"LANDLESSNESS: DOES THE LAW HAVE AN ANSWER? WITH SPECIFIC REFERENCE TO MACHAKOS AND MAKUENI DISTRICTS

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BY

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DEDICATED TO:

My mother who thought it wise to take me to school when i became of age ; has maintained me from that day upto today.

ACKNOWLEDGEMENTS

A compilation of this nature would not have been possible without the help, and encouragement i got from others. Now that the work is complete, ifeel very obliged to return special gratitude to the following for I owe them a lot, collectively and severally.

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2. The LL.B III class of 1989/92, who are my collegues, and from whom I gathered many ideas which have really helped to improve my study.

3. All my friends, and especially Koki whose close companionship during the study has been an inspiration, when I felt discouraged.

4. Mrs. Monicah Kisily, who despite her normal secretarial duties found time to put this work into its final script.

To all the aforementioned, I return a million thanks, and say that the debt I owe, I will carry forever.

TABLE OF STATUTES

1. The constitution of Kenya,
2. The Registered land Act 1963 (cap.300; laws of Kenya
3. The Transfer of property Act of India, 1882 (Group 8; Applied Act
4. The Limitation of Actions Act, 1970 (Cap 22; law of Kenya)
5. The Governments Land Act Cap 280 laws of Kenya
6. The land Control Act cap 302 laws of Kenya
7. The judicature Act, 1967 (cap 8, laws of Kenya S. 3(i)

ABBREVIATIONS

E.A.L.R.	EAST AFRICAN LAW REPORT
C.A.	COURT OF APPEAL
R.L.A.	REGISTERED LAND ACT
L.C.A.	LAND CONTROL ACT
G.L.A.	GOVERNMENTS LANDS ACT
CAP	CHAPTER
K.A.N.U	KENYA AFRICAN NATIONAL UNION
I. T.P.A.	INDIAN TRANFER OF PROPERTY ACT

"The first man who having enclosed a piece of the ground bethought himself of saying. This is mine, and found people simple enough to believe him, was the real founder of civil society. From how many crimes, wars, and murders, from how many horrors and misfortunes might not anyone have saved mankind, by pulling up the stakes, or filling up the ditch, and crying to his fellows, Beware of listening to this importer you are undone if you once forget that the fruits of the earth belong to us all and the earth itself to nobody"

Jean Rousseau

INTRODUCTION

The Problem

Mention land in any sphere of our society, and you will surely know that perhaps there is no aspect of Kenya's history that has attracted as much attention from writers, scholars, politicians and Wananchi in general, like land. Land prevades all aspects of the political, economic and social phenomena of the Kenya Society hence it is very important a resource.

The struggle for Land and the right to use land, the vicissitudes of man's relation to land are recurring features in the history of mankind. For without land, there is no survival for the human race. The relationship between man and land are therefore very important in our study.

The saying goes thus; 'whoever owns the land wields the power.' The entire historical epocks holds this to be true and we strongly uphold the same.

It is from the importance that is attached to land that we strongly feel that the situation of the landed and the landless should be addressed to. Generally, people are concerned with the landed, that is what they have, and how they have acquired it. It is in very few cases where people refer to the landless. In actual fact, the landless are in most cases only referred to when they have interfered with the land of the landed.

Owing to the imposition[3] of the western legal structures in the Kenyan situation there has been a marked alteratum in land relations. The area of our study is not an exception to this general rule. Therefore, the creation of the social structures that have taken roots in Kenya could be said the ultimate cause of landlessness as a social problem. This is the issue that we intend to tackle in our thesis.

Our thesis however covers the whole country in general but mostly inclined towards one particular area namely Machakos/Makueni Districts. To be more specific it is meant to be a case study, but with a national outlook.

REASONS WHY THE STUDY IS UNDERTAKEN

This study is undertaken with a few objectives in mind.

We hope that by the end of the thesis, we will have produced something which will be of help to many.

To the landed, the study is aimed at showing them that there is no need of filing so much land for oneself while there are many who are landless.

The landless should be aware and get awakened to the fact that they have rights on some land somewhere. Their rights might be far-fetched or somehow unreal but they can be revived if followed seriously.

The study, further aims at warning the legislators yet another time, that their laws do not reflect the wishes of the people they are supposed to. The legislator are therefore supposed to take need of such scholarly works, and make use of them for the betterment of the society.

But, the question is whether research conducted by scholars in the ordinary course of academic work ever reaches the ears of the legislators, or evens get their attention. However, we strong feel that a lot more would be achieved if legislators took a keen interest in research findings as a means of communicating the peoples needs and demands of the legislature, rather than regarding such paper as mere academic useless efforts.

Lastly, the study endevours to reveal the situation or the state of affairs in Machakos/Makueni Districts. The reason behind this being the fact that alot may be said, and a lot has been said in relation with landlessness in Machakos/Makueni Districts. However, this has been said from a general point of view without pinpointing the affected areas. It is from this premise that we intend to take an approach of tackling the problem of LANDLESSNESS as manifested specifically in these areas.

CHAPTER BREAKDOWN

This thesis is composed of four chapters. These chapters are co-related in such a way that at one point or the other, there will be some repetition. But it should be understood that each chapter is addressing a specific issue aimed at

elucidating on certain material facts which are a prerequisite to our work.

Each chapter is sub divided into subsections which have sub headings. This mode has been adopted to make it easier for the reader to grasp the gist of the matter contained herein our thesis. There are paragraphs in each chapter and the number is not standard for they are as many or as few as the situation demands.

Chapter one, the opening chapter, starts with theoritical framework. This is intended to trigger off the readers mind to some mental jogging as regards property rights. It will cover the different concepts of property that exist locally nationally and internationally. The aim of including this part in this chapter is to show the origin of property, and to emphasize on the importance which the founders of law place on it.[4]

Further this chapter will cover the access to land in the pre-colonial era in Kenya, and the history, and development of private property and interests in land in England. The feudal system, and its subsequent importation to the Kenya society, thus breaking the system of occupation to be discussed in part one of this chapter is the launching pad for our treatise. This is the basis of landlessness.

Chapter two, the legislation that was enacted after independance to govern all land related dealings. In particular, the constitution, the Registered Land Act, the land control Act and the Government lands Act are all to be covered under this chapter.

The discussion of these Acts is geared at exposing how the legislation, or the laws we have, have continued to exercabate the problem of landlessness rather than solving it.

In our chapter three, we will narrow down our views to the case study area. This is Machakos/Makueni Districts. In our endevours to show the manifestations of landlessness, we will state specific cases as examples. These examples are to

include the Masongaleni resettlement scheme,Athi river area, Katelembu Co-operative society, and several Auction charged lands.

All these examples are aimed at showing the extent of the problem of landlessness in Machakos/Makueni Districts.

Chapter four, our last chapter is not a chapter as such. But it is meant to harmonize the other chapter by drawing the threads of each to form a solid conclusion with some policy recommendations.

METHODOLOGY OF RESEARCH

Our work is mostly archival although because it is a case study, we have to get some material from the Machakos law courts, and the Ministry of physical planning in Machakos.

There were some interviews carried on orally to some squatters leaving near Athi River, and several people who are beneficiaries in the Masongaleni Resettlement scheme.

No questionaire has been used for most of the written work that we have to use has been collected by use of questionaires. It is from these published works that we are going to borrow our wisdom from, therefore, there is no need of using questionaires.

N.B.

Property in this paper is to be regarded as Realty and not personal property. This is to be implied from the premise of the general law rule that:-
"all interests in land are real property, with an exception of leaseholds (or terms of years which are classified as personality)"[5]

FOOTNOTES TO THE INTRODUCTION

1. In his book Discourse on Inequality part 11 (quoted) in Lawrence C. Becker, Property Rights philosophic Foundations (London: Routledge Kegan Paul) 1977

2. Relationship between man and land - see simpson S.R. "Land Tenure: "Some Explanations And Definitions" (1954) 6 JAA 51
   See also Wade H.W.R. Landlord, Tenant and Squatter 78 LQR 541

3. Okoth - Ogendo: Imposition of Property Law in Kenya

4. J.W.C. TURNER Some Reflection On Ownership in English Law (1941) P.343

5. Megany R.E. and Wade H.W.R. The Law of Real property 3rd Edn. (London: Stevens & Sons Ltd) 1962 see also 5th Edn 1975

CHAPTER ONE

WE KNOW EVERYONE WOULD LIKE SOME LAND - ONE OF THE CLASSICAL FORMS OF OPPRESSION IS TO DEPRIVE PEOPLE OF IT"[1]

THEORITICAL FRAMEWORK

"It is so no-a-days forexample, we see a man carrying an umbrella, we cannot tell whether or not he possesses it. If he is a thief, he possesses it. If he is the owners servant, we shall probably deny his possession. If he is a borrower, we may have our doubts. The language of everyday life may hestitate about the matter. Law must make up its mind: law must decide"[2]

Pollock and Wright[3] have gone on to substantiate the quotation above in relation to hand. They said, before we attribute possession of land to a man, we must be supposed to have when the manner in which he came by the land has been taken into consideration. However, for purposes of our study we will say at once that we require to know how he came by that land.

The right to own property is recognised internationally. The American and French revolutions[4] produced the innovation that is, the first formal enumeration and definition of the rights and freedoms of individuals with the state incorporated into the very foundation of state itself. In france, it took the form of Declaration of the rights of man and the citizens of 1879. In U.S.A. of the Bill of rights added to the constitution in 1791 among them the right to own property.

During the English Industrial revolutions[5] the ideas of John Locke, Jean Jacques Rosean emphasized that a ruler could only derive his powers from a social contract with his subjects which imposed obligations on him as well as granting him rights.

Socialism of the C19th was demanding that the government should intervene actively and redress social and economic injustices. John Locke[6] emphasized specifically on property. He said, life, liberty and property were the most sacred of all rights of man. John Lockes proposition was reinforced by

Article 17 of the universal declaration of human rights which stated that:

"Everyone has the right to own property alone as well as in association with others"[7]
It goes on to say that, "No one shall be arbitrary deprived of his property"[8]

In a more absolute form the right to property shall be guaranted does the African Charter. But not so either of the United Nations Covenant which observe complete silence on the matter

IDEOLOGICAL ISSUES

The Marxist demonology[9] terms the property owner as the most wicked capitalist, exploiting the toiling masses and living by owning. They propose that all the property (productive) must be vested only in the state, to use and to dispose of it in the collective interest. If a capitalist property is taken from him, he deserves no compensation in this school of thought.

The liberal school of thought regards the state as anthema and state that the ability to acquire property is the principal incentive to thrift hardwork, responsibility and the development of the individuals full potential.

At this point, it is imperative for us to note the fact that, Europeans, Americans and Africans evidently prefer the liberal view to the Marxist, and therefore enshrine it as a universal human right[10]. However, most socialist countries are silent on the matter. Never the less in most European, American and African treaties it is only the use and enjoyment that are emphasized on. Little do they say about ownership.

When it comes to the deprivation of property, or control of its use, the European, American and African Charter give the state its public authorities for more scope for intervention than in the case of any other right or freedoms on grounds such as public need, public utility which are not to be found anywhere in any human rights treaty.

Conclusively, we would say that the right to own property is more

weakly protected than any other right. The actual occupant of the soil, who is cultivating it and taking its fruits might be doing so in exercise or professed exercise of any one of the many different rights. These rights are not baseless, and therefore inorder to establish the land rights existing in the Kenyan situation, we are forced to fall back to western Europe and that the development that fostered the present Kenya land rights.

The foregoing illuminates the way to our first chapter. Since land prevades all aspects of the politica, social and economic characteristics of the Kenyan Society. The access to land in the pre-colonial era is thus very important in our discussion.

1.2 THE STRUCTURE OF ACCESS TO LAND IN THE CUSTOMARY SET UP (CUSTOMARY LANDS TENURE BEFORE THE COLONIAL ERA)

In indigeneous African societies, the land owning unit was the fami or lineage group. A particular lineage group would settle on a piece of land and hold that land by usufrutuary rights. This point is summed and reinforced by the following quotation:

"The notion of individual ownership is quite foreign to native ideas. Land belongs to the community, the village or the family, never to the individuals. All the members of the community or village or head of the family has charge.of land, and in a loose mode of speech is sometimes called the owner. He is to some extent in the position of a trustee and as such holds the hand for the use of the community or the family. He has control of it and any member who wants a piece of land to cultivate or built upon, goes to him for it, but the land so given still remains the property of the community or family. He cannot make any important disposition of the land without consulting the elders of the community, family, and their consent must in all cases be given before a grant can be made to a stranger"[11]

This was the status quo in relation to land rights in the African thought. The land could be parcelled out to each member of that community who became of age to start his own homestead. This individuals was therefore expected to exploit the resources available to his utmost ability.

The use of land was open to all everybody by virtue of being

a member of a certain tribe. Every member was entitled to the use and occupation of land once it had been cleared and settled on by that particular unit which he belonged. The individual would use that land for the exploitation of the soil. The occupation of land was thus of user only. He did not have absolute rights. The individual could therefore not alienate land to somebody else without the consent of the rest of the unit.

Each group had a council of elders who were involved in the administration of the land. Among the Kamba people these were known as the clan elders (Atumia ma Mbai)[12] Their major role who to parcel out land to the members of community who had become of age, and to arbitrate in cases of quarrels emerging among the individuals and families. At any rate the elders had no title to the land, since it was a non-existent concept in the African context. The radical title remained in the lineage group but the right of user by possession was in the individual. This goes to defeat the general notion that land was held of a particular tribe.

The concept of primitive communial ownership which is deemed to have been a characteristic of the African societies is a rebuttable presumption of fact. The reason being that in the customary set up, there was individualization which was evident in the exercise of control of a piece of land once one settled on it. However, it should be noted that individualization was not in the context of the western ideologies. Professor Schapera commented this about the Mbera:

"Land perse has no value in the eyes of the Mbera, and nobody bothers about it until it is cleared. Any member of the tribe or any stranger who has been granted permission to settle in this country can of right take and clear as much land as he defines for his house, his feeds and possibly his family burial ground. As soon as he has done this the position has changed. The work he has put into the plot gives its value, it is now his property, and no one may encroach on it... so long as it continues to be used, it remains the possession of him or his heirs."[13]

This is true of the Africans, for there was actually a noticeable sense of individualization. The control which each one had over his piece of land.

However, the political organization was not centralized. The social structures were extremely segmented and acephalous[14]. There was no centralized authority on matters relating to land. Yet as one writer has pointed out, there was a universality of certain concepts through out a cross section of Kenyan societies amidst the multiplicity of cultures which existed in Kenya.

The patterns of land tenure were greatly connected with the political organization. As such the acephalous nature dictated that land could only be held by a unit of the tribe. Land therefore belonged to a tribe by virtue of being occupied by units within that tribe. This aspect leads to the attenuation of the principle that in Kenya land was owned by a tribe. The land holding unit as said earlier was the lineage group but not the tribe at all.

Africans had no other motives of holding land as illustrated by the Mbera's example. No cash value was attached to land since the mode of production determines the land tenure, and the importance people attach to land. Speculation in land for the purposes of capitalist monopolization was therefore non-existent. The occupation of land carried with it some sense of brotherliness which the feudal system in England lacked. To reinforce this proposition, we will use sorrenson's words, he said:

"This fact is manifest in many customs as any passerby could eat off ones farm to his fill so long as he did not carry away anything"[15]

This was very true in the African societies, and in conclusion, he further went on to conclude his work with this remark which is to be a locus classicals in our work. He said:

"Access to land was therefore centrally important and land was equa central in the jurisprudence of these societies"[16]

Therefore the usufrutuary right was the major idea . The concepts of ownership and possession were unheard of in relation to land. Actually, access to land was of paramount

importance. However, to a stranger the Africans concept of access to land could not be very clear at first sight. But, the fact tha the African land rights could not be ascertained did not mean that the Africans had no rights to land. At least Bohannan P. was sincere in respect of the above point when he said

"The analysis of the clusters of rights andclaims, privileges and liabilities which are related to the ways in which Africans hold and work the land, like on it and use its products is acomplex one, on the one hand because of the difficulty in evaluating the exact nature of the rights and claims, and on the other hand, because the implication of economic social, political and religious factors. It is therefore difficult to characterize African systems of land tenure in terms of familiar legal or linguistic concepts"[17]

The pre-colonial set up in Kenya and in most African countries as regards land tenure, the land systems, land use, and the conceptio of ownership did not allow for a situation of the landed and the landless. As we pointed out earlier, land belonged to 'everyone' and everybody was contend. It is during colonialism when the problem of landlessness was born being a child of the capitalistic economy that was introduced.

1.3 HISTORY AND DEVELOPMENT OF PRIVATE PROPERTY AND INTERESTS IN LAND IN ENGLAND

1:3:1 Structure of Access to land in England (Feudal theory)

Generally, the origin of property rights can be traced back to the origin of the family[18]. The fatherright and inheritance of property by children favoured the accumulation of wealth. Land was the basic tool in the production process and therefore was given alot of concern.

In medieval England[19], We see the development of the property rights in land during the reign of Edward I. During this period the state of the society's great part of public rights and duties were inextricably intervoven with the tenure of land. Thus the whole governmental system, financial, military, judicial were part of the law of private property.

After the Norman conquest of 1066, all land in England was held of the King and any person who had the right to live and cultivate it was a tenant. Land belonged to someone who was his lord. If the Lord was the King, then the tenant was one of the Kings tenants in chief. Each of the person who stood between the kings and the other person was a mesne or an intermediate lord.

This was the actual arrangement with it connected with the theory that at some past time, all lands were the kings to do what he liked with, he could give land to any of his great Barious and his heirs for certain services. They could later give it to another Mr. X who could in turn give it to Mr. Z until we came to the lowest tenant who could now enjoy the land. This process was called subinfeudation.

The process of sub-infeudation collapsed with the death of Edward 1 in the year 1307. During this period, a statute of Quia emptores terrnum[20] was enacted. According to this statute, no one else save the king had land that he did not hold of someone else. In every case, the tenant in respect of the land owed some service to the lord - this in theory was the return he made for his lord for the land. The ideal of tenure superceded the theory of kings ownership - tenure being some mode of holding the land.

As time went by, these tenures were classified into six groups namely:- Frankalmoign, Knights service, Grant Sergeantly, Petty Sergeantly, free socage and Villeinage. We do not intend to go into details of this classification because so much literature exis in details about the same. Never-the-less it is important to menti how each tenure was held and by who.

Frankalmoign was held by religious persons and bodies. They did no earthly service to the lord, but only owed a spiritual service by praying for the soul of the donor who had given them land.

Knight service and petty sergeantly were modes of holding land by military service to the king (lord). Knights service involved the real army of armed horsemen whereas petty sergeantly was just made for the supply of war implements.

Free socage and grant sergeantly fell under one category. They were tenures by some fixed service which was not military. For example, doing some ploughing, payment of rent etc.

Finally, there was villeinage which was a type of tenure held by those who were unfree. These people were not slaves although unfree. They were not rightless and law does not treat them as things it treats them as persons. They had land which the law had not granted them, and no protection was accorded by the law. If the lord chose to capriciously eject them, they had no remedy against the lord in the kings court. The law stamped him as a person with imperfect rights.

The doctrine here was that the land was the lords, that the tenant is merely a tenant at the lords will whom the lord at any time could eject. The tenants could not therefore alienate their lands. But if tenure was freehold, it was protected in the kings courts.

This sytem of land ownership introduced new concepts in relation to property. For instance, before the Norman Conquest primogenitu was unknown. If a man left several sons, his whole property land, chattels were as a general rule divided among them all. P Primogeniture crept in with the conquest. Gradually aset of rules of inheritance giving the whole land to the eldest male wherever these were males of equal degree. This concept was late extented to all lands.

In the middle ages, land law became the basis of public law. The system of tenure could provide the king with an army or with a revenue. For istance, men owe military service by reason of tenure, by reason of tenure the king could get profitable wardship, marriage and escheats. He was the supreme and ultimate landlord.

The influence of tenure went on to the judicial system, and parliamentary system and thus every man claimed a right to hold a court of, and for his tenants. All judicial and governmental organizations were determined by tenure.

In feudal system, there was no absolute ownership the general idea being that no land in England in the hands of a subject

which is not held of some lord by some service and for some estate.

At this juncture, it is imperative for us to note that the fact feudalism in England was imperfectly realized. It was an ideal which was more theoritical than it was in practice. We must constantly notice that this is the time when common law got its shape, yet land law is taking the shape of unprincipled labyrinth of many theories.

The essence of discussing this feudal theory is that these concepts discussed are the same ones that were imposed in the Kenyan system during the colonial era. At independance and after extension of the western concepts of property (land) has continued to affect the rights to land and the tenure system in Kenya. It is therefore important for us to discuss the origin of the ideas of 'ownership' and 'possession' which are the two important concepts which have fostered the problem of landlessness

1:4:1 ACCESS TO LAND IN THE COLONIAL ERA: ALIENATION OF AFRICANS AND THE LEGAL JUSTIFICATION

The close of C19th witnessed the partition of Africa [21] among the main imperialist powers one of these powers was Britain (England). One of characteristic feature of the scramble was the rise of monopoly combines which own and control the social means of production specifically land.

In 1885, at Berlin Conference, all powers aimed at establishing a report on an orderly acquisition and sharing up of Africa continent. By the Agro-German agreement of October 1886 the territory which was to constitute Kenya was under Britain-British sphere of influence. The colonization of Kenya by the British raises a few consequent policy and legal issues which we will address ourselves to in this section.

In 1895, East Africa was declared a British protectorate. The British government had to ensure that there was enough power for effective rule. Inorder to ensure that there was enough power, the foreign office issued the East African Order-in-council

of 1897. This was inaugrated officially on 12/8/1897 when Kenya received the;

"Substance of common law, doctrines of equity and the statute of general application in force in England which were only going to apply so far as the circumstances in Kenya and its inhabitants permit, and subject to such qualification as the circumstances may render necessary."

This provision set a stage for the imposition of alien laws and institutions that were to have fundamental consequences for land relations in the Kenya Society. The transplanting of the unprincipled labyrinth of many theories started on an official note. All the imperfect feudal rights discussed in section one of this chapter were to be imported to Kenya by force. Consequently the promulgation of several other orders-in-council and ordinances was aimed at developing the European sector by under developing the African sector.

In 1833, the British government had been advised by the law officers that the exercise of protection over a state did not carry out with it power to alienate the land contained therein, unless a right to deal with waste and unoccupied land was specifically reserved in an agreement or treaty of protection, no such right could be allowed in a protectorate and even in respect of waste and unoccupied land, it was not clear whether it could be alienated. This was a major draw back since it limited the colonial authorities power to control land which was one of their major target.

Despite the advise by the law officers, the British government acted deaf to it. By 1896, the Indian land Acquisition Act[22] was extended to Kenya. This Act allowed the government to acquire land compulsorily for the Railway, Government building and other public purposes. Those indigeneous people who were affected by the compulsory acquisiton had to look for land elsewhere. This was the beginning of the landlessness problem.

The land regulation which was passed in 1897 was specifically made for settlers. It empowered the commissioner to offer any certificate of occupancy valued for 99 years for those wishing to take up land. Settlers also wanted to settle in the rest of the protectorate and this facilitated the 1899 enactment[23]. In this enactment, the law officers in Britain deliberated on the right

to deal with waste and unoccupied land in the protectorate. The aforesaid right hereby accrued to Her majesty by virtue of her right to the protectorate. This was because protection in these circumstances involved sovereign control over all lands not appropriated either by the sovereign or by individuals.

The main issue here is the fact that the assumption of a protectorate perse operated to confer rights upon the crown.

To give effect to the law officers opinion, the East African order in Council of 1901 was enacted. According to this orders all crown lands were to be held in trust for Her majesty. The commissioner was further empowered to make grants or leases of crown lands on such terms and conditions as he might think fit. Crown lands were also defined as:

"Public lands within East Africa protectorate which for the time being are subject to the control of her majesty protectorate and all lands which being or may hereafter be acquired by Her majesty under the land Acquisition Act 1896 or otherwise howsoever"

It is therefore imperative for us to note that the whiteman has already invaded and destroyed the pre-existing natural economy prevalent among the indigeneous societies. The natives now have very limited rights to the land, landlessness continues to deepen its roots in the society.

Thus in 1902, the Crownlands ordinance was promulgated. It conferred on the commissioner the power to make outright sales of lands and leases of 99 years to prospective European settlers. Since the rights of African were only seen in terms of occupation when land was no longer occupied by Africans, it could be sold or leased as if it were waste or unoccupied land.

Basically, Africans were shifting cultivators, much of their land was left on many occassions to revert fallow. The consequent declaration of their unoccupied fallowing land as crownland therefore struck at the very basis of their subsistence economy. The case of PETER WANYOIKE GATHURE VS: A BEVERLY[24] explains this fact more elaborately.

In 1915 there was a crown lands ordinance which clothed the' commissioner cum-governor under section 34 with the power to grant leases for 999 years.at nominal rent. Section 54 conferred on him, "the mandate to set aside land for the use or support of the members of the native tribes of the protectorate" The natives had no rights of alienation whatsoever. Section 56 the governor-in-council could alter such native reserves while under section 57 he could exclude from such reserves any land requi for public purposes.

This was a complete deprivation of the Africans, as illustrated by the case of ISAKA WAINAINA WA GATHOMO & KAMAU GATHOMO VS MURITO WAS INDANGARA & OTHERS'SIR BARTH C.I candidly contended that:

"In my view the effect of the crown lands ordinace, 1915, and the Kenya (Annexation) order-in-council, 1920 by which no native private rights were reserved, and the Kenya colony order-in-council, 1921, as I have already stated is clear interalia to vest land reserved for the use of a native tribe in the crown. If that be so then all native rights in such reserved land, whatever they were, under the Githaka system disappeared and natives in occupation of such crown land became tenants at will of the crown of the land actually occupied"[25]

In effect therefore Africans had been converted into tenants at will of the crown. Their tenancy could be revoked anytime as per the whim of the crown and finally they were limited to specifi limited reserves.

The consequences of the reserves are grossly negative. First, there was overcrowding under the legally imposed notion of territorial fixity. There was deterioration of soils in those reserves because of poor methods of farming. Natural rise of population among the Africans was inevitable. This exercabated the problem of landlessness.

By 1940's land scarcity in the reserves had beeome a critical economic and political issue. The Africans were demanding for the restoration of their 'stolen land'. This culminated with the 1952 mau mau rebellion, and it is this time when the Europeans become aware that the land issue was not longer going to be ignored.

The swynerton plan of 1954[26] was a move towards reform and it was emphatic on tenure and technology of production. These two were termed as the main issues of accessibility to land. The plan suggested that a restructuring of the system of property right in reserves could help confirm security of tenure through an indefeasible title. However, the plan did not cover or concern any peasant, it was only to the farmers already dealing with settler crops.

Individualization of tenure was also seen as a political instrument which could be used to blunt Africans demands for land redistributi Swynerton included that, "the greatest gain would be a content and stable community"

Never-the-less, the individualization revealed for the first time the true extent of landlessness. But the tenure reform cannot be said to have automatically generated landlessness, it only aggravated the situation of those who were already landless but had been accomodated in one way or another under customary law. Their privileges along with other customary rights not noted on the register were extinguished by the process of registration.

1:4:2 ALIENATION OF AFRICAN LAND AND GENERATION OF LABOUR

Basically, the colonial land policy was bent on the alienation of extensive tracts of arable land for the settlers and limiting native land for their very bare existence as a stimuli for coercing the natives to flood the labour market. This is well manifested in the labour inquiry board of 1908 which said:

"..... The land set aside for native reserves should be limited to the present requirements of the natives. The existence of unnecessary extensive reserve is directly antagonistic to an adequate labour supply[27]"

The Africans could only derive their income from wage labour on European farms. R.D Woiff[28] says that by limiting the land and the knowledge available to the Africans in the reserves, protectorate land policies induced them to leave the reserves for employment as wage earners on European farms.

To safeguard the alienated land from interference and encroachment by the dispossessed Africans, the colonial regime criminalized the tort of tresspass to land. This ensured that Africans were restricted to their appointed reserves, and those who were labourers remained labourers. They were not supposed to go or settle where they were not required to.

This use of criminal sanctions is deemed to have been used to implant the notions of sanctity and impregnability of private property in the African mind. By the Trespass ordinance of 1924 section 3 , it provided that "Any person who shall without reasonable excuse where-of the burden of proof shall lie upon him, enter upon the cultivated or enclosed land of any other person, without the consent of the owner, occupier, or person in charge thereof, shall be guilty of an offence and on conviction, shall be liable a fine not exceeding 50/= and in default of payment, the imprisonment of either description for a term not exceeding one month"

This means that Africans could only be on a particular piece of land if it was within the reserves, or if he was a labourer on a settlers farm. The question of our concern is, what then happe to this labourer after he lost his waged labour? If in the reserves registration had already taken place, then this person became landless. Many people became landless during this time especially those who were labourers and also those who were active participants in the mau mau rebellion.

H.W.O. Okoth Ogendo[29] writing on the African land rights in the 1902 ordinance says that the settlers had two sets of problems. The first being the extent of their rights to land, particularly land found to be suitable for the settlers. The second was labour. In theory however, the Africans were not supposed to be thrown out of their land even if it fell within the settlers grants. The Africans were to be given time to vacate. The provisions of both 1901 and 1902 ordinances had loopholes which were to the disadvantage of the settlers. That is why they demanded for the freedom to enter into agreements for the removal of the Africans. In addition, the reserve policy was adopted and African were grouped into definate reserves. This enabled the whites to secure more arable and suitable lands for their settlement.

However, some reserves had been established through the use of treaties. The Maasai agreements of 1904 and 1911 are the best examples. It is at this time when we got the first case related to land alienation - The case of OLE NJOHO & OTHERS VS OF THE EAST AFRICA PROTECTORATE[30] where the Maasai's lost their land to the whites after entering into a treaty. Their efforts to sue the government were rendered futile. They were moved to Laikipia and later on to the more arid southern Rift Valley despite the terms of the treaty of 1904, that the settlers will not take up land elsewhere in the reserved areas.

The outlying Districts ordinance provided mechinery whereby the administrations could declared certain districts as 'closed'. For example Ulu and Kikumbulu in Ukambani. This declaration restricted all movements to and from that district. Therefore, African were controlled in their movements in certain parts.

This means that Africans not only lost their right to property but also lost their freedom of movement. Most of the Kenyan tribes were nomadic tribes, restricting their movement was going to the very basis of their livelihood. They were reduced to rightless beings, the only option remaining was to become labourers in the settlers farms.

The area between Kiu in Ukambani and Fort Ternan in western Kenya was all under the control of the Europeans. These areas were controlled without prior caution in relation to any land rights of non-Europeans in the protectorates. Africans were just dumped in the reserves and their cases forgotten except when they went seeking for waged labour.

CONCLUSION

Now that we have exhaustively discussed what was happening both in Britain and Kenya as regards land ownership, we want to discuss several legal issues emanating therefrom.

First, we have noted that though in Britain the feudal system came in with the Norman Conquest, the system was very fair to the inhabitants of western Europe. Nobody was left landless even though some had imperfect rights on the land. The modes of holding land were quite numerous and as such every person held land by whatever tenure. Therefore we can conclude that the Norman Conquest never affected England in a negative way as far as land was concerned.

By contrasdiction, the advent of the colonial rule in Kenya can by no standards be compared to the feudal system in England. The whiteman came and extinguished all the rights of the Africans that is the rights of occupation in land. The colonial rulers do not want to recognize these rights. Instead, the Africans rights to property and movement are curtailed. The native (Africans) can only be compared to the lowest class in the feudal system - the villeinage. These was the mode of holding land without proper rights of holding it.

These are the people said to have imperfect rights Thus even though this is the lowest group or class of people in the country, they are still recognised. They are not landless. However, the law cannot protect them, they are actually in a better position than the natives in the colonial era.

In the feudal England, nobody is landless just like it is with the customary society. But then when the whiteman from the same England comes, he extends the same rules applied in England in the Kenyan context. This is evidenced by the declaration of the whole land as crown land as long as it is under the governors protection and control.

The African land rights are not recognised and the various ordinances are all aimed at advancing the territory of the whiteman and limiting the African to the reserves for their bare existence.

Colonialism was aimed at getting raw materials for their industries establishment of ready markets, for their manufactured goods and further to establish a Tabula Rasa for investiment of surplus capital. These being their prime aims, then the unfairness and injustices manifested in their dealings with the Africans might be justified.

In addition, as generally understood by all, the Europeans took Africans as sub human beings who did not deserve any fair treatment. The whiteman had a misconception abinitio about the potential of the African (blackman). Infact, the whiteman could not imagine that there were land rights in Africa or that actually the African really needed the land. This misconception of the blackman is clearly manifested in the attitudes of and the treatment of Africans by the settlers.

The next chapter will deal with the various Acts of parliament enacted after independence to encompass all the land issues. The spirit behind each statute enactment, and the applicability and practicability of each statute are to be discussed in details.

FOOTNOTES TO CHAPTER ONE

1. See H. Carns: Law and the social sciences (1935) p.g 59
   J.W.C. Turner_ Some Reflection on ownership in English law (1941) p.g343
2. See Megarry: The law of Real property
3. See F. Pollock and R.S. Wright_ Possession in common law p
4. French Revolution 1789 and American Revolution 1776
5. See Lawrence C. Becker, property rights : Philosophic Foundations
6. Ibid
7. See sieghart Paul_ The lawful Rights of Mankind: An Introduction to the legal code of Human
8. Article 17 of the universal Declaration of Human Rights on
9. Karl Marx: The Origin of Family, private property and stat
10. See the universal Declaration of human rights
11. Lord Chancellor Halden in the case of
    Amoda Vs Tijani Vs. Secretary of S. Nigeria (1921) A.G. 399
12.
13. Appointment of chiefs like Kinyanjui of Kikuyu land
14. Meaning Different local tribes each with its own powerful structures and institutions
15. M.P.K. Sorrenson_ Land Reform in Kikuyu (O.U.P.) NBI 1967 - pp 3 - 5)
16. Ibid
17. Land Tenure (Bohannan p.) in D. BUBUYCK?, ed. African Agrarian systems oxford 1a.
18. Supra No.9
19. Maitland: History of English land Vol. 1 pp 282-90
20. A statute of 1290
21. The Berlin conference of 1885
22. The Act of 1894
23. E. Ast African Order - in - Council 1899
24. (1965) E. A 514 at P. £L¾
25. 1922-23) 9 KLR at 102
26. R.J.M. Swynerton_ Assistant Director of European Agriculture - Plan to intensify the Development of African Agriculture in Kenya
27. Richard D. Wolff_ Britain & Kenya 1870-1930 p.g 99
28. Ibid
29. Okoth - Ogendo: Tenants of the Crown
30. (1914) 5 E.A. L.R. P.70

CHAPTER TWO BREAKDOWN

2.0 TOPIC LANDLESSNESS AND THE LAW

2.1 INTRODUCTION

2.2 LANDLESSNESS AND THE CONSTITUTION

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2.6 CONCLUSION

2.0 LANDLESSNESS AND THE LAW

2.1 INTRODUCTION

As we have already observed in chapter one, Africans were completely alienated from their land. Customary land tenure was replaced with the English law as evidenced in the 1950's and peoples rights to land were now being subject to a new law based on a foreign tenure. Africans were compelled by legislation to vacate their traditional land. Consequently, landlessness arose in the white Highlands, Central province, Rift valley and parts of western province.

In our second chapter, we do not wish to go into details about the different legislations that the colonial rulers used. Rather, we intent to look at the independent Kenya, discover how the independent Kenyan government addressed the problem of landlessness caused by the colonial alienation of land.

But, before we continue we make clear the fact that our discussion is inclined to the contention that the fact that landlessne the subject of our study was there before, at and after independance, is enough evidence to show that land law in Kenya has very many loopholes. It is these loopholes that our discussion revolves around. In so doing the Registered land act, the constitution of Kenya and the land control act are to be screened and discussed exhaustively, especially where they seem to have exercabated the problem of landlessness.

2.2 LANDLESSNESS AND THE CONSTITUTION

Holdsworth[1] in his book had this to say on the importance of land law to any country.

"The rules which regularize the manner in which land can be owned, used and disposed of must always be of a very great importance to the state. The suitability of the state, and the well-being of its citizens at all times depend to no small extent on the land law[2]"

This shows the importance of land law to any country which entirely depends on land for economic survival.

The draftsmen of the Kenya constitution in the lancaster House conference of 1960 never forgot to include land in the constitution.

...

However, so much influence of the English property law is quite evident. The rights of the private holder of property (land) became very well protected, in actual fact being made sacred by virtue of section 75 of the constitution.

Initially, the first parliament sought to address the needs of the landless people. In the opening statement, the president said

"We rejected both western capitalism and Eastern communism and chose for ourselves a policy of positive non-alignment"[3]

This quotation imports a socialism spirit which was known as African socialism. It had been adapted and was aimed at developing and grounding a system which was in itself African in its entirelty. This system was based on the African traditions and was to be adjusted to suit changing social times. Any form of selfishness and greed emanating from private ownership was not to be condoned.

It is quite interesting to note the concern the first leaders of our nation had towards the landless. James Gichuru representin Kanu at lancaster House conference in 1962 said:

"This council records that the settlement of the landless, unemployed and impowerised is a matter of the greatest urgency. It therefore supports a general policy of land reform the principles of the settlement schemes and urges the government to examine all possible methods by which such people may be provided with land and which such people may be provided with land and adequate finance in the quickest and most economical way possible."[4]

During the debates, several very constu ctive arguments with a philanthropic base were advanced. These arguments led to what the is in our constitution today. If this be the case then why do we have the problem of landlessness?

The constitution further stipulates as to what a Trust land is, and how it can be set apart. This is to be found in chapter 9[5], and the provisions are so clear as to how the Trust land shall rest in the county councils, within whose area of jurisdiction it is situate. It also indicates how the land shall cease to

be

be a trust land by the vesting of the title in an individual or body. The manner in which a trust land can be set apart by the county council, and the setting apart of trust land for purposes of government are well prescribed. Land which is no longer required for purposes of government and the Escheat of rights in former trust land are given clear elaboration.
The fact that our constitutions addresses the idea of private property, is a clear indication that everyone is entitled to some land. If everyone is entitled to some land, then the constitution should have provisions concerning the landless. The mere fact that the issue of the landless was ommitted shows that the fundamental law of the land is completely silent on this very important social problem, landlessness.

Mzee Jomo Kenyatta in one of his speeches said that:

"Our greatest asset in Kenya is our land, this is the heritage we received from our forefathers. In land lies our salvation and survival"[6]

Thus, what future is there for one who does not have land? This is a question that many of us may not take into account, but in our third chapter we will show how many of our population are landless.

2.3:0 WHO THEN OWNS THE ONCE COMMUNIALLY OWNED LAND

2.3:1 LANDLESSNESS AND THE REGIME OF R.L.A[7]

As earlier discussed, the Swynerton plan of 1958 [8] identified the African system of tenure as the major constraint. It therefore suggested a system of fragamentation whereby one family could posses several fields in different places but this never augered well with the African community.

Later, the idea of the idefeasible title was introduced. According to this system an individual could be given a title to the land he owned to the exclusion of all other people. This system was said to be proper for the development of the parcel and for investiment since there was security accorded by the title.

However, swynerton with his prophetic tongue never declined to say that this will create a landed and a landless class. But he

still commented that this is a normal step in the evolution of a country.

No sooner had this system been introduced than there appeared a landed and a landless class. This happened in the sense that only a few people could own land since family land could be registered under one or a few individuals. The rest of the family members could have no land.

According to section 27 (a) of the RLA; the private holder is addressed as an absolute proprietor.
The section states:

"The registration of a person as a proprietor of land shall vest in that person the absolute ownership of that land together with all the rights and privilleges belonging or appurtenant thereto....."

Section 28 reinforces on the provisions of section 27(a) and is to the effect that_ the rights of a proprietor whether acquired on first registration subsequently for valuable consideration, or by order of court, shall be rights not defeated.

Courts have strictly observed the above provision as shown by the case of Esiroyo V. Esiroyo & Another whereby the general wish of family members was not reflected by the register, then it means that all those people all rendered landless.

In this case, a father was held to have absolute rights in the family land, so that he held a title free from all other interest and claims whatsoever. The court emphasized that all the customary rights claimed by the litigants had been extinguished when registration took place.

In the other case of SELA OBIERO Vs OPIYO[10]. The plaintiff who was the youngest wife of Obiero, was registered as an absolute owner of the family land. The plaintiff brought an action in court praying for an injunction to restrain the defendants, their wives children and servants from trespassing on her land. The defendant inter alia claimed that the plaintiffs registration was obtained through fraud. Bennet J; said inter alia

that it was not possible at all to rectify the register because first registration could not be defeated.

These two cases show how the destruction of the communial land tenure and the establishment of individual ownership and private property were finally completed. Communial land tenure becoming extinct.

The kind of ownership introduced by the RLA is absolute rights and total protection from any other person claiming similar rights over the same piece of land. If a father can deny his sons any right to the land, then the situation gets out of way. We are not very sure how somebody who is neither a brother nor a son is going to be treated by the absolute proprietor. This brings into light the fact that there are many absolute proprietors who own expensive parcels of land whereas their neighbours do not even one acre plot to be buried when they die. It proves beyond any reasonable doubt that the greedy desire for personal gain is on the lead, the sense of service does no longer exist, the communial brotherhood long gone.

A flash back to Historical events" Shows us how absolute powers can be abused. The powers granted to an absolute proprietor being no exception are also prone to be abused. As a result therefore it is realized that the former sense of morality and obligation is long gone hence giving rise to many infractions as pertaining to land. These infractions can either be termed as unconstitutional in the legal parlance or unjust in the popular speech.

However these absolute rights are limited by the overriding interest the overriding interests are only interests which can be known to one who owns land. Customary rights the only rights that any person claiming a right on a reigstered land are not overriding interests within the meaning of section 30'[12] of the RLA.

We strongly feel that the government can be called upon to check the provisions of the RLA with the interests of the people it affects at heart. If this could be done, the problem of landlessness could be alleviated to a greater extent.

Never-the-less it is imperative for us to note the fact that

through judicial decision, the position has tremedeasly changed. As such in the case of Muguthu Vs Muguthu [13] Madan J said that a person who registered as a sole proprietor of family land, only held it as a trustee for the other members.

This case however is an indication of the fact that all the power is vested in the courts of jurisdictions of different cases. The remedy to a rightful claimer under customary law only exists if the particular court decides to take into consideration the existence of such rights.

2.4 LANDLESSNESS AND THE LAND CONTROL ACT [14] WITH SPECIAL REFERENCE TO PRESIDENTIAL POWERS UNDER THE ACT

The land control act is used by the state to control and regulate dealings in land held by private holders. It deals with Agricultural land which is defined by section 2 of the Act.

According to section 8 (1), consent is to be acquired within 6 months failure to which the said transaction is rendered void. The essence of the consent of the land control Board is that it is a kind of protecting shield to ensure that any individual holder does not transfer his interest in land so as to divest himself of the same. The Board is entrusted with the function of screening the transaction so that if it discovers some financial defect, or if the transfered land will not serve its purpose well, the consent is refused.

Basically, the Act intended to discourge the idea of foreign ownership and to foster Africanization, although this was not the only goal. Actually a thorough look at section 9 reveals many more other reasons which are of interest to our discussion.

Forinstance, the land control Board established by the land control Act will, not consent to a transaction where such division or transfer will reduce productivity or involve such other sub-transfers. Secondly, where this will create injustice to one of the parties, consent will be denied. Thirdly, a person with sufficient shares in a company which is private will not be allowed to receive more land. Fourthly, a holder is protected from loosing his interest to a person who has

accumulated alot of property.

Further, the land control Act in section 23 and 24 [15] provides for presidential exercise of powers to excempt and, or prohibit transaction which are controlled by the land control Board. When there is exemption, parties have to go to their relevant land control board, although by a transaction being prohibited, the land control board cannot allow applications on such a land.

Prior to the inclusion of the presidential powers in the land control Act, there were very many arguments both for and against the idea of including this presidential powers. This is the area of our interest since we are inclined to the fact that the presidential powers never solved any problem which the Act could not have solved. what this inclusion did was to worsen the problem of landlessness as will be discussed later.

During the debates which led to the enactment of these two sections, Shikuku said that contrary to the African socialism paper No.10 of 1965, [16] the Act was merely legalizing the robbing of the land by the rich. That those with a lot of money at the time and in bigger positions to take most of the land were going to take it then legally, and that land would belong to a few in the country.

Further arguments were advanced to the effect that vesting all th powers in the president nullified all the aspirations of the Bill This was so in the sense that if the president can have all the powers to himself to do whatever he liked, then the purpose of th Bill was non-existent. If the president was not a president who took the needs of the citizens seriously, or if he was a wrong president, then the power would be too great a power concentrated in the hands of one individual. Constant experience has always shown that such power is prone to be abused. Several motions moved during the first parliament are very illustrative of this fact.

For example, Mr. Kioko [17(a)] had this to say:

".....Sir, I beg to move the following motion:

That in view of the fact that the Kenya Ministers salaries are high in terms of the economy of the country and due to the failure by the government to put into effect the recommendation on land ceilings- this house calls upon the Kenya government to introduce immediately strict control on the scramble by ministers and participation in land deals through their relatives.

Mr Speaker Sir.....

I am asking the government to apply straight away, before it is too late, this ceiling inorder to stop the minister from continuing to purchase tracts of land. I know sir, to own land in Kenya is not a crime at all and, constitutionally wherever anyone could possibly own land he is quite free to do so, but we have been disturbed - the country as a whole by the few privile ged and they are members of the cabinet. They are buying land before we have settled the landless situation in the country. They are fulfilling their own needs first. This is what brought me to this attitude whereby I thought that as a member elected by the people of this country, I should bring it to the notice of the government members who can consider this case which is very serious." 17(b)

Thus as clearly shown by the words of Mr. Kioko those who had the Money, and were closer to the president were the ones who benefited. This Phenomena has continued upto today, for it is not the landless poor who get this presidential exemptions. It is only those who are politically and financially in a position which can enable them to benefit from the presidential powers.

Masinde Muliro commending on the presidential powers to deal with Agricultural land said:

"..... We do not want any exemptions because we do not want people to appeal to the president and thus reduce the president to be someone who if one appeals to the president finds that the president is generous, is merciful and gives him exemption. No one should be given exemption on this question of land. A person should only be allowed to buy land through the land control board. If the District Commissioner turns him down, let him appeal to the minister of the central government in Nairobi.... Once that is finalized, it is finalized once and for all. It is Kwisha and

and nobody can excempt him."[18]

Inorder to contract the above contention, Ngala came up with a justification for the inclusion of the presidential powers. He thus said:

"I think it is quite appropriate that the Head of the government, the Head of state should be given such allowances to make his decisions at his own discretion in the interest of the country as a whole."[19]

Faced with this state of affairs, we are totally unable to sum up. Both the arguments for and against the presidential powers to deal with land sound to have some gist. But, owing to the socio-economic inequalities in the country we are of the opinion that this powers vested in the president should not be so draconian.

The president being the head of government and state is trusted to have the country's interest at heart. However, though the president is said to be elected by the whole population on a proper vote, he is still a human being and a politician. As such it is not a surprise if the president indulges into all the practises which every other politician does to remain in his post.

It is for this case that we are arguing a case for authority for the distribution of land resources being placed in the hands of thoroughly knowledgeable individuals, who know the situation of the lands in question. And that, the president being a politici he could be prone to exercise the power in a manner likely to favou his political sentiments and survival.

As will be discussed in chapter three, the presidents power under the land control Act has been used to reward persons who have rendered some services to the country in general, and to the president in particular. For example, several members of the armed forces especially the highly placed have been beneficiaries Further, we have noted that the influential and powerful people in the country that is those persons who can offer security have often than not benefited from the presidential powers. Those people who closely associate with the president be they relatives, acquintances, confidants or friends have benefited

in a tremedous way. What about the Landless poor people?

Constant experience and available stastical date have clearly indicated that it is in very rare occassions that the president benefits by the exercise of his power them that are landless. The whole exercise has been reduced to a personal influence and this has caused more landlessness that it has helped to solve the problem. This will be furthered in chapter three when we will deal with the Masongaleni issue.

To conclude we will use the words of Mr. Oginga Ondiga once vice president who brought out the fact that powers of the president can really be abused. For he said:

"I Clashed with president Kenyatta because he wanted to grab land and he asked me to do the same but I refused."[20]

The much land that has been given to relatives, friends, confidants and politicians by the president, the much land that has been grabbed if it were equally redistributed, the problem of landlessness could be non-existent in Kenya. It is upon this conclusion that we contend that in our opinion the powers granted to the president do not serve any purpose. In the positive except in very few exceptional cases. As a result therefore for efficient, effective and equitable functioning of the land control Act, we call upon the government to make land a commodity which is not to be handled by an individual. Infact, we suggest that any prohibition, or exemption should be a subject to be discussed in parliament if the problem of landlessness is to be solved. It should not be left at the hands of an individual person.

2:5 LANDLESSNESS AND THE GOVERNMENT LANDS ACT [21]

The government lands Act is a precedural law related to land and its substantive law is to be found in the I.T.P.A.[22] This Act was enacted purposely to deal with the government unalienated land. Government unalienated land is the one which is not for the time being leased to any other person or in respect of which the commissioner has not issued any letter of allotment.

The subject of this discussion is contained in section 3, 7, 19, and 130 of the Act mentioned above. Section 3 provides;

"The president in addition to, but without limiting any other right, power or authority vested in him under this Act, may:-

(a) Subject to any other written law,,make grants or dispositions of any estates, interests or rights in or over unalienated government land: ....."[23]

Sub section (b) and (c) [24] give other instances when the presiden may deal with the government lands that are unalienated.

Before we continue with the discussion, we have to define the terms government land and unalienated government land for purposes of clarity. "Government Land" means land for the time being vested in the government by virtue of section 204 and 205 of the constitution as contained in schedule 2 to the Kenya independence order in council, 1963) and section 21, 22, 25, and 26 of the cons itution of Kenya (Amendment) Act 1964

"Unalienated government land" means government land which is not for the time being leased to any other person, or in respect of which the commissioner has not issued any letter of allotment as defined earlier.

The powers given to the president under section 3, 12, 20 and 128 can only be exercised by him and only him alone. On other instances, the commissioner may execute conveyances and do other acts on behalf of the president. It is under the delegated powers that the commissioner may cause land available for alienation for agricultural purposes to be surveyed and divided into farms.

These powers granted to the president cum the commissioner by delegation are quite discretional. The Act impliedly gives the impression that government lands whether alienated or not are one thing with the president. He can make any grants as he deems fit although his actions are supposed to be subject to any written law. All written laws as discussed earlier have a tendency to exhort the president beyond the law. For instance section 23 and 24 [26] of the land control Act do not bind the president since the Act does not stipulate the president area of operation. He is not even bound by his actions and decisions, he can revise them where appropriate.

Hence, the test of presidential discretion being subjective, the president deals with the land that belongs to the government as he thinks fit and expedient. His powers hovers over and above most of the written laws. That is why he makes grants to the people of his own choice. It is in very rare occasions that the grants are made to the landless people. In actual fact, for the president to grant land to the landless, there has to be real pressure to the president to do so. This contention is to be substantiated further in the next chapter.

The fact that the presidential powers can be sub delegated to the commissioner is also not very safe. Land is a very sensitive area, and the fact that the government might have some unalienated land somewhere does not gurantee some individuals to use that land for their own political gain. The government land if vacant we suggest, and if not falling within the reserved areas which for one reason or the other the government has set apart, should be used for the landless.people. Otherwise, what is the need of letting land lie idle making it like a prey to the land grabbers who will always justify their ownership by saying 'the president granted'. Instead, this land should be used to settle squatters who have no land at all. This way the problem of landlessness will be solved.

Section 130 provides for the recovery of the government lands in unlawful occupation. The procedure is well defined under this section and several other subsequent provisions. As will be discussed in the next chapter, there are instances in Machakos Makueni Districts when people have been evicted from the government lands in a very uncivilized, unconstitutional and unjust manner. Here are people who have squatted on government lands for over thirty three years. They are quite ignorant of things like trespas they have nowhere to go, they are landless to be precise.

In our view, the government which almost means the same thing as the president should not just evict this people. They should only be moved from that piece of land for public interest and be taken to another unalienated land if the public interest is to be served

Therefore since the Kenyan government is presumed to be a democratic one, we do not see the reason why it should treat its people with ' a neo-colonial coerion' The attitude that developed during the colonial era about government lands should cease. This

is only possible if our government repeals what there is in the government lands Act to suit the interests of those who are landless.

Owing to the fact that the I.T.P.A. is the substantive law to the government lands Act, we realize that government grants are not affected by the I.T.P.A. Under section 138 of the I.T.P.A., the I.T.P.A. is not to apply to crown grants and such grants are to take effect according to theirs.

Therefore, whatever the presidents grants, it matters not whether there is unfairness or not for there is no law that an individual or group aggrieved by the issuance of unalienated government land can invoke for help.

There are other exercises which the government does which in our opinion have also exercabated the problem of landlessness without giving a legal remedy. These exercises includes interalia the idea of compulsory acquisition. Compulsory acquisition is stipulated in the Kenyan constitution under section 75. This section gives situations under which compulsory acquisition can be done the issue of public interest being given priority.

Despite the fact that public interest is given consideration, our opinion is inclined to the fact that in the present Kenya compulsory acquisition can only increase the problem of landlessness. With this we mean that owing to the population expansion, there is very little land left where many agricultural people can settle comfortably. It is not just enough to get somebody's land and give him compensation. The compensation might not be enough to get land elsewhere considering the market value variance from place to place. Thus having no vacant land left and the compensation being less in terms of economic value, we only get more landless people. This has happened in Makueni during the expansion of the town to accomodate the new district as we will see later.

We therefore call upon the government in this respect to be responsible when it comes to compulsory acquisition. There should be concrete legislation governing those who are affected by the exercise of compulsory acquisition. We have no intentions to attenuate the importance of compulsory acquisition, but all we are saying is that it is not enough to take peoples land, give them money and expect them to get land. Where they should get the land should be the governments concern if landlessness is to be curbed.

There are many other arguments for and aginst compulsory acquisition. Umeh John [27] with whom we totally concur with is of the view that compulsory acquisition is capable of working untold harshness for which remedy should be sought. He further contends that unless there exists justification authenticated to the pertinent social facts, private property especially that belonging to the inhabitants of the rural areas should not be interfered with at all.

2:6 CONCLUSION

Having discussed the Acts of parliament that affect land in a major way, we now come to the conclusion of our chapter. To conclude, we say that the discussion that we have embarked on is hoped to have raised important issues. These issues it is our hope that are issues of interest to the public in general and to the land lawyer in particular.

We have discussed the law related to land as entailed in the constitution, the Registered land Act, the land control Act, and the government lands Act. This does not mean that there are no other Acts of parliament dealing with land. We have the land Adjudication Act, the land consolidation Act, the Agriculture Act which we have not discussed in this piece of work. Never-the-les we comment that they are also very important in matters dealing with land though they do not figure out like the other Acts discussed.

The next chapter will deal with the areas of our study. That is, Machakos/Makueni Districts, which make the case study will be tackled exhaustively. Therefore, the chapter is to be composed of examples from these areas that manifest the problem of landlessnes

FOOTNOTES TO CHAPTER TWO

1. Holdsworth: Historical Introduction to land law p.g 3
2. Ibid pg.3
3. Opening presidential statement - session paper No.10 of 1965
4. (a) James Gichuru representing KANU at the 1962 Lancaster Conference
   (b) Kenya Debates (1962) LXXX V III 405 ff
5. The Kenyan constitution cap 9 on Trust Land
6. Jomo Kenyatta 1964
7. The Registered Land Act. Cap 300 laws of Kenya
8. Swynerton plan of 1954 (R.J.N.) Ass. Director of European Agriculture - plan to intensify the Development of African Africulture in Kenya
9. 1973 E.A 388
10. 1972 E.A 277
11. Works of Montesque on Absolute powers
12. The Registered land Act 1 on overriding interests
13. H.C No.337 (1968), unreported- by Madan J.
14. Land control Act cap.302 laws of Kenya
15. Sections on presidential powers under the land control act
16. During the debates of the 1st parliament
17. (a) Mr. Kioko: Representative of Kenya Offinal Report Kenya National Assembly
    (b) The 5th session VXIII 6th October 1967 Cols 249 - 262
18. Ibid Columns 269-70
19. Supra No.17 (b) 6th Oct. 1967 cols 269-70
20. At Mombasa Ramogi institute of Technology in standard saturday 4/4/1981
21. Cap 280 laws of Kenya
22. Indian Transfer of property Act of 1882
23. Supra No 21
24. Ibid
25. Discretional powers, cannot be delegated
26. Supra No.15
27. A Nigerian writer: On compulsory acquisition of land in Nigeria Law KN.96.3 U53

CHAPTER THREE

INTRODUCTION

"Behold, I have set the land before you ..... Deutoronomy

'And ye shall divide the land ..... for an inheritance among your families ..... according to the tribes of your fathers, and ye shall inherit"

Numbers 33:54

Thus goes the Biblical overtones in relation to how land as a resource should be distributed. In the same way, and in the same manner, the Kenyan laws on land discussed in our chapter two have set the land before those in administration. These are the people who should divide the land that we have in Kenya appropriately to all the citizens. If this could be adequately done, the problem of landlessness would be alleviat

In this chapter, which is our third chapter an attempt will be made to draw together the threads of the preceding chapter and to compare the influence of the principles which have affected land law on a practical point of view. This view is going to revolve around Machakos and Makueni Districts in the Eastern province.

Therefore, in our endevour to present this piece of work clearly, we will adopt a mode of thought, or a way of explaining things known as the nineteenth century Historislim[2] which means that:-

"The belief that an adequate understanding of the nature of any phenomenon (here land law) and an adequate assessment of its value are to be gained through considering it in terms of the place which it occupied and the role which it played within a process of development"[3]

Specific cases that have loudly demonstrated the problem of landlessness will therefore be discussed vividly. But before doing that, we intent to give a general introduction to the land that composes the two districts.

Machakos and Makueni Districts are situated in the Eastern province of the Republic of Kenya. Generally, these are marginal areas characterised by very little rains coupled with dry harshal climatic conditions.

The agricultural output is quite low. These two districts cover a very extensive land which is made up of 10 administrati units namely Makueni, Kathonzweni, Kibwezi, Mwala, Central, Mbooni, Yatta, Kola, Kangundo and Masinga.

During the colonial era, there was no much European agricultura infiltration into these areas. However, the Kenyan white highlands where the settlers were concentrated extended to cove the area or land anywhere between Kiu in Ukambani and Fort Ternan in western Kenya. All the places in Ulu and Kitui lying north of latitude 20° south formed part of the highlands[4].

Further still, the land found in Ulu and Kikumbulyu areas had beeen declared closed. The reason behind this was that these areas were found in the outlying Districts under the outlying Districts ordinance. They therefore formed a basis for control of native movements in certain parts of the protectorat

All the other land in our areas of study was designated as with the lowland division provided that the Governor could by the method of proclamation remove any areas from one division to the other. This trend of proclamation was commonly applied in the government unalienated lands[5].

These government unalienated lands are protected areas under the laws of Kenya. Ordinarily, people are not supposed to cla any right of user on such lands.

The whole concept of government unalienated lands was quite foreign to the property conception of the native population. Every person could claim usufructuary rights to any vacant land, as long as one could develop that land. Development of the land should be taken to mean reasonable care of the lan within the context of the native population. There was nothin like catchment areas, Game reserves, in the native conception.

Thus, the idea of having some parcels of land set aside for th government, termed as protected areas, in an area where the notion of land ownership was completely different caused and has continued to cause serious problems in land relations.

In actual fact, the problem of landlessness can partially be attributed to this factor. As will be discussed later, many of the landless people in the two districts covered by our study were squatters on these parcels designated as government unalienated land.

The best example in this case being the squatter population that had been living in Kyulu hills from 1938 upto 1990, when the government evicted them from that land.

Further still, the presence of government unalienated land that is not in any economic use, has occassioned instances of land misappropriation hence giving rise to inequality in the distribution of land. Presidential grants to his friends, confidants, and many other senior government officials has exercabated the problem of inequality in the distribution of land which is the major cause of the problem of landlessness.

In our opinion, if there could be fair and equal distribution o the land found in the two districts of our study, the problem of landlessness could be alleviated.

The next part of our work will therefore entail a discussion on specific incidences evidenced in our area of study, that have clearly manifested the idea of inequality in the distribution of land. This in our view has been a major cause of landlessness.

THE INCIDENT OF THE MASONGALENI RESETTLEMENT SCHEME

The Masongaleni Resettlement scheme is situated in Kibwezi division in Makueni district. The land under question here has been government unalienated land, and the inhabitants of the sorrounding areas refer to it as D.C.K. Our efforts to trace the origin of the name D.C.K. and the full meaning of these initials proved futile, since even after interviewing several inhabitants, they could only say it used t be a white-settler area.

A general survey of this parcel of land shows that the land has a very high agricultural potential. Infact, as observed, the

Settlers who had occupied it during the colonial era engaged in horticultural farming.

The land covers over 40,000 acres, and it borders an agricultural research institute (KARI), owned by the university of Nairobi. This land is about 10,000 acres, and is used for agricultural research purposes.

Adjacent this rich agricultural land is the Kyulu hills. These hills provide a water catchment area and therefore, they are a protected area[6] under the laws of this country.

However, there had been a considerable settled population in this area. These population was undoubtedly squatter population

Consequently, in the years 1990/91, the government took measures to evict these squatters[7]. The Kenyan law prescribes in very clear terms the penalty for trespassing or squatting on government unalienated land.

As a result, in Machakos law courts there were very many cases related to the eviction. The cases being criminal charges, they read as follows:-

'Trespass to Kyulu Hills part of Tsavo National Park'

The squatters on the defence case could plead not guilty. Further, they could argue that they have lived on that land sinc 1938, and hence prove that this was their ancestral land according to Kamba customary law[8]

The prosecution side however, having firm grounds reinforced by the Kenyan law, won the cases in most of the incidences. The end results therefore were that these squatters were rendered landless.

The incidents of the eviction from the Kyulu hills and the Mason aleni

incident are co-related. This is so in the sense that the government thereafter sought to settle the victims of the eviction from Kyulu Hills on an alternative land.

Incidentally, earlier in 1989, the government had cleared, and parcelled out the Masongaleni resettlement scheme for the allocation to those who were landless in that area.

By logical inferrance, the beneficiaries of this land, set aside for allocation could have been the evicted persons who were now landless. In legal parlance, this could have been fair and just.

However, to the contrary, a case erupted last year which showed that this land never benefited those who it was meant to benefit. Rather, it had been allocated to other leaders in Machakos and Makueni Districts.

In the Daily Nation newspaper, the writer[9] of the column, the way I see it commenting on the allocation of the land in Masongaleni, in his jornalistic language, put it thus:

'as a case of very important persons who were so landless that they had to be given land meant for those who have never know what it feels like to own a single acre'[10].

Thus, the Masongaleni incident entailed a contraversy as to the legality of the acquisition of that land that had been set aside for the landless people.

Some leaders who are actually the persons who brought this incident to the light, alleged that there was illegal acquisition of plots of land in this particular area.

The other leaders who had acquired the 200 acre plots in this area, in response asserted that the land had been allocated to them by the administrators. Precisely, their argument was that they had acquired these plots legally, and therefore had enforceable rights over that land.

Political issues came up during this a criminous debate, and

there were threats of being suspended from the ruling party[11], if one continued to insist that the acquisition was illegal.

After some time, the state nullified the allocations.[12] The nullification was a prove beyond any reasonable doubt that the exercise had been unjust and illegal. The allocation had been based on a complete infraction of the law. Hence, those who had been allocated land could not claim good title to the 200 acre plot.

The nullifying of the allocation read as follows:-

"all the land cleared and parcelled out in the scheme in the Kibwezi area of Machakos District before 1989, remains intact"[13]

The state only took this step due to the bitter quarrel waged by politicians over the morality and legality of allocating land made for the landless people to influential and rich individuals. Otherwise, it is quite clear that if politicians had not brought the issue to the open, then the state would never had intervened.

At this point, it is imperative for us to look at our laws, see whether they could be invoked for help in such a matter.

Firstly, the question that we pose here is who is a landless person according to the laws of this country?

The Kenyan laws do not answer this question adequately. Beginning with the fundamental law of the land, that is the constitution[14], it only touches on compulsory acquisition and offers protection from deprivation of property. The constitution operates from an assumption that every citizen has property (land) which can be protected. That is why no provision is made as concerning the landless people.

The Registered land Act[15] introduces the absolute proprietorship in land. It is therefore from the absolute proprietorship that we infer the fact that those who cannot claim all absolute rights on any land are to be termed as landless.

It is only when the rights of adverse possession,[16] and prescription[17] are introduced when the squatter, that is the landless person is recognised by law.

However, these rights of adverse possession, and prescription cannot be applied where government unalienated land is concerned.

The Masongaleni incident happened to be related to government unalienated land, and therefore, the landless people could not have claimed adverse possession on the Kyulu hills, or the land in Masongaleni.

Because of lack of law which could have been used in the Masongaleni incident, the administrators who were claimed to have allocated these plots to the wrong people did it by using their powers, and had no sufficient answer as to the legality of the allocatio

The other legal issue amounting from this incident is about criminal charges for trespass on government unalienated land. The leaders who had acquired parcels of land in Masongaleni illegally were not charged in any court of law.

The land had been set aside for resettlement of the landless people. The rich and influential individuals got that same land simply because at that time nobody was claiming a better title to it.

The fact that nobody could claim a better title during the transition from a government unalienated land, and a resettlement scheme, did not give those who are influential a righ to take advantage of the same.

In our opinion, it would be just if the government would make laws to govern such instances when injustice is quite prevalent. By so doing it would check the problem of unequal distribution of land hence curbing the problem of landlessness.

After the nullification of the allocation, there was a proper scrutiny as to the validity of the allocations. It was therefore discovered that those who had been allocated parcels of land were not genuine squatters. In effect therefore, the land was redistributed among the genuine squatters, and a 200

acre plot which had been formerly allocated to one person could be divided into 10 acre plots.[18]

Consequently, 20 people could now benefit from land which had been appropriated to one person. Many people who were formerly squatters have now settled on this 10 acre plot, and have got indefeasible titles to their plots.

THE INCIDENT OF THE PRESSURE TO DEGAZETTE THE NGAI-NDEITHYA RESERVE

According to section 118 (1) of the constitution of Kenya, Trust land can be set apart for the purposes of the Government Ngai-Ndeithya game reserve is an area set apart by the government for wildlife.

The land in question was gazetted on 9/1/1977 thus enabling it to be out of reach of any human settlement. The reason here being that wildlife forms a great part of the tourism industry, and therefore the need to preserve it.

This reserve is to be found adjacent to Kitui Game reserve, but it extents towards Kambu and Mitito-Andei areas in Kibwezi division.

The Director[19] of Kenya wildlife services revealed that extreme pressure from a few individuals was forcing this reserve to be degazetted. The essence of the degazetting being to pave way for illegal human settlement.

In this incident, it was revealed that the land in question is about 212 km^2, and if no measures are taken, the land is prone to be misappropriated.

The few individuals who were pressurizing for the degazetting of this land are top government officials. They cannot therefore be termed as landless people in the strict sense of the word. If the degazetting exercise would have succeeded, the end results could have been more inequality in the distribution of land. There are a few legal questions which arise from this incidents.

Firstly, what law governs the game reserves and the national parks? As indicated earlier on, the constitution provides for the setting apart of land for the purposes of the government or any other body which is authorized or a corporation.

When land is set apart for the prupose of the government, it should be set a part at the public interest, and for the public benefit. If both the public interest and benefit are upheld, then citizens will be content with the use of the land set a part.

In the case of the Ngai-Ndethya game reserve, the principle of public interest and benefit seem to have been overlooked. If Infact, this game reserve is a facade, that is it has very few animals in our observation, and rarely do tourists visit the place.

In our opinion, this reserve does not serve its purpose properly. For this reason therefore it is noted that the illegal human settlement that has paved its way to the reserve might be justified.

However, we want to suggest that if that reserve does not serve its purpose adequately, then the government should release the land to the county councils. This is possible by applying section 119 [20] of the constitution.

If this could be done, then the landless people could benefit from the allocation of plots from the said land. Otherwise, if the government does not check onto the usage of such a land, then the rich and influential people will benefit from it. These people are not landless and therefore the problem of landlessness will be increased.

It should however be understood that, we are not in any way apposed to the conservation of wildlife, but are only suggesting that, wildlife could be conceratrated in certain areas, which are be benefitial to the country, except for some few animal species that can only survive in certain areas.

There is no need of having so many landless people in the country

being sacrificed at the alter of wildlife. Instead, the government should be sensitive to the needs of its people so that the situation of expansive game reserves with very few animals does not exist, while we have very many Kenyans who are landless.

THE INCIDENT OF SQUATTERS IN ATHI RIVER AND KATELEMBU AREAS[21]

Athi river and Katelembu areas are located in Machakos District. Unlike Makueni District, Machakos district is more densely populated because the climate is a bit cool, when compared to the warm conditions in Makueni.

The incident in Athi river involves some squatters who have lived on the piece of land in dispute since 1958. The land is said to be owned by some other wealthy businessmen, who, for over 20 years had not claimed any rights on the said land.

These squatters, being 124 in number, have been appealing to the government to intervene so that the wealthy businessmen should not evict them from this land.

The wealthy businessmen are now claiming, a legal right on this land in dispute, The squatters on the other hand are arguing that they also have a right to some piece of land, and therefore should not be evicted from this land without being shown an alternative.

This incident in Athi river raises some legal questions, that a property lawyer should not ignore.

Forinstance, the question that we are asking ourselves here is, can the rights of a squatter be revived, and legalized?

The answer to the above question is yes through prescription and adverse possession[22]. The squatters do not understand anything about these two concepts. If they would know such legal method of acquiring rights that are enforceable, then they would be in a position to assert their claims successfully.

Ignorance of the law is not a defence, we all uphold the principle. But it is equally important to educate the Kenyans about the laws that affect them in their day-to-day living. For example, if these 124 squatters would be educated about what the law says about their situation, then obviously they would secure legal titles that are absolute[23] against any other claimant.

The second issue under this sub heading is related to a court proceeding. This court proceeding involved a civil case between the Katelembu co-operative society, and over 100 squatters. The case was presided over at Machakos law courts in 1991.[24]

The defendants in this case, who were squatters had been charged with malicious damage to property belonging to the plaintiffs - co-operative society.

The historical background of the land in dispute reveals the fact, the land in dispute once belonged to white settlers. These settler farmers used to have shamba boys, who after the settlers sold the land to the co-operative society, have cantinued to live on the same land as squatters.

The members of the co-operative society, that is the shareholders for many years did not interfere with the squatter settlement. It is only in 1990, when these shareholders started threatening to evict them from the land in dispute.

It is because of the threats that these squatters started to demonstrate in protest against the threats. These demonstration is the one that resulted in the damage to property of the shareholders who have already started fencing their plots.

From the foregoing discussion, it is very clear that if these squatters rights to this land are not revived, then they are to be rendered landless people once they are evicted.

Infact, from the decision of the court, these people were termed as trespassers, and the co-operative society received a court order to evict them on behalf of its shareholders.

In our opinion, these shareholders are people who have land elsewhere, and that is the reason as to why they have taken such a long time to develop their plots in this area in dispute.

To evict poor landless people from the land which they are claiming to be their ancestral land is quite unfair.

According to these squatters, the land was left to them by the white settlers. But then they do not have legal titles to the same land.

If they knew that legal titles are important, then they could have applied to the High court of Kenya, to be registered as the absolute owners. This could have been very possible because for over 12 years, the shareholders had not interfered with their occupation of the land. Thus, the rights of prescription, and adverse possession could have came in to their aid.

Being ignorant of their rights, these squatters have slept on them, and therefore very little can be done to help them.

However, we have noticed that the law governing squatters rights is quite narrow, and rarely covers all the details that are necessary if the squatters rights are to be revived. Forinstance, if the squatter only uses 10 acres out of 100 acres, but his animals once in a while are taken for grazing outside the 10 acres where he has settled. The question is, will the squatter claim the 100 acres by through adverse possession, or the 10 acres? The law should be reformed so that it can be clear on such issues that are very confusing.

Having dealt with the incidences which in the recent past have vividly manifested the problem of landlessness in the two Districts of our study, we are now going to tackle other aspects or factors that have also contributed the problem of landlessness in these areas.

Interalia, we have the issue of Auctions of charged lands which has been a major contributing factor to the problem of landlessness This is the one that we are going to discuss in our next section.

LANDLESSNESS CAUSED BY AUCTIONS OF CHARGED LANDS

According to the sale of goods Act[25], property in either goods or in land can be sold through Auction sales. In Auction sales property is sold to the highest bidder at the fall of the hammer.

Land in many instances has been used as security in banks so that one can secure a loan. Whereas this has been a very welcome idea that has enabled many people to develop their land, it has had this disadvantages as well.

In very many cases where the mortgager is unable to pay back the loan, the only alternative left to the mortgages is to Auction the mortgaged land.

Once the mortgaged land is sold off, usually, the mortgagor is left landless, and without any means of support.

From the information[26] received from Kambaland Auctioneers, who are specialists in Auction sales, in Machakos District, the list of those people who have lost their land in Auction sales proves that Auctions of land have really contributed to the problem of landlessness.
The interests of a mortgagor as reflected by many Auction sales shows that most of the mortgagors do not have any other source of income which is independant of the land which they have mortgaged.

The mortgagees are aware of this but do not seem to regard this as an interest as defined in section 77[27] of the registered land Act.

Thus, when the mortgagees effect their power of sale, and sell the mortgagors land, they leave the mortgagor both landless and without any other source of income in most cases.

The mortgagors seem to have no power to realize money from the only form of property which they have. The reason behind this being the fact that the presence of a charge in the encumbrance section hinders powers of absolute proprietorship given to them under section 27 of the registered land[28] Act

In effect therefore, the mortgagor can neither sell part, nor

the whole of their property to meet the loan repayments. But, the Mortgagee has the power to sell the whole of the land to pay off their loans, or to realize their money back.

When the mortgages sell the property in land, the sale price is calculated not with the market value in mind, but only counting up the capital sum of the loan owed, and the interest payable, the lawyers fee, the Auctioneers fee and other costs within his interest.

Therefore, unless the bids go higher than this amount, the mortgages will always sell the charged land for a price calculated to pay off these expenses and no more.[29]

This means that the mortgagor whose land has been Auctioned does not stand any chance of sharing anything from the sale of goods Act, the law relating to Auction sales is clearly provided. It is operation is as we have discussed in our work.

However, in our opinion, this law is quite unfair to the mortgagor, whose land is auctioned. There should be other provisions such as the fact that the mortgagor should be allowed to sell either part of the land, or the whole land to pay off the debt.

If this could be provided, for, then the mortgagor could sell the land at the market value, then pay off the loan and may be buy another parcel of land with the remaining money. The same money could be used to invest in other business ventures so that one could have a source of livelihood.

There is therefore, an urgent need to reform the law related to Auction sales especially where the subject matter of the sale is land. This reform should have the interest of the mortgagor at heart, so that they are not left landless.

The problem of landlessness caused by Auction sales may however seem negligible, but there are so many cases of families that have been left landless because the person who has been holding the land in trust for the others, has used the title deed to secure a loan. In the event of failure to repay, the loan, the land is auctioned leaving the whole family landless.[30]

CONCLUSION

In this chapter, our task has been an attempt to open the eyes and minds of the readers to the practical examples of landlessness, as well as to help them to find a possible solution to the problem of landlessness.

Thus, original material has been compiled into a move concise, and ordered presentation covering current examples of the problem of landlessness.

We have therefore discussed the issue of eviction from the Kyulu hills, a protected area. The resettlement scheme at Masongaleni and its subsequent misallocation to people who were not landless, and the squatter problem in several places in Machakos District.

In our endevours to substantiate our work, we have had to peruse past records, address both present and the future prospects in relation to land. Lastly, we have offered some suggestions to solve the problem of landlessness.

These suggestions include ideas such as legalizing the rights of squatters on government unalienated land if the land is not being utilized otherwise.

In addition, we have pointed out that inorder to avoid landlessness and to achieve better results, a code of practise supported by legislation and inspection machinery is necessary. This will check the idea of misallocation of land and enhance even distributio of land to all people.

The rules governing auction sales especially where land is the subject matter have been a rigid set of fixed standards. This has been a cause of a lot of cases of landlessness. Therefore, if the problem of landlessness, is to be alleriated, there is need to review these laws so as to have the interests of the Chargoris at heart.

The next chapter, the concluding chapter, is a summary of the preceding chapters. It is intended to examine the case for new strategies in relation to land law, hence the possibilities and the stumbling blocks that the legislators must face and overcome if real progress is to be made in solving the problem landlessness are to be addressed to

FOOTNOTES TO CHAPTER THREE

1. The Bible, King James Version p.p 130 and 132
2. Maurice Mandelbum', Current Legal problems 1984 pg 63 land law texts and the explanation
3. Ibid at pg 64
4. See for example, the crop production and livestock Rules GN 242/1928 applying to the Machakos/Ulu Reserve Under the outlying Districts ordinance of 1902
5. Governments land Act cap 280 lawa od Kenya
6. Ibid
7. The Trespass case to Kyulu hills part of Tsavo Nationa Park - case No.1033 of 1990
8. Ancestral land is land acquired by right of inheritanc see Lewin Julius, Recognition of Native law and custom in British Africa. (London - Macmillan 1938 pg.8
9. See Wahome Mutahi's works in the Daily Nation Newspape Monday August 19th 1991
10. Ibid
11. Kenya African National union party, during the era of a single party system in Kenya.
12. Daily Nation Newspaper Tuesday July 23rd 1991.
13. Ibid
14. The constitution of the Republic of Kenya
15. See cap 300 laws of Kenya
16. Limitation of actions Act of 1970 cap 22 laws of Kenya
17. Ibid
18. See information received from the Ministry of physical in Machakos.
19. Doctor R. Leakey in the Kenyan Builder Vol.14 No.4 of
20. See section 119 of cap 9 of the constitution.
21. Reported in the Daily Nation sunday 7th July 1991
22. Supra No.16
23. See the Registered land Act cap 300 laws of Kenya sect 27 and 28
24. A good example being Phillmona Nthenya Mbothi Vs Leah Kamene Kavoo (unreported) of 1991
    Katelembu Co-operative society Vs. Mutua Kyenze and 40 others case No.1095 of 1990
25. See sale of goods act cap 31 laws of Kenya
26. See the case of
    Lr No.337/133 belonging to Peter Masilu Katuu

Kangundo/kyevaluki 119 and Kangundo Mbusyani 1343
Reported at the standard Newspaper in the months of June and July 1992.

27. The power of sale of a mortgagee.
28. The rights given to an absolute proprietor after registration
29. This is reflected by the conditions for sale - Highest bidder at the fall of the hammer, not at the market value.
30. See the case of Simeon Nzioki Mue (unreported) of 1980, in Machakos law courts.

CHAPTER FOUR

RECO MMENDATION AND CONCLUSION

This paper is not to be taken as a conclusive study of the situation of land, land use and landlessness in Machakos and Makueni Distircts. Rather, it is intended to be another of those warnings to the legislators that their laws do not reflect the wishes of the people they are supposed to apply to.

In our opinion, these laws have became a yoke on the people to be fulfilled whenever there is no other choice, and to be ignored or overlooked when there is space to do so.

Our work has outlined the history and content of land law in Kenya, and the consequences of the application of these laws. Further, we have identified specific cases where landlessness is evident either due to strict application of the law, or lack of application of the law at all.

At independance, Kenyan's first priority was political sovereignty and very little attention was accorded to the economic relationshi We can therefore conclude that the theme was:

"Seek ye first the political kingdom and all things shall be added to you"

Amongst these things that the Africans were to be added was freedo to own land. The African needed this freedom since they had been put in the native reserves[2] and had no freedom to own land while there.

This was but a facade when we look at the problem of landlessness that has continuously affected our country since the time of independance.

Just to summarize what has been discussed, we want to emphasize on the fear which was among the Africans, and which led to their acquiesie to mult-racial influence in land, as well as in government to ensure at the end of the transfer of power, politica independance would not be delayed.

The Kenyan leaders compromised over the settler plan.

This is well illustrated by the case for million acre scheme[3].

The million acre scheme was a settlement plan for Africans, and it would have had positive results if it could have been implemented properly. This scheme was two edged.

Firstly, it was a plan for Africanization of the highlands, and secondly, it was a constitutional and statutory gurantee in the sanctity of property.

During that time, there were settlement programmes which included mainly the million acre transfer of settler land to Africans. As a result there was transfer of large European estates to individuals corporations and partnerships.

The composition of land Development and settlement Board held the responsibility for the entire settlement programme. These boards were made up of representative of colonial Boards of Agriculture.

This means that the land development and settlement Board was mainly representative of European Agriculture and the colonial a administration. Africans were fairly represented in the land Development and settlement Board. But, the Board dissolved after attainment of our independance.

However, the programmes for settlement never admitted many of the landless as the circumstances of decolonization might have suggested[4].

But we have noticed that after independence leaders adopted the idea of 'what have you done for yourself' type of attitude. This attitude holds that a leader should acquire property andsespecially land because property goes with status. As a result therefore, our leaders after independence were not really concerned with the problem of landlessness seriously.

Oginga Odinga observed that:-
"The government ..... are unable to take drastic action over land ..... Its ideological commitment to capitalism is reinforced by the ownership by many individual members of the

government of hundreds and even thousands of acres of land .... This being so, they cannot issue policies which will benefit the wananchi"[5]

In effect therefore a new class of Blundells and Delamere were being created. There was a new spate of re-entrenchment of private ownership.

The same government that Ogingà has commented on, the one that cared very little about the wananchi went a head to enact the land laws applied in Kenya.

These laws that were enacted exercabated the problem of landlessnes rather than solving it, as discussed in our chapter two. The idea of absolute proprietorship was introduced and this has helped to increase the problem especially where there is a dispute to a family land. However the emergence of the idea of customary trust has sort of helped to solve the problem..

The problem of squatters has increasingly plagued Kenyans in their local societies. Infact, the problem runs from the coast to the western part of the country.

In most incidences of squatter population, these issues are arising from farms acquired by individuals or partnerships during the 1960's. This means it was immediately after independence. These squatters owing to their ignorance, and desperation have continued living on these land without security, and being subject to indiscrete ejection by the owners.

The issue of squatters has been a serious issue. Due to this reason, the matter was taken up by the K.A.N.U (Kenya African National Union) Delegates conference in December 1990. However, despite the deliberations, very little was offered to solve this problem.

As earlier pointed out, land in Machakos and Makueni Districts is quite unevenly distributed. The trend is that most senior government officials have very extensive parcels of land.

These senior government officials usually get this land through

presidential grant. Whereas it is good for the president to reward his officials, we strongly feel that even when he s is passing the grants he should have the interests of the Wananchi (citizens) at heart.

It defeats justice and fairness when those who have land are being added more, and those who do not have any land not being given anything. The landless people should be given priority if there is vacant land somewhere. This way, there will be fair distribution of land as a resource, and the problem of landlessness will be alleviated.

All in all, we are of the opinion that the Kenyan legislators should take heed and look at the existing law relating to land. As indicated earlier, we feel that it does not reflect the wishes of the people adequately. This therefore calls for a thorough review of this law.

The law takes a very narrow view of land rights. As a result, all multiple rights claimable under the customary law cannot be covered fully. There is therefore need to broaden the view taken by statutes so that they do not leave a lacuna in very important aspects of law relating to land rights.

In Kenya, the capitalist mode of operation has pre-occupied the min of almost every person. This capitalistic trend makes every individual want to acquire more and more land. The Kenyan land law does not provide a selling on the maximum acreage one should have.

If the law could have a selling on the amount of land an individual can posess, then the problem of misappropriation, and poor distribution of land would cease hence every person would be in a position to possess some land.

The population explosion is one thing that the legislators should have in mind in deciding matters related to land. For instance, the group ranches[6] in Masai land established by a government statute may cause serious problems in the future. This is because with increase in population, while registration has already taken place, a problem of landlessness will be created.

Though our suggestions seem to be far-fetched, we firmly believe that as pointed out earlier in our work, a code of practice, supported by legislation and inspection machinery would really help to curb the problem of landlessness.

The formulation of a code of practise calls for a land law reform programme.

There are so many Acts of parliament and so many laws therein that are related to land issues. But these laws have proved to be inadequate, and very narrow. At times they are even conflict such that one act gives an owner of land a right, which right is taken away by another law in another Act.

Some other laws like those that confer powers to the president giving him the right to grant land are also quite very questionable. The presidential powers that are accorded are quite draconian, and there is no check for those powers. Montesque commenting on any absolute powers said that:-

"

"Power corrupts, and absolute power corrupts absolutely"[7]

Mutatis Mutadis, these powers confered to the president are quite absolute, and therefore prone to be abused.

That is the reason as to why land has been allocated to people who are not landless through the presidential grants.

We suggest that these powers should be checked. This is only possible if some law could be enacted to control the exercise of the presidential powers in relation to land.

We cannot say all, but we are confident that we have said something that can be added to the pre-existing works of those who have gone before us, towards a common goal of a democratic Kenya, which will upholds the rights of allcitizens equally.

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CHAPTER FOUR

FOOTNOTES

1. Garry Waserman; politics of decolonization, Kenya Europeans and the land issue (PhD Thesis)

2.

3. General christoper leo: The political economy of land in Kenya: The case for million Acre scheme

4. See Okoth - Ogendo works on Impositoon of property law in Kenya

5. The Times 11th April 1966 article by Oginga Odinga Not yet Uhuru, (Heinman London 1967 pp 253)

6. See cap 287 laws of Kenya

7. See words of Montesque in his book The spirit of the laws Cespirit de laws)

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4. Wade, H.W.R., " Landlord, Tenant And Squatter," 78 LQR 541

5. Walsh, W.F., Title By Adverse possession," (1938-1939) 16 NYULQ Rev.532

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