty, landlessness and social economic problems, thereby defeating one of the aims of the Land Control Act, i.e. to prevent rural idleness of a peasantry unused to the freedoms and responsibilities of individual land tenure. Thus in Min No. 73/71 where the applicant wanted to sell his land so as to go and look for a job, consent was refused. This, as the Board noted, was contrary to Mzee's call of "go back to the land".

This leads to the conclusion that in trying to prevent landlessness, one of the aims land reform, i.e. to make land a marketable commodity is hindered, for the two are incompatible.

On the other hand, it cannot be denied that for those people to whom the social considerations do not apply, land has actually become a marketable commodity. In Embu, there has been an average of 634 land transfers according to the 1971 - 75 Annual Reports, with the highest number of registered transfers being in 1975 when 744 transfers were registered.

The Land Control Board does not bother much as regards sub-economic divisions as we have seen. Before 9 acres could not be sub-divided but now even 2 can be divided⁸¹. The Land Control Board rarely gives regard to the economic considerations contained in section 9 of the Land Control Act (which are the paramount considerations). Although the Board might ask the purchaser what agricultural developments he intends to carry on the land, the Agricultural Officer is left with the work of supervision which he hardly carries out. I was made to understand by one of the Land Control Board members that consideration is given to the economic consequences only when the transaction refers to trust land.

One of the most important consequences of Land Reform has therefore not materialised on a large scale as expected although the number of land transactions seems to be increasing.

Because of the social considerations that still loom in the Land Control Board members, the absolute proprietorship to be guaranteed by section 27 R.L.A. has become questionable.

The L.C.A. was also intended to prevent accumulation of land in the hands of few rich people for speculative purposes. But the fact there is no ceiling as to the amount of agricultural land that one should own⁸² makes it easy for people to buy land for speculative purposes. The trend now is that any person with money is free to buy land. The Land Control Board perhaps assumes that a person who has got money is capable of developing the land.

During a friendly talk with one of the "big" people in the lands office, he informed me that he had a plot of land near my home and also another one in a different place. On asking him what he intended to do with them, he replied that since land prices are shooting up terrifically, he intends to keep the plots for about 2 - 3 years and then he can sell at a profit. This clearly shows that he had no intention of developing the land, and I have no doubt that there are many others who fall in his line of thought.

Land registration and Land Control have therefore not succeeded in preventing accumulation and what this means is that a person can buy pieces of land in many different places, and bearing in mind that these days a person can buy even half an acre, fragmentation still continues.

On the whole, however, land transactions have become very frequent unlike under customary land tenure which even forbid sale to a person from a different clan or tribe. Anybody can now buy land in Embu. The person I was talking to from the Land Registry is actually a Kikuyu.

Fathers these days are not very keen in preserving land for their sons. Since they sell land usually to meet necessities such as school fees, they say that the sons will be able to buy land after getting a job.⁸³ All this has had the result of weakening the traditional institutions especially those concerned with the function of property in society. There is no longer the equitable distribution of land and land is not seen as an essential means of subsistence.

FARM CREDIT

As we have seen, registration converts land into a transferable asset. It was hoped that title deeds would make it possible for people who want to develop land to obtain credit from the credit giving institutions. This was based on the assumption that title deeds would be the only reliable means of securing agricultural development loan by charging their lands as security⁸⁴.

As Okoth Ogendo⁸⁵ rightly notes, all charges are almost approved by the Land Control Boards. The Embu North Land Control Board is not an exception to this practice. Okoth attributes this partly to the Boards consideration of the importance of the flow of credit into agriculture and partly to the fact that these do not immediately involve a threat to ownership. While the latter argument may hold some water, I have my doubts as to the former argument, for, as I mentioned earlier, the Land Control Boards are less concerned with the improvement in agriculture while granting consent. On the other hand, although the chargor may be asked what agricultural improvements he is going to carry out with the loan, the loan rarely ends up in the shamba, since there is nobody to supervise its application.

Title deeds in Embu have served as an important means of obtaining loans in only some of the credit giving institutions.

The Agricultural Finance Corporation (A.F.C) asks only for the title deed,⁸⁶ while the co-operative union credit and savings bank does not even insist on the title deed but asks for the security of any cash crop which might be on the farm⁸⁷. The Co-operative Bank can even plant cash crops for a person and accept the same cash crop as security. The reason for this I guess is because the A.F.C. and the Co-operative Bank give their loans only in kind and rarely in cash. In that way they make sure that the loan goes to the intended purpose. The A.F.C. Manager informed me that they usually send some personnel to go and see how the farmer is getting on and they will only resort to sale of the land if the farmer has misused the loan, which rarely happens.

Few people however, make use of an institution such as the A.F.C. because they will be restricted in their application of the loan. So they resort to the Commercial Banks which do not usually care how the loan is being applied. This can be shown by the January 1976 Data. While the A.F.C. registered 28 charges, Kenya Commercial Bank registered 58 charges.

The Banks and the I.C.D.C. do not easily accept title deeds alone as security⁸⁸. The applicant has to show that he has other sources of income to enable him to pay the loan when it matures. How is a person who has no other income expected to develop that land if the Banks are not ready to advance money for him? of what use is land as security? Only few people are thus able to take advantage of title deeds. Although one farmer told me that banks have now started sending out personnel to see that loans are being put to the intended purposes, this is on a very small scale and does not alter the fact that Banks are only interested in knowing how an applicant will be repaying the loan.

The approximate data given by an agent of the Kenya Commercial Bank is that out of 100 borrowers, 50% are able to pay; 50% have to be reminded that the loan is over/ due and out of the 50% reminded 10% have to have their lands sold because they cannot pay. This has got a double result. In the first place, because of lack of supervision, no agricultural development is effected. Secondly the chargor is rendered landless. Does land registration achieve its aim in this respect?

The Industrial and Commercial Development Corporation (ICDC) while insisting on title deeds as security, advances loans only for industrial and commercial development. The applicant must also have had some business experience, or must have done some development on the land, or must be owning a permanent building. How can the applicant be expected to have developed the land if Banks are reluctant to advance loan to him if he has no other security. The poor title deed holder is thus left in a dilemma.

The provincial I.C.D.C. Officer gave me to understand that a lot of land is now being sold because their owners are unable to repay within the given period. It is very rare that the I.C.D.C. can extend the time of ^{re} payment. Unlike the A.F.C., the I.C.D.C. does not even advise the person to subdivide the land and sell a portion to meet his debt. All it is concerned with is recovery of its money with interest and does not care whether the land is worth more than the loan. If the land fetches more on being sold, the remainder is given to the borrower, but the I.C.D.C. does not make the effort to make it fetch more.

In reference to the I.C.D.C. and the Commercial Banks it can therefore be said that the argument that individualization of land per se would give the farmer security with which to obtain credit for agricultural development is a dead letter as far as the poor peasants are concerned.

For those who are fortunate to get loans, they are for other business enterprises and not for agricultural development unless the farmer had in mind all along the incentive to develop the land. Most of the people these days are even buying more land not to develop it but to enable them to be granted loans for other purposes.

To sum up, although registration can be said to have facilitated the granting of credit in a way, this has ^{not} resulted in the expected leap in agricultural development. Only credit giving institutions like the A.F.C. and the Co-operative Bank can be said to help farmers although not in a very large scale. The A.F.C. caters only for the large scale farmers and this leaves only the Co-operative Bank to cater for the small scale farmers. If there is going to be any leap in agriculture, the small scale farmer must be given more credit facilities than exist today.

CONCLUSION

Much of what I would have said by way of conclusion is included in chapter four since it is all linked up with the impact of land registration on customary land tenure. Any attempt to do so would therefore mean a repetition of what I have already said. In summary therefore, I will only make a general assessment of the land reform programme and pinpoint a few things which I think might be of help if any economic benefits are to come out of the whole system of land reform.

In chapter three, I made it quite clear that the reasons for introducing land registration were both political and economic. The economic justifications were geared towards achieving the political motives. Thus white agriculturalists like Swynnerton hoped that farm planning and improved agriculture would encourage consolidation leading to registration, other people like Simpson wanted to carry out consolidation and registration for political reasons while the emergency regulations still existed. They wanted to strike while the iron was hot.⁸⁹ It is therefore not surprising to see that the economic objectives have not been achieved. The advocates of land reform, being less concerned with the economic benefits, did not take sufficient positive move to encourage African agriculture. As a result, there has not been the expected leap forward in agriculture and the basic feature of the pre-consolidation land problems have not been much altered, e.g. large economic holdings have not been created for as we have seen, fragmentation still continues on the ground and there is no economic acreage unit. There is no sufficient land for cash crops; litigation still continues because of the legal consequences of land registration which are incompatible with customary land tenure and also because of the ill working of the registration personnel. The agricultural revolution that was expected to follow from consolidation and registration having failed, employment which was hoped to result has not been created.

Title deeds enable only few people to borrow money and this money is not even for agricultural development. To crown it all, landlessness which the L.C.A. was hoped to prevent has not been prevented.

It is true that to some people land tenure reform has removed many a stumbling block to progress for an individual can now develop his land holding with the help of credit^{and} advice from agricultural experts, at the same time being encouraged to take long term improvements because of the security afforded by his title. But this is only if his title is free from any customary claims and if the farmer all along had the incentive to work and not just because the land has been registered. Few people are bothered to go and approach the agricultural experts. I should think that it is the duty of these agricultural experts to go round the country side advising people as to how they can best care for their land. But even if they go round doing this, the only people who will be able to reap any benefits will be the lucky few who are able to obtain advanced loans, and as we have already seen the percentage of ~~which~~^{such} people is very small compared with what the agronomists expected.

Instead of the expected leap in agriculture, what is happening now is that peasant indebtedness is increasing at a large scale. Granting of individual titles was in a way conditional because the whole purpose was that after being granted the title, the individual owner would develop the land and use it properly. Practically however, this is not so for after registration a person is left to do what he wants with his land. Consequently many people are buying lands for no other reason other than to enable them to obtain loans for other purposes. Those small holders who obtain loans by the security of title deeds are unable to repay them because they employ the money to discharge other obligations other than for agricultural development.

As a result, they find themselves losing their lands. This land goes to the rich people who are able to buy it but not for development but to accumulate for speculative purposes.

Thus the main idea of land reform i.e. to have as many economic holdings as possible and to provide security of tenure has not been fully realised. Is there any need of retaining the rigid land control rules which are not in any way helping to realise the objective^s of land reform? The land control mechanism, as we have seen, has almost broken down for everybody who applies for a subdivision is granted consent so long as the social considerations do not apply to him, and the economic considerations of such a transaction are disregarded.

Legislation per se, as Jacob,⁹⁰ observed in respect to Malysia, cannot affect economic changes unless it is combined with other measures. The^{se} include alternative employment facilities to relieve pressure on the land so as to curb fragmentation and adequate credit facilities for the small scale farmer. Without alternative employment facilities to absorb the surplus population, customary law rules will continue to determine land use and ownership for it seems that the African will not readily comply with the provisions of the R.L.A. unless there is sufficient jobs outside agriculture to draw the surplus population from the land⁹¹. Moreover, he does not understand the law in the R.L.A. which is borrowed from the English society with which he has little in common. May be a complete departure from the customary law of inheritance as well as customary law of land holding would be necessary if fragmentation is to be eradicated. But, as McCauslan⁹² observes, such a move would render some people landless and this would necessitate making a living open for those who would become landless as a result.

In my view, it seems that with the high increase in population, the creation of economic holdings is impossible unless this goes hand in hand with the creation of more job opportunities. Kenya is a developing country and so it would be difficult to create industries and other institutions to absorb the surplus population from the land. Perhaps one of the solutions would be to forget the whole question of creating economic holdings and concentrate on developing the land however small the parcel may be. A small land unit, well managed would produce even more than a large unit which is poorly managed or not managed at all. What is needed is more efficient management of farming operations. There should be introduced and made available to farmers proper farming tools and an extension of farm management services to make sure that farmers are trained to make good use of them. This, coupled with adequate credit facilities to the small scale farmers should be able to produce some economic benefits to the farmer and consequently the country as a whole. These suggestions apply if the R.L.A. is to be retained in some modified form. As noted in the introduction and chapter three, land registration has always acted as a tool of imperialism. If the rejection of this takes effect, then the R.L.A. will go and probably a reform based on African land tenure concepts will replace it.

re J.K,

National property in freedom and unity

(Nairobi, Oxford University Press 1967)p.53

:s Mine.

FOOTNOTES

¹ See (a) Republic of Kenya, Report of the East African Royal Commission 1953-55, (London, June 1955) Ch. 23.

(b) Republic of Kenya, Report of the Working Party on African Land Tenure 1955-59 (Government Printer, Nairobi) Ch. 12 and 13

(c) Republic of Kenya, Report of the Mission on Land Consolidation and Registration 1965-66 (Government Printer, Nairobi) Ch. 16.

The Land Consolidation Act and the Adjudication Act are based on this report.

(d) Report of the Conference on African Land Tenure in East and Central Africa (Arusha, 1956) para 22-24.

² Hereinafter referred to as the R.L.A.

³ See Sorrenson M.P.K, Land Reform in the Kikuyu country, (Oxford University Press, 1967) Ch. 12.

Mainye Gilbert J, The Application of Ss 27 and 28 of the R.L.A. (Cap 300) and its impact on the Gusii customary Land Tenure. A Dissertation submitted in partial fulfilment of the requirements for the LL.B Degree, University of Nairobi, April 1976.

⁴ Nyerere J.K, National property in freedom and unity (Nairobi, Oxford University Press 1967)p.51

⁵ Italics Mine.

⁶ Ibid.

- 7 James R.W. and Fimbo G.M. Customary Land Law in Tanzania
(Nairobi East African Literature
Bureau 1973) p. 6-7.
- 8 Italics Mine.
- 9 James R.W. and Fimbo G.M. Supra
See Gathomo v. Murito wa Indangara 9 E.A.L.R. 102.
- Stanley Kahehu v. A - G 18 KLR.5
Crown Lands Ordinance 1902 S.30.
- 10 See Njenga F.X, 'African Land Tenure Concepts in Kenya in
Contemporary Setting, Journal of Denning
Law Society Vol 1 Nos 1-4 pp 265 - 283
- 11 (1921) 2AC 399, p.404 - 405
- 12 Munoru G.G.s, 'The concept of customary sale of land today,
Journal of Denning Law Society Vol.1 Nos 1-4 pp
89-93.
- 13 Hamilton R.W. 'Land Tenure among the Bantu Wanyika of East
Africa, Journal of the African Society
p. 13-18
- 14 5 E.A.L.R. 141.
- 15 See Lord Lugard, Dual Mandate in the British Tropical Africa (2nd
1923) pp 280-292. Ed
- 16 Simmonce A.J.F. 'Land Redemption Among the Forthall (Murang'a)
Kikuyu, Vol.5 Journal of African Law pp 75-81.

¹⁷(1920) 8 E.A.L.R. 129, quotation taken from p. 131

¹⁸See Nyerere J.K., Supra pp 162-171

¹⁹Sorrenson M.P.K, Supra Ch. 1

²⁰Vol. 1 Court of Review Reports p.2

See also Amaya v. Kafuna Vol. 6 Court of Review Law Reports p.6

²¹Njenga F.X. Supra p. 265-283

²²Munoru G.G.S. Supra

²³Hamilton R.W, Supra.

²⁴Nyerere J.K, Supra pp. 53-58, 162-171

²⁵Battern T.B, Problems of Land Development (Oxford University Press, 1954) pp. 30-38.

²⁶My account in this chapter is based solely on personal interview conducted with some Embu elders.

²⁷See ^{Living} Mwaniki H.S.K, The/History of Embu and Mbeere. to 1906 (Nairobi East African Literature Bureau 1973)

²⁸"Muembu" and "Mumbere" are Embu words meaning a person from Embu and Mbeere respectively.

²⁹Embu way of saying Acquisition by hunting "Mutego" means trap.

³⁰"Kathanwa" means Axe.

³¹"Aembu" means Embu people.

³²Italics Mine.

³³English type of land tenure was introduced in Kenya through the application of the Transfer of Property Act of India 1882; the Indian Acquisition Act 1894; The Land Titles Ordinance 1908 and the Crown Lands Ordinance of 1902 and 1915, but Africans were not involved in these. In this paper, I am only concentrating on the general trend.

- 46 Ordinance No. 9 of 1930
See Isaka Wainaina v. Murito 9 K.L.R. 102 which shows that Africans still remained tenants at will of the Crown ever after the 1930 Ordinance.
- 47 Great Britain, Report of the Kenya Land Commission 1932
- 48 Ibid No. 1, 2, 3, 4, 6, 7 of the terms of reference.
- 49 Swynnerton R.J.M, A plan to intensify the development of
(Government Printer, Nairobi 1955).
- 50 Ibid Para 10.
- 51 Sorrenson M.P.K, Land Reform in the Kikuyu country p. 119-120
Koinange supported Land Consolidation and Registration by saying "As the people in the division are very politically minded, land consolidation should be carried out during the emergency otherwise they should find themselves in big arguments" p. 115.
- 52 These rules were made under S.64 of the Native Lands Ordinance. Many people assumed that entry into the adjudication register according to the Land Tenure rules conferred legal title thus making the person whose name is so registered the legal owner of the land. This interpretation is however questionable because S.68 of the parent statute nowhere mentioned that entry into the adjudication Register would extinguish customary rights and interests not shown on it.
- 53 Ordinance No. 1 of 1957.
- 54 Republic of Kenya, Report of the working party on African Land Tenure Supra. pp 1-2.
- 55 Land Control Ordinance No. 22 of 1944
- 56 East African Royal Commission Report Supra
- 57 Ordinance No. 27 of 1959.
- 58 Ordinance No. 28 of 1959.

- 59 See D.C. of Kiambu v. R. and Others: Ex parte Etham Njau (1 EA. 109 where the court of Appeal refused to grant an order of Mandamus to rectify first registration although it was clear that the plot of land in question should have been registered in Njau's name.
- 60 S. 89 1959 Registration Ordinance.
- 61 Land tenure and control outside the Native Lands, Sessional Paper No. 10 of 1958-59 and No. 6 of 1959-60. (Government Printer, Nairobi)
- 62 Wasserman Gary, The Independence Bargain. Kenya Europeans and the land 1960-62, Journal of Commonwealth Political Studies, 1973, (Columbia University)p. 1
- 63 Ibid, p.8
- 64 The Land Control Act, No. 34 of 1967.
- 65 Caps 283; 284; 302; and 300, Laws of Kenya, respectively.
- 66 Sorrenson M.P.K. Supra p.201
- 67 1973 EA 388.
- 68 Republic of Kenya. East African Royal Commission Report, Supra ch2
- 69 (1972) E.A. 227
- 70 Ibid p. 227. Bennet J. referred to S.143 of the R.L.A. which provides that first Registration is unchallengeable even if fraudulently obtained.
- 71 (1971) K.H.C.L. No. 16
- 72 See Sawyer Akilagpa, 'Customary law in the High Court of Tanzania' 6 EALR 265.
Agunda Akinola T, 'The role of a Judge with Special Reference to Civil Liberties'
Vol. 6 E.A.L.R. 265
- 73 Report of the working party on African Land Tenure.
Supra. pp 29-37 para. 69-90.
- 74 Information from Mr. Kibwika, an Officer with the Embu Co-operative Union Credit and Savings Bank.
- 75 Data collected from the Embu Law Courts Registry.
- 76 Embu, civil case No 102/74

77 Okoth Ogendo. Supra p. 174

The 1965 Commission reported that Boards refused to grant consent to transactions unless they were satisfied that alternative means of subsistence existed and in any case if members of the proprietor's family objected to the disposition (Report of the Mission on Land Consolidation and Registration in Kenya, Supra).

See also Wilson R, 'The Economic Implications of Land Registration in Kenya's smallholder areas', Journal of Statistical and Social Inquiry of Ireland, Vol. 22 No. 3 1972 pp. 124-151 and also

Wilson R, 'Land Control in Kenya's Small Holder Farming Areas' University of Nairobi, Institute for Development Studies, Staff Paper No. 89, 1970.

78 A hand book for the guidance of land control Boards, Ministry of Lands and Settlement, (Government Printer, Nairobi, 1969).

79 Embu North Land Control Board Min No. 331/65.

80 E.G in Min Nos. 340/65; 99/66; 21/71

81 Information from one of the Embu North Land Control Board members.

82 A handbook for the guidance of Land Control Boards; Supra. The Ministry advised that whether a man has sufficient land is a question of fact in relation to the agricultural potential of land and does not necessarily mean that the application should be refused. In other words, the Board should look at the capabilities of the man.

83 The assumption is that after leaving school, the son will automatically get a job. The fathers forget that this depends on whether the son passes his examinations and whether the son after so doing he will be lucky enough to be employed. Many school leavers who have gone through school successfully, including ex-university students, are floating in the towns vainly looking for jobs.

- 84 Swynnerton R.J.M. Supra para. 13 8.65 R.L.A. provides for the mortgaging of land as security.
- 85 Okoth Ogendo Supra. p. 38
86. Information from the A.F.C. Manager. UNIVERSITY OF NAIROBI
- 87 Information from an Officer of the Embu Co-operative Union and Credit Savings Bank.
88. Information from the Provincial I.C.D.C and an agent of the Kenya Commercial Bank, Embu.
- 89 Sorrenson M.P.K, Supra p. 115 where J.M. Gonds, then District Officer in charge of South Githunguri Division suggested that they should "strike while the iron is hot", and while the emergency regulations existed.
- 90 Jacoby E, Man and Land, The Fundamental issues of development (Andre Deutsch, London, 1971), p. 273 referred to by Okoth Ogendo Supra. p. 174
- 91 Fliedner H, East African Institute of Social Research Conference, 1963 Part E of the proceedings. Same views expressed.
- 92 Sawyer G.F. East African Law and Social change. p. 209 (East African Publishing House Nairobi 1967)

APPENDIX

ABBREVIATIONS

PERIODICAL

E.A.L.J East African Law Journal

CASES

A.C Appeal Cases
E.A.L.R East African Law Reports 1957 —
K.H.C.D Kenya High Court Decisions
K.L.R. Kenya Land Reports 1912- 1956

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Maguthu v. Maguthu (1971) KHCD No. 16 28, 29, 30, 31
Muluwa Gwanoubi & Others v. Abduldrasool Alidina
Visram 5 EALR 141 3
Obiero v. Opiyo (1972) E.A.L.R. 227 22, 29
Tijani v. The Secretary, Southern Nigeria
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1. Report of the East African Royal Commission 1953-55
(London, June 1955).
2. Report of the Working Party on African Land Tenure 1955-59
(Government Printer, Nairobi, 1959).
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