REPUBLIC OF KENYA

Report of the Commission of Inquiry into the Land Law System of Kenya on Principles of a National Land Policy Framework Constitutional Position of Land and New Institutional Framework for Land Administration

Chairman:

Charles M. Njonjo

Presented to

His Excellency

Hon. Daniel T. arap Moi, C.G.H., M.P.

President and Commander-in-Chief of the Armed Forces of the Republic of Kenya

ember, 2002

Report
of the
Commission of Inquiry
into the
Land Law System of Kenya
on
Principles of a National Land Policy Framework, Constitutional Position of Land and New Institutional Framework for Land Administration

TABLE OF CONTENTS

Page

PART III

ANNEXES

APPENDIX

COMMISSION OF INQUIRY INTO THE LAND LAW SYSTEM OF KENYA
P. O. Box 45986, Nairobi, Kenya
Tel.313744/313710; Fax 313758
E-mail:landlaw2002@hotmail.com or
landlaw@onlinekenya.com

20th November, 2002

His Excellency, Hon. Daniel T. Arap Moi, C.G.H., M.P.,
President and Commander-in-Chief of the
Armed Forces of the Republic of Kenya,
P. O. Box 40530,
NAIROBI.

Your Excellency,

RE: REPORT ON PRINCIPLES OF A NATIONAL LAND POLICY FRAMEWORK, CONSTITUTIONAL POSITION OF LAND AND NEW INSTITUTIONAL FRAMEWORK FOR LAND ADMINISTRATION

Your Excellency appointed this Commission by Gazette Notice No. 6593 dated 17th and published on 26th November, 1999 as read with Gazette Notice No. 1797 dated 27th and published on 31st March, 2000; Gazette Notice No. 2972 dated 11th and published on 19th May, 2000; and Gazette Notice No. 4445 dated 14th and published on 21st July, 2000 to inquire into the Land Law System of Kenya.

The Commission's Terms of Reference were set out in detail in Gazette Notice No. 6594 dated 17th and published on 26th November, 1999.

Consequently, the Commission received oral and written submissions and complaints from Kenyans on a variety of land issues both in its offices in Nairobi and during the Commission's visits to all the provinces and districts of Kenya.

In accordance with one of its Terms of Reference, the Commission contracted consultants to undertake studies on some Kenyan communities on the issue of customary laws relating to land.

The Commission visited selected foreign countries for comparative studies on identified and relevant land matters.

In December, 2001, the Commission submitted to Your Excellency an Interim Report on certain critical issues which, in our view, required urgent remedial action and could not wait until we completed the Inquiry as it might then be too late to remedy the situations complained of by Kenyans. The same issues were repeated and re-emphasized in subsequent representations by Kenyans who have persisted in urging for their expeditious redress. The entire Interim Report is reproduced as an Appendix to this Report for ready reference and such action as Your Excellency may deem appropriate.

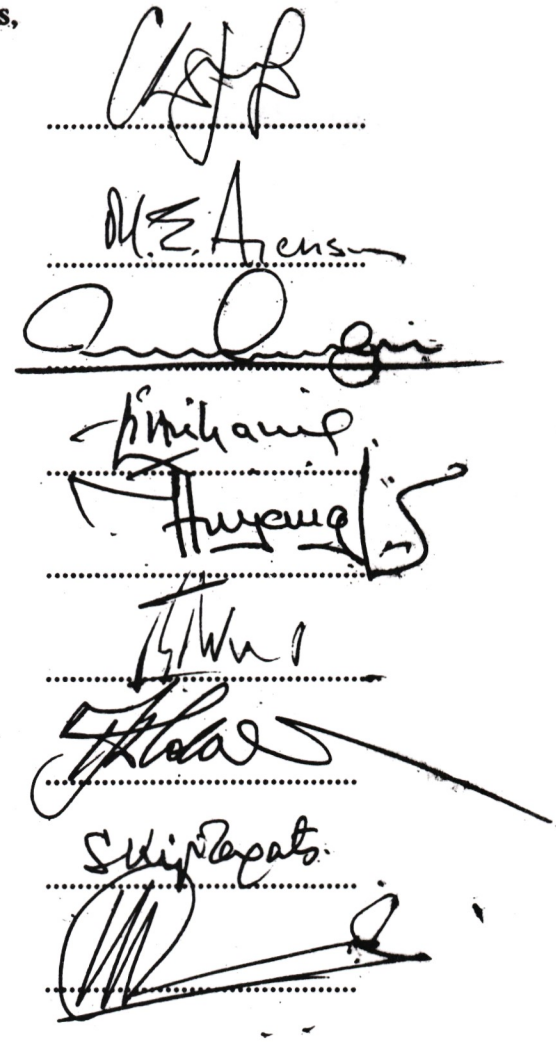
Since developing principles of a National Land Policy Framework it has become clear to the Commission that existing problems together with the underlying causes regarding the administration and management of land in Kenya cannot be adequately addressed under current arrangements. These can only be comprehensively dealt with through the restructuring of land administration and management in the country. The restructuring is perceived to revolve around three issues which are: the Principles of a National Land Policy Framework, the Constitutional Position of Land and a New Institutional Framework for Land Administration. These form part of this Report.

A view is also beginning to crystalise that the whole question of undertaking continuous reforms on land should be part and parcel of land administration. The basic foundations of such a programme need, however, to be laid early. The proposed new institutional framework for land administration appears to provide a vital foundation for a badly needed sustainable land reform programme. This is an added reason for proposing in this Report a comprehensive and better co-ordinated national land policy framework for the country, anchoring the entire land question in the Constitution and providing a statutory mechanism for implementing the reformed land policy programme.

What is contained in this Report only forms part of the Final Report of this Commission which is still under preparation. The Commission is still analysing massive data which it has collected to enable it to address many other issues afflicting Kenyans in accordance with the remaining Terms of Reference.

Accordingly, we submit this Report.

We remain,
Your Excellency's most obedient servants,



Charles M. NJONJO,
Chairman.

M. E. ARONSON,
Vice-Chairman.

P. N. NDUNGU,
Commissioner.

Ezekiel IDWASI,
Commissioner.

F.R.S. ONYANGO,
Commissioner.

Benjamin KUBO,
Commissioner.

Keriako ole TOBIKO,
Commissioner.

Stephen KIPKENDA,
Commissioner.

Omar BWANA,
Commissioner.

Juma Athman LUGOGO (Prof.), ...
Commissioner.

Jane Mwanje MANASSEH (Mrs.), ...
Commissioner.

Joel Kipkemboi YEGO, ...
Commissioner.

V.M.W. KATTAMBO (Mrs.), ...
Joint Secretary.

Emma NJOGU (Miss), ...
Joint Secretary.

ACKNOWLEDGEMENTS

This Report is a follow-up of the Commission's Interim Report submitted to His Excellency The President in December, 2001. It addresses three major pillars of what will constitute the Final Report still under preparation. These are Principles of a National Land Policy Framework, the Constitutional Position of Land and a New Institutional Framework for Land Administration.

We wish, once again, to express our appreciation to His Excellency The President and Commander-in-Chief of the Armed Forces of the Republic of Kenya for his foresight in establishing this Commission to inquire into the land issues which are fundamental to the development of this country.

In addition to the persons already thanked in the acknowledgements section of the Interim Report, the Commission wishes to extend its gratitude to the following:-

(i) Prof. H.W.O. Okoth-Ogendo who was the Commission's consultant on the principles of a national land policy framework.

(ii) Mr. Roger Neville Rose who was the Commission's consultant in drafting legislation for the establishment of the proposed National Land Authority and District Land Authorities.

(iii) Prof. Casper Odegi Awuondo, Dr. Akinyi Nzioki, Dr. Tomiik Konyimbih and Mr. Tom O. Ojienda who were the Commission's consultants on customary land laws of a few selected Kenyan communities.

(iv) Officers of the Ministry of Foreign Affairs for their efficiency in organising the Commission's visits to foreign countries.

(v) Members of staff of the Commission whose names appear in Annex 4 to this Report.

The Commission also extends its profound gratitude collectively to all those who played a role in facilitating its work but have not been singled out for specific mention.

EXECUTIVE SUMMARY

The land question in Kenya is a colonial legacy. The colonization of Kenya first by Omani Arabs at the Coast and then by the British towards the end of the 19th Century, had great impact on land relations in the country. African traditional systems that had stabilized through centuries of evolution were suddenly disrupted through expropriation of large areas of the country by the application of laws that were alien to the African customary way of life.

At independence these foreign systems were adopted by the independent Government and expropriation of African lands legitimized in the Kenya Independence Constitution.

Attempts to effect land reforms to address the land question were undertaken soon after independence but these were basically geared towards land re-distribution. Such reforms were carried out without a comprehensive policy on land, a situation that obtains to-date.

The development of the country and rapid population growth have created new problems on land relations. This, added to historical legacies, have resulted in a labyrinth of problems that require serious attention.

The appointment of this Commission by His Excellency the President was therefore timely and is to be commended.

The Commission has visited every province and district in the country to hear evidence and receive memoranda on land problems afflicting Kenyans. A lot of evidence including memoranda has been collected and is being analysed in accordance with the Commission's terms of reference

This Report is part of the results of the Commission's work and addresses itself to the issues listed hereunder.

The Commission submitted its Interim Report in December, 2001 (Appendix to this Report) on matters that were urgent and needed to be addressed by the Government immediately. The lack of an overall Land Policy for Kenya has been identified as the basic cause of the current problems in the administration of land. In response to this, the Commission has now developed Principles of a National Land Policy

Framework for Kenya which forms Part II of this Report and addresses the following issues among others:-

- The need for an overall Land Policy for Kenya.
- The need to provide a permanent and sound basis of land ownership and administration in the Constitution.
- The need to reform land tenure, management of land and land based resources including productive and sustainable land use practices.
- The need to develop a simple and efficient land dispute resolution process that is devoid of corruption, delays and incompetence.
- The need to develop an efficient and equitable land delivery system.

The Report covers the following areas by Chapter:-

- Overview of the Commission's work to-date: Chapter 1;
- A geographical, population and historical background review: Chapters 2 and 3;
- The principles on which a Land Policy should be based that covers categories of land; land tenure systems; land based resources; the planning and use of both rural and urban land; the management and development of land; land rights delivery systems and the settlement of land disputes: Chapter 4; and
- The implementation of the Land Policy: Chapter 5.

The Principles of a National Land Policy Framework for Kenya need to be developed into a **National Land Policy** for the country. It is the policy that will give direction for continuous **Land Reform** in the country. In order to effect this policy, an appropriate institutional mechanism has to be established. The current land administration system has proved unreliable and inadequate and it is recommended that a **National Land Authority** be established by legislation and entrenched in the Constitution so that it can implement a **National Land Policy** for Kenya in the future and maintain a continuous review process.

In order to involve local communities in the management of land, to enhance efficiency and to avoid bureaucracy associated with a centralized administrative system, it is proposed that **District Land Authorities** be

established by legislation and entrenched in the Constitution to administer land at the District level in accordance with national policy guidelines set and monitored by the National Land Authority.

The Constitutional proposals contained in the policy framework and the proposal to set up a new institutional mechanism for land administration need to be anchored in the Constitution to give them security.

The legal requirements needed to establish a new land administrative structure form part of this Report and include:

- The Constitutional proposals needed to implement the Policy Framework: Chapter 6; and
- The New Institutional Framework for Land Administration including a Draft Bill for the necessary legislation: Chapter 7.

PART I

INTRODUCTION

CHAPTER 1

OVERVIEW OF COMMISSION'S WORK TO-DATE

Appointment and Terms of Reference

1. The Commission was set up on 17th November, 1999 vide Gazette Notices Nos. 6593 and 6594 published on 26th November, 1999 as read together with Gazette Notice No.1797 of 31st March, 2000, Gazette Notice No.2972 of 19th May, 2000 and Gazette Notice No.4445 of 21st July, 2000.

2. The Commission was directed to hold an inquiry under the following terms of reference:-

(a) to undertake a broad review of land issues in Kenya and to recommend the main principles of a land policy framework which would foster an economically efficient, socially equitable and environmentally sustainable land tenure and land use system;

(b) to undertake an analysis of the legal and institutional framework of land tenure and land use in Kenya and to recommend a programme or programmes of legislation that would give effect to such policies;

(c) to recommend guidelines for a basic land law and complementary legislation and associated subsidiary legislation which would address, *inter alia*, the following issues—

(i) the systems of land tenure appropriate for the country;

(ii) the system of land ownership and control;

(iii) the system of acquisition and disposition of land rights whether by inheritance or otherwise;

(iv) the structural framework for the administration of all categories of land whether state, communal or private including the consolidation, updating and improvement of all procedural legislation relating to the registration of titles to and of all other instruments concerning dealings with land and of interests and rights therein, thereto or thereover;

(v) the structural framework and principles for the administration and management of protected areas

including wildlife sanctuaries, coastal and marine zones, wetlands, catchment areas, forests and nature reserves;

(vi) the system of land use planning, management and development;

(vii) the process of land delivery including survey, registration and the preparation of official records relevant to such survey and registration;

(viii) the structural framework for the processing and settlement of land disputes;

(ix) the replacement of the foreign applied laws;

(x) the repeal and/or replacement of all laws now deemed to be obsolete;

(d) to take into account all customary laws relating to land and so far as practicable, to incorporate such of those laws, with such modifications, if any, as may be considered to be desirable for the purposes of making them consonant with present -day conditions;

(e) to incorporate in such new legislation, if thought desirable in the interests of people of Kenya, with or without modifications, the provisions of any laws of other states relating to the tenure of or dealings with land and of any rights or interests thereto or therein;

(f) to prepare a draft or drafts of such new or amending legislation as may be necessary to implement the recommendations of the Commission to be developed as indicated above; and

(g) to make such further recommendations as the Commission may deem necessary.

3. On 25th January, 2000 the Commission was officially launched and started working from its Kencom House Office, Nairobi.

Collection of Views from the Public

Memoranda

4. On 29th March, 2000 the Commission published its Terms of Reference in the print media and invited members of the public to send written memoranda addressing all matters under inquiry. At the same time

the Commission sent out invitations for oral and written submissions to, *inter alia*, professional societies, non-governmental organisations, government ministries and departments, the judiciary and members of parliament.

Visits to the Provinces and Districts

5. The Commission visited all the eight provinces and each of the districts in the country to collect views from members of the public who included local members of parliament, members of the provincial administration, heads of government departments, mayors, chairmen of urban and county councils, councillors and civic officers.

6. The public meetings were well attended and speakers gave their views on various land issues. Random selection of speakers at these meetings was used to give a chance to a cross section of the public to make their presentations. Oral evidence was recorded by hand and by tape.

7. The following were the dates of the public meetings:

- Coast Province - 26th June to 2nd July, 2000
- Rift Valley Province - 21st to 30th August, 2000
  - 23rd to 30th October, 2000
  - 20th to 22nd November, 2000
- Western Province - 29th January to 6th February, 2001
- Nyanza Province - 26th February to 10th March, 2001
- Eastern Province - 4th to 8th June, 2001
  - 14th to 22nd June, 2001
  - 22nd to 26th June, 2001
- Central Province - 27th August to 6th September, 2001
- North Eastern Province - 10th to 12th September, 2001
  - 17th September, 2001
- Nairobi Province - 15th to 24th October, 2001

Hearings

8. During the month of April, 2002 the Commission organised and held hearings at its offices where some professional societies, Government departments, special interest groups and individuals were given a chance to submit memoranda and make oral presentation of their views.

Mombasa Secretariat

9. In order to address issues peculiar to the Coast Province, a Secretariat was set up in Mombasa on 26th June, 2000 to receive oral and written presentations from members of the public in that Province. In particular, the Commission undertook detailed investigations into land issues at the Coast, notably land governed by the Land Titles Act (Cap. 282), absentee landlords, tenants-at-will and squatter settlements.

10. The Secretariat was manned by 3 Commissioners who made follow-up visits to all the seven districts in the Province. In addition, the Commissioners, whenever necessary, made special visits to areas with critical land problems.

11. The Secretariat was wound up in April, 2001 having been in operation for 10 months.

Interim Report

12. After receiving both oral and written presentations from the public from all the Provinces and Districts in Kenya, the Commission found it necessary to deal with some pressing land issues that required urgent attention. The nature of these problems was such that they could not await the conclusion of the Commission's inquiry. Consequently the Commission embarked on preparing an Interim Report.

13. The Interim Report, which was submitted to His Excellency the President in December, 2001, addressed itself mainly to problems that required administrative intervention and some amendments to existing laws. The issues discussed in the Report included extension of Government leases, disregard and abuse of certain laws and practices, land adjudication and consolidation, management of land registries and critical land issues peculiar to the Coast Province. The Interim Report captured the sentiments of a large section of the public and various interest groups.

The views and recommendations in the Report were not supported by a land policy framework since it was still under discussion.

14. The Interim Report appears as an Appendix to this Report.

Complaints from Members of the Public

15. Soon after the Commission was formally launched many members of the public sent in or brought complaints against various government ministries and departments, notably Ministry of Lands and Settlement, Ministry of Local Government, local authorities, the provincial administration, public and private institutions and individuals.

16. Although the Commission had not foreseen the large number of complaints that ensued after its appointment, it was quick to note that item c(viii) of the terms of reference instructed it to make recommendations which would address 'the structural framework for the processing and settlement of land disputes.' Therefore the Commission felt that the complaints received should be dealt with because they provided an insight into the weaknesses of the current dispute settlement mechanisms including the courts where delays adversely affect the rights of interested parties. The complaints were also indicative of the breakdown in the administration of land laws as a whole and abuse of office by public officials dealing with land matters.

17. In a bid to address this issue, the Commission met with Permanent Secretaries from three Ministries; the Office of the President in-charge of Provincial Administration and Internal Security, the Ministry of Lands and Settlement and the Ministry of Local Government and discussed modalities of handling complaints regarding their respective Ministries. It was agreed that complaints relating to a particular Ministry would be referred for action to a liaison officer nominated by the Permanent Secretary of the Ministry concerned.

18. So far 1,478 such complaints have been received and the majority of them referred to the above Ministries for investigation, action and feedback.

Visits to Foreign Countries

19. Pursuant to one of its terms of reference, the Commission decided to make, for comparative purposes, visits to seven countries, namely: Tanzania, Botswana, Egypt, Israel, England, India and Australia.

20. The visit to **Tanzania** from 28th October to 4th November, 2001 was premised on, *inter alia*, the shared ancestry and British colonial history as well as the fact that both countries are presently grappling with many land issues resulting from vestiges of colonial rule. A Presidential Commission set up in Tanzania in 1991 inquired into land issues which were considered similar to those falling within the mandate of this Commission, for example, issues relating to the land policy and settlement of land disputes. The Commission hoped to enrich its inquiry through mutuality of experiences and an exchange of views with key players in the Tanzanian land law reform and policy review process. It also expected to get useful insights into issues such as forest management, human/wildlife conflict, and pastoralism.

21. The Commission visited **Botswana** from 25th to 29th November, 2001 principally to carry out a comparative analysis of the powers of the Botswana Land Boards and those of the Kenyan Land Control Boards, as well as to gather insights into the management of ranches. This was considered necessary especially in relation to serious and complex problems which the Commission is expected to tackle with respect to the legal and the institutional framework of managing ranches and marketing livestock products from pastoral communities. Botswana's reputation of an advanced system of managing ranches and elaborate beef marketing programmes, as well as the existence of a policy and legislative framework on grazing of livestock, was seen as a useful reference point towards the development of an appropriate framework for pastoralism in Kenya.

22. **Egypt** and **Israel** were visited mainly in order to assist the Commission gain an insight into appropriate strategies for managing irrigation schemes. The Commission's experience in several Provinces disclosed that a number of irrigation schemes had collapsed due to mismanagement and uncertain land tenure arrangements among other factors. Furthermore there were many complaints regarding lack of adequate protection of water resources, as evidenced by increasing disclosure of destruction of water catchment areas, and lack of exploitation of available water resources to provide food security in needy areas of the country such as Garissa, Mandera, Tana River and other arid and semi-arid areas.

23. The Commission considered it important to conduct on the spot studies of irrigation schemes and the land tenure and institutional arrangements which facilitate these schemes in one developed country

(Israel) and one developing country in Africa (Egypt). The visit to Israel took place from 13th to 18th January, 2002 and the visit to Egypt was made from 11th to 15th March, 2002.

24. The visit to **India** was made from 12th January to 18th January, 2002. The decision to make the visit was guided by the need to discuss improvements to land laws which contained provisions and concepts that Kenya had borrowed from India's legislation and was still applying locally. For example, Kenya is still applying the Transfer of Property Act of India 1882 to many property transactions. It was thought that the study would throw light on ways in which India had adjusted this Act to suit modern circumstances.

25. In addition, the Commission noted that India has a very high population and yet is self-sufficient in food production. Bearing this in mind, it was thought that the visit would assist the Commission gather ideas on how to deal with complaints by the public over land ceilings, food security, and water catchment conservation.

26. The Commission also desired to look into how India manages the issue of sectional titles. Furthermore it was considered necessary to find ways of responding to complaints by members of Kenya's *Jua Kali* Sector who spoke at various public meetings organised by the Commission. India's cottage industries were seen as possible avenues of tapping experience that could be used to address the *Jua Kali* sector in Kenya.

27. The Commission visited **England** from 18th to 22nd February, 2002. The objectives of the visit were aimed at addressing several concerns. Most of the land laws applicable in Kenya are based on English law. Although English laws have been modified to suit modern circumstances, Kenya still lags behind. The Commission was anxious to discuss the circumstances surrounding the changes in English law that have taken place.

28. The Commission also hoped to gain first hand knowledge of the operations of the Land Registry System in the United Kingdom which is considered to be one of the best examples of a centralised and computerised system. This knowledge was considered useful in dealing with the Kenyan Registry System which has serious shortcomings.

29. In addition to the above considerations the Commission expected to gather ideas on critical issues such as rapid urbanisation and its implications to land use and management, settlement of disputes, sectional

properties law, environmental management and administration of boundaries. All the areas suggested for discussion were considered to be problem areas on which consultation was necessary in order to assist the Commission provide workable solutions.

30. The decision to visit **Australia** from 14th to 26th February, 2002 was influenced partly by the Commission's public meetings at which suggestions were made for greater participation of the public in the administration and management of land resources. These resources were said to include national parks, game reserves, forests, dams and lakes. The Commission hoped to gain useful ideas on how to tackle these suggestions from a country where communities are empowered to own, manage and administer similar resources.

31. Furthermore land claims by several groups such as the *Ogiek* and *Sengwer* of Rift Valley Province as well as some communities in the Coastal region such as the *Boni*, *Bajuni* and the *Mijikenda* made it necessary for the Commission to study the treatment of the rights of indigenous groups in a jurisdiction that had developed legislation enabling Aborigines to lay claim to native land.

32. The Commission considered other important issues on which Australia was reputed to have wide experience, such as sectional properties legislation and the Torrens System of registration.

33. Thus it was felt that on the spot discussions on the above matters would yield useful information and ideas that would enrich the inquiry.

34. Reports of the above visits were prepared and have yet to be studied in detail for lessons they may offer. In addition to the reports, there is a vast amount of literature gathered from the visits which undoubtedly contains invaluable ideas for comparative purposes and for use by the Commission in the compilation of its Final Report.

Preparation of a Land Policy Framework, Studies on Customary Law and the Preparation of the Kenya National and District Land Authorities Bill

35. In the performance of its tasks the Commission is enjoined to commission papers and reports from experts in various areas. Certain aspects of the Commission's terms of reference made it necessary for the Commission to request the Government to hire experts to advise the Commission.

36. To start with, the Commission hired an expert to work on the principles of a land policy framework. The assignment involved several meetings with the expert. The meetings took place intermittently for a period of one year. The final paper by the expert was submitted in October, 2002. It formed a useful guide which the Commission has used together with the views of the public and other evidence to draft the Policy Framework Principles which form part of this Report.

37. The Commission also hired four experts to carry out studies on customary land laws of a few sample communities. The experts represented four disciplines namely law, anthropology, land economics and sociology. This composition was aimed at eliciting a multi-disciplinary approach to the incorporation of customary law into the formal legal system of Kenya in response to one of the Commission's terms of reference. The process of identifying the experts started in the month of September, 2001 and the studies took place within a period of 6 months starting from May, 2002 to October, 2002. The final reports of the experts were received during the second and third weeks of October, 2002.

38. Whereas some of the recommendations emanating from these studies have been incorporated in the recommendations of this Report the Commission expects to take full advantage of the experts' findings in its Final Report.

39. As the Commission embarked on the preparation of this Report, it became necessary to prepare a draft Bill in line with one of its key recommendations. This in turn necessitated the hiring of a consultant legal draftsman to assist the Commission refine a draft Kenya National and District Land Authorities Bill prepared by the Commission. The initial Bill was discussed by the Commission during the second week of October, 2002. Thereafter two Commissioners were mandated to travel to London in order to discuss the Commission's draft with the consultant legal draftsman. The Commissioners held meetings with the draftsman for several days and returned with an updated version of the Bill which has since been refined by the Commission and is attached as Annex 1 to this Report.

40. The Bill forms the backbone of the legislative process that is necessary to bring the recommended institutional framework into fruition. Other necessary legislative changes will be considered in the Final Report.

Outstanding Tasks

41. The Commission was given a very wide and involved mandate. The centre piece of that mandate is term of reference (a), which required the Commission to undertake a broad review of land issues in Kenya and recommend the main principles of a land policy framework to foster an economically efficient, socially equitable and environmentally sustainable land tenure and land use system. Part II of this Report addresses that term of reference. Arising from the said policy principles, the Commission has lifted the questions of constitutional position of land and new institutional framework for land administration as the logical starting points for initiation of the land reform programme envisaged by term of reference (a). The rest of this Report is devoted to addressing the central issues of Principles of a National Land Policy Framework, Constitutional Position of Land and New Institutional Framework for Land Administration. Issues that are subject matter of the remaining terms of reference will be dealt with in the Final Report. These will include:

(i) guidelines for a basic land law, complementary legislation and associated subsidiary legislation to address, *inter alia*, the issues listed in paragraph 2(c) of this Report;

(ii) codifying and incorporating into legislation customary laws relating to land;

(iii) preparation of a draft of new or amending legislation to implement the recommendations of the Commission;

42. The Final Report will also deal with a number of special issues such as:

(i) Land buying companies, co-operative societies and partnerships;

(ii) Problems concerning the *Iloodoriak/Mosiro* Land Adjudication Sections.

PART II

PRINCIPLES OF A NATIONAL LAND POLICY FRAMEWORK FOR KENYA

CHAPTER 2

COUNTRY BACKGROUND

Kenya's Geographical Features

43. The Republic of Kenya has an area of roughly 581,751 square kilometers (or 44.6 million hectares) of which 97.8% is land and 2.2% water surfaces. Only 20% of this area can be classified as medium to high potential land; the rest being arid or semi-arid. Forests and woodlands occupy about 7% (i.e. about 37,000 square kilometers) of the country. Some of these form part of national reserves and game parks which together account for 10% of the country's area.

44. Topographically, the country may be divided into four distinct geographical regions, namely, the coastal plain, the arid low plateau, the highlands, and the Lake Victoria basin. Rainfall patterns, though extremely varied, generally follow those regions, with the Lake Victoria basin receiving the heaviest and most consistent record.

Population and Human Settlements

45. According to the final results of the 1999 census[1], the country's population now stands at approximately 29 million at an overall growth rate of 1.9%. At this level of growth the population is expected to rise to 55 million by 2050. North-Eastern Province registered tremendous growth due to the under-enumeration which was experienced in the 1989 census and to the refugee influx from neighbouring countries. Rates of growth declined in all other Provinces. In terms of demographic characteristics, the population remains relatively young at 60% below the age of 18 years. Slightly over 51% of the population are female.

46. The decline in population growth rates in the last ten years was the result of both increased mortality and a steady decline in total fertility levels. Mortality levels remain high as a result, *inter alia*, of the persistence of tropical diseases such as malaria and intestinal infections, as well as poverty related causes including widespread hunger in certain parts of the country. More recently, the rapid spread of HIV/Aids has increased mortality levels in both urban and rural areas. Recent estimates[2] indicate

---

[1] Report of the National Population Census, 1999, Government of Kenya, Nairobi, 2001.

[2] See Section 2.3 (iii) of the National Development Plan 2002 – 2008, Government of Kenya, Nairobi, 2002

that HIV/Aids prevalence in most parts of the country now stands at about 16% of the adult population. This has led to reduced gains achieved earlier in health standards, life expectancy, mortality and child survival and has increased dependency ratio and strained traditional care structure in most parts of the country. Although considerable progress has been achieved in controlling this pandemic, mortality due to HIV/Aids is yet to peak in spite of these efforts. Decline in total fertility rates[3] has been the result of changing perspectives to family sizes as well as increased use, especially by women, of modern methods of contraception. The link between HIV/Aids prevention and family planning has also contributed significantly to fertility regulation.

47. As would be expected, the pattern of human settlements is primarily a function of eco-climatic factors read together with the country's political history. Approximately 75% of the country's population live within the medium to high potential, and the rest in the vast Arid and Semi-Arid Lands (ASALs). One consequence of this is that size distribution of land varies quite widely as does physiological pressure which ranges from as low as 2 persons per square kilometre in the ASALs to a high of over 2000 in parts of Kisii, Vihiga, Kiambu and the Eastern slopes of Mount Kenya.

48. The rural-urban balance stands at 78% and 22% respectively with the most rapid urban growth centres still confined to Nairobi, Mombasa, Kisumu, Nakuru, Eldoret, Kakamega and their satellite extensions. According to the 1999 census, the overall growth rate of Kenya's urban population now stands at 6% implying a very rapid rural-urban migration pattern. This is further reflected in the country's poverty statistics which indicate that absolute poverty in the rural and urban areas, now stands at 50.1% and 53.1% of the population respectively.

Land in Economy and Society

The Structure of the Land Economy

49. Kenya's economy is and will for a long time, remain primarily dependent on agricultural and pastoral land uses. Current estimates indicate that agriculture and pastoralism not only provide livelihoods for over 75% of the country's population, they support 70% of all wage employment and contribute over 80% of export earnings. Crops that

---

[3]Report of the Kenya Demographic and Health Survey, 1999, Government of Kenya.

dominate the agricultural economy include coffee, tea, pyrethrum, cashewnuts, sugar-cane, rice, citrus fruits, wheat, coconut, cotton, horticulture, sisal, maize, sorghum and millet, amongst others. These are grown for either or both cash and subsistence purposes by large and small-scale farmers in the medium to high potential areas. Livestock farming for both dairy and beef production is also a significant undertaking especially in the ASALs where over 50% of Kenya's livestock are located.

50. Major land uses outside agriculture and pastoralism include harvesting of forest products (for timber and fuel wood), tourism, mining, fisheries and infrastructure. These together define the environment in which Kenya's land economy functions.

51. According to the Economic Survey for the year 2000, Kenya's economy had been in recession for the previous three years. All major indicators recorded negative growth rates between 1997 and 1999. The Economic Survey for the year 2002[4] however, shows that the economy recovered from a negative growth of 0.2% in the year 2000 to record a modest growth of 1.2% in the year 2001. All sectors except the building and construction recorded positive growth. Transport, storage and communication had the highest growth of 3.1% while agriculture and manufacturing recorded 1.2% and 0.8% growth rates respectively. A recent survey[5] of the incidence of poverty throughout the country indicates that the prevalence of poverty at the national level stands at 52.2% meaning that this proportion of Kenyans cannot achieve the minimum expenditure needed to acquire basic food and non-food items. The survey also indicates that the overall incidence of poverty stands at 53.9% and 49% in rural and urban areas respectively. In the case of rural Kenya the incidence of rural poverty remains intricately linked to the state of the land economy.

52. A combination of factors explain this rather dismal performance. The first was inadequate rains in major food growing areas following hard on the heels of the severe El-Nino downpours which had pounded the

---

[4] Economic Survey 2002, Government of Kenya.

[5] Poverty Reduction Strategy Paper for the period 2001-2004 Volume 1 Government of Kenya, Nairobi, June 2000.

country only a few years earlier. The second was the cost of agricultural inputs and shortages of labour in an otherwise labour intensive enterprise. This latter constraint was, among other things, a function of the escalation of morbidity and mortality among the rural labour force due to the spread of HIV/Aids infection. The third was exceptionally high pre-and post-harvest losses due to inefficient technologies of production and storage. The fourth was the effect of more systemic problems the most important of which were the decimation of land quality and the destruction of associated resources through deforestation, encroachment into marginal lands, increased population pressure, poverty induced land use responses, and the general absence of sound land and resource use policies. And the fifth was the poor state of infrastructure, including dilapidated roads, lack of markets and mismanagement of various institutions dealing with agricultural and pastoral produce.

The Political and Social Context

53. Beyond economic factors, however, it is important to recognise that land issues in Kenya are, in addition, deeply entrenched and this for political and socio-cultural reasons.

54. The political factors that have shaped the nature and characteristics of issues surrounding land in Kenya are intricately intertwined with the country's history. A distinction must be made in this respect between the Ten-Mile Coastal Strip of Kenya[6] and the rest of the country. Because the former was, until 1963[7], controlled and administered by colonial authorities on behalf of and as property belonging to the Sultanate of Zanzibar, the politics of access to and control of land in this region has always been and remains a complex issue involving as it does, the interaction between indigenous populations, Arab landlords and the State.

55. Although the control and administration of the rest of the country, including areas that were not under European settlement, was more direct, the land question remains an important factor in the dynamics of political relationships there as well. Indeed as a settler enclave, political relationships among white settlers *inter se* and between them and Africans

---

[6] The so-called Ten-Mile Coastal Strip was a strip of land, running inland for a distance of ten nautical miles, parallel to the Indian Ocean commencing at Vanga at the border with Tanzania upto Kipini including the Lamu Archipelago.

[7] Just before Kenya became a Republic in 1964, the Ten-Mile Coastal Strip was purchased by the British Government from the Sultan of Zanzibar and transferred to the mainland, see Ghai Y. P and MacAuslan, J P. W B. Public Law and Political Change in Kenya, Oxford Univeristy Press, Nairobi, 1972

were always determined by the land question: its acquisition, ownership, control, use and distribution.

56. Thus being central throughout the country the land question was, not surprisingly, also the primary drive in the country's independence struggle. Beyond independence in 1963, the land question quickly asserted itself as the fundamental factor in the dynamics of power and wealth allocation among the elites who were now in control of the instruments of State power. The land question therefore remains high on the country's political and development agenda.[8]

57. Underlying, and hence reinforcing that significance, is the fact that for indigenous Kenyans, land also has an important spiritual value. For land is not merely a factor of production; it is, first and foremost, the medium which defines and binds together social and spiritual relations within and across generations. As one Nigerian Chief put it, "land belongs to a vast family of which many are dead, few are living, and countless members are still unborn"[9]. Issues about its ownership and control are therefore as much about the structure of social and cultural relations as they are about access to material livelihoods. This is one reason why debate about land tenure in Africa always revolves around the structure and dynamics of lineages and cultural communities rather than on strict juridical principles and precepts.

Implications for the Definition of the Land Question

58. The geographical, economic, political and socio-cultural factors outlined above must constantly be kept in mind if the essential characteristics of the land question in Kenya are to be identified. For not only do they locate land and associated resources at the centre of the struggle for identity and survival, they also point to the major concerns which policy development in this area must address. The rest of this framework identifies and examines those concerns and develops principles which should guide the development of comprehensive policy in respect thereof. It is expected, however, that as the factors which shape land relations change, so will State responses in terms of specific policy issues.

---

[8] See generally Harbeson, J. W. Nation-Building in Kenya: The Role of Land Reform, Northwestern University Press, Evanson, 1973.

[9] Lawrance J.C.D. The Report of the Mission on Land Consolidation and Registration in Kenya, London, 1966.

CHAPTER 3

THE LAND QUESTION IN KENYA

Colonial Foundations

The Settler (Dominant) Economy

59. As was the case elsewhere in colonial Africa, one of the earliest acts of imperial control executed by the British in Kenya was the assertion of sovereignty over land occupied by indigenous people. This came in two phases.

The Ten-Mile Coastal Strip

60. As regards the ten-mile coastal strip which had, for a considerable period of time, been under the suzerainty of the Sultanate of Zanzibar, British authorities assumed jurisdiction over land by virtue of an Administrative Agreement entered into in 1895 with the Imperial British East African Company (IBEAC) transferring control over all lands ceded to the latter by virtue of a Concession Agreement signed in 1888 with the Sultan. Under that Agreement, all rights to land in the Sultan's territory, except private lands, were ceded to the company[1]. Private land in this context meant land held under certificates of ownership issued by the Sultanate. Consequently, indigenous rights to land were, by a stroke of the pen, transferred to the IBEAC and ultimately to British Colonial authorities. In order to clarify this matter and thus put to rest any claims by indigenous inhabitants of the coastal strip to land ownership, the colonial government promulgated an Ordinance in 1908 requiring

> "all persons being or claiming to have an interest whatever in immovable property....before the expiration of six clear months.... (to) make a claim in respect thereof...."

61. The Land Titles Ordinance[2] (as it was called) further declared that

> "all land....concerning which no claim or claims for a certificate of ownership shall have been made....shall be deemed to be Crown land".

---

[1] See Sorrensen, M.P.K, The Origins of European Settlement in Kenya, Oxford University Press, London, 1968.

[2] Now Cap. 282 of the Laws of Kenya.

All land thus declared to be "Crown land" was henceforth to be governed by the Crown Lands Ordinance, 1902[3].

62. According to the report of a Parliament Select Committee released in 1978[4]:-

> "Adjudication of claims under the 1908 Ordinance (was), the *primary* cause of landlessness by indigenous people in the ten-mile strip as we know it today. For it ruled out the possibility that these people and sections of non-Mazrui Arab communities could ever acquire title or guaranteed access to land during the colonial period. The reasons why most indigenous coastals made no claims as required by the Ordinance are not difficult to understand. First of all, the indigenous people of the strip had no knowledge of the existence of the Ordinance. Even if they did, they never understood its provisions. Secondly, the Ordinance had no relevance to indigenous conceptions of land tenure. That they should be asked to lay claims upon the soil was a startling proposition. Thirdly, the Ordinance was clearly biased against these people. For the colonial government and courts believed that no African, whether as an individual or a community had any title to land. Hence for purposes of the 1908 and other colonial land Ordinances land occupied by Africans was always treated as ownerless. Fourthly, the actual investigation of claims was done mainly by Mudirs - usually Mazrui Arabs absorbed into colonial administration - who were generally unsympathetic to the indigenous people. Fifthly, the time limit within which claims could be made was extremely short. And indeed after 1922 claims would no longer be received at all. Besides when in 1926 three "native reserves" were established in Kwale and Kilifi, any further doubts concerning the possibility of ever receiving claims from indigenous coastals were laid to rest. For with the exception of thirteen pockets of land in Kwale, land comprised within these reserves were deliberately delineated outside the ten-mile strip. New legislations passed in 1938 extinguished any other rights that "natives" in Kenya as a whole might have had *outside* their respective reserves. Sixthly, because

---

[3] Ordinance No. 21 of 1902.

[4] The Report of the Select Committee on the Issue of Land Ownership along the Ten-Mile Coastal Strip of Kenya, Government Printer, 1978.

the Ordinance had introduced a basically British conception of land, i.e. that whatever is attached to the land becomes part of that land, these people also lost whatever rights to the product of the soil, e.g. coconuts, etc. that they may have had under Muslim law and their own customary law. Although a few people were compensated for permanent improvements, the majority simply remained on the land in the belief that it was still theirs; a situation which was perpetuated by the fact that most of the new land owners were never resident on the land anyway".

The Rest of Kenya

63. As regards the rest of what is now Kenya, the imperial government, acting on the advice of the law officers of the Crown[5], declared[6] on December 13, 1899 that under Britain's own Foreign Jurisdiction Act 1890, the imperial power had control over and could therefore freely dispose of

> "waste and unoccupied land in protectorates where there was no settled form of government and where land had not been appropriated to the local sovereign or to individuals".

64. Arguing that Kenya was such a protectorate, the Law Officers advised that the imperial power was, in this case, at liberty to declare any land therein to be "Crown lands" or "to make grants of them to individuals in fee or for any term". That advice was duly incorporated in the first local land legislation; the East African (Lands) Order in Council, 1901 which purported to confer on the Commissioner of the Protectorate power to dispose of all public lands on such terms and conditions as he might think fit, subject only to any directions which the Colonial Secretary of State might give. The Order-in-council was later expanded and re-enacted in the form of the Crown Lands Ordinances 1902[7] and 1915[8] under which, "Crown land" meant and included

> "all public lands within the East African Protectorate which for the time being are subject to the control of His Majesty's

---

[5] Comprising the Attorney-General and the Solicitor-General
[6] Foreign Office Confidential Papers 7403 No. 101.
[7] Ordinance No 21 of 1902.
[8] Ordinance No. 22 of 1915

Protectorate, and all lands which have been or may hereafter be acquired by His Majesty under the Land Acquisition Act, 1894, or otherwise howsoever".

65. By this definition all land including what later became known as the Northern Frontier District (comprising the Northern parts of the current Rift Valley and Eastern Provinces, and the whole of North-Eastern Province) were summarily appropriated to the imperial government.

66. This new and entirely alien juridical dispensation had drastic implications for land relations in colonial Kenya.

67. The first had to do with the re-location of radical title (ultimate ownership) to land. By asserting that the imperial power and not indigenous inhabitants held radical title to land, the stage was firmly set for the expropriation of land held by indigenous people and its allotment to settlers and other private agencies who otherwise would not have qualified to receive it under customary law. The necessary legal procedures and processes were, in consequence, put in place to ensure, not only that allotees received land under terms and conditions determined by imposed English Property law, but also that indigenous inhabitants lost claims to all land, to the colonial power, whether such land was expropriated or not.

68. That state of affairs was sealed in 1915 by an opinion delivered by the then Chief Justice[9] to the effect, *inter alia*, that whatever rights indigenous inhabitants may have had to the land had been extinguished by colonial legislation leaving them

> "mere tenants at the will of the Crown, of the land actually occupied, which would presumably include land on which huts were built with their appurtenances and land cultivated by the occupier - such land [including] the fallow".

69. From a purely juridical point of view, that judgment summarises the relationship between the State and individuals with respect to land even today; that notwithstanding the many legislative and institutional reforms that have occurred since its delivery in 1915. The reasons why this is so will emerge in the course of this analysis.

---

[9] In the case of Isaka Wainaina, wa Gathomo and Kamau wa Gathomo vs. (1) Murito wa Indagara (2) Nanga wa Murito, (3) Attorney-General of the Protectorate (1922-23) 9(2) KLR, 102.

70. The second was the establishment and development of an agricultural economy managed and controlled exclusively by settlers. The immediate value to the imperial power of the relocation of radical title was that it opened the door to a new and essentially exploitative set of relations of production around land resources. Erected on over 75% of all high potential land available for agriculture, the new economy was predominantly market oriented and tied essentially to the needs of and demands generated by European metropolitan centres. Internally that economy was sustained by a number of important factors. The most important of these was constant government assistance in the form of protection and subsidy to European farmers for production, storage and marketing of agricultural produce. This was effected through the establishment of commodity boards and other institutions catering exclusively for European agriculture.[10]

71. The third was the emergence of new political structures founded on the ownership and control of over 8 million acres of land. In charge of it was a motley of elites ranging from an upper middle-class plantation type gentlemen drawn from Britain; through to some mean looking South African colonials bent on creating a "white man's country....with no non-sense about equal rights for black and white", to syndicates owned by multinational companies based in Britain. These were the land ownership class which set the tone and pace for political developments through the colonial period. They controlled the machinery of government, determined the status and privileges, if any, of indigenous populations and, it was them that charted the course and conditions for the transfer of power in the late 1950's and early 1960's.

The African (Subservient) Economy

The Structure of Subservience

72. To ensure absolute administrative and ideological control over the indigenous majority the colonial ruling class engineered the establishment of ethnic enclaves variously known as "native reserves" "areas" or "lands" into which indigenous people were shunted. The native reserves policy was directed at a number of objectives. The first was to prevent acquisition of prime native land by settlers through dubious forms of

[10] Government protection was most evident during the depression years especially in the 1930s; See the Agricultural Advances Ordinance (No.12 of 1930), the Land and Agricultural Bank Ordinance (No.3 of 1931), the Agricultural Mortgagor s Relief Ordinance (No.35 of 1934) and the Farmers Assistance Ordinance (No.18 of 1936).

private "agreements", "treaties" or "concessions" with chiefs and traditional elders as had indeed happened elsewhere in colonial Africa[11]. The second was to facilitate simpler and more efficient control and administration of "natives" by the colonial government. It would no longer be necessary to spread resources over vast areas of land occupied by migratory or semi-sedentary populations. These would now be administered in ethnically defined and exclusive boundaries under their own or modified form of "native authorities".[12] The third was that close administration of reserves in "outlying" areas of the territory also operated to protect European settlements in contiguous areas from invasion by pastoral communities. This was achieved through the declaration of "closed districts"[13] mainly in the ASALs of Northern Kenya.

73. The fourth and perhaps most important objective of the native reserves policy was that it made labour recruitment easier for the hoards of agents charged with securing its continuous supply for Europeans farms. To ensure that labour would indeed be available, elaborate legal and administrative infrastructure was quickly put in place for the purpose. These included crude taxation measures, coercion and aggressive recruitment in areas settled by indigenous inhabitants. As early as 1919, a circular issued by the colonial administration made it clear that the primary duty of colonial administrative officers was to secure labour for European farms, not to promote development in the African areas.

The effects of subservience

74. The native reserves and similar policies had important impacts on African land relations; several of which are worth enumerating here. First they led to severe destabilization of social and production relations in the African areas; these being founded as they were on community access to and control of land. An important factor in that destabilization was the fact that the settler economy survived essentially by depriving its indigenous counterpart of its most valuable human capital - its able-bodied men and women.[14] That in turn substantially weakened overall social and political authority in those areas.

---

[11] Many such treaties had been concluded in Tanganyika, Nyasaland and Rhodesia to mention but a few. See for example, Miller, C. Lunatic Express. Westlands Sundries, Nairobi, 1971.

[12] The first reserves gazetted under the Crown Lands Ordinance 1915 in 1926 consisted of 14 land units reserved for African occupation. That reservation, however, was not exclusive, a privilege which came only in 1938 with the promulgation of the Kenya (Native Areas) Order-in-Council of that year

[13] This was done under the Outlying Districts Ordinance No.5 of 1902.

[14] See generally, Van Zwanenberg, R. M. Colonial Capitalism and Labour in Kenya, 1919-1939, East African

75. Second, by confining communities to specific enclaves and denying them opportunities for technological adaptation or market adjustments, colonial land and administrative policies led inevitably to serious land deterioration in the African areas. This was compounded by official neglect and even hostility to indigenous agriculture as a viable economic enterprise and systematic exclusion of African produce from official marketing channels.[15]

76. With increased population pressure and consequent food demand, the traditional equilibrium between land availability and patterns of its use, which was usually maintained through territorial expansion and shifting cultivation, was no longer possible. That also tended to intensify competition for land resources among ethnicities, clans and lineages leading inevitably to disputes and social fracture.

77. Third, in the absence of a clear framework for the evolution of African land relations, no organised regime of indigenous property law was able to emerge. Indeed customary law was not only relegated to the sphere of "foreign law" which in any litigation would need specific proof, it was systematically discredited in legislative enactments and judicial proceedings throughout the colonial period.[16]

78. The perceived inability of customary land law to meet the challenges of contemporary agriculture is, to a large extent, a function of that disposition.

79. Fourth, and finally, the massive displacement of indigenous populations as a result of the establishment of colonial economic and political structures was to become a critical question in the post-independence political settlement. Indeed that factor alone defines the land question in Kenya and elsewhere as "the last colonial question" that must be resolved.

Colonial Responses

80. Some attempts were made by colonial authorities to address these issues.[17] These were, however, undertaken in a policy context which

---

[15] See also Van Zwanenberg, R.M., Agricultural History of Kenya to 1939, East African Publishing House, Nairobi, 1972.

[16] See Okoth-Ogendo, H.W.O. The Tragic African Commons: A century of expropriation suppression and subversion, keynote address at a Workshop on Public Interest Law and Community – Based Property Rights held in Arusha, Tanzania, August 1-4, 2000.

[17] See Okoth-Ogendo, H.W.O. "African Land Tenure Reform", in Heyer, J. J. Maitha and W. Senga , Agricultural Development in Kenya. An Economic Assessment, Oxford University Press, Nairobi, 1976.

assumed that what was happening to African agrarian systems were simply manifestations of their inherent contradictions.

81. The victim, most colonial administrators argued, was indeed the perpetrator of those impacts! Three important interventions were consequently made with that perspective in mind. The first involved programmes designed to decongest the African areas through resettlement on vacant "Crown" or reserved land, and reconditioning of degraded land. To plan and finance these procedures, a Development and Reconstruction Authority (DARA) was set up in the mid 1940s assisted by an African Land Utilisation and Settlement Board (ALUS), later renamed the African Land Development Board (ALDEV). For a wide variety of reasons, these programmes never succeeded. Some of these included the inherent unsuitability of the land ear-marked for resettlement, the coercive manner in which the reconditioning schemes were administered, and general cultural aversion to the dislocation of families, clans and lineages in the process of resettlement.

82. The failure of land development and settlement schemes as well as increased political activity and violence fueled by land pressure in the African areas led, inevitably, to the search for new interventions. One of these involved strategies designed to improve production structures and infrastructure through the provision of limited extension services and new, if rather simple, technologies. These strategies, however, were essentially experimental, being targeted only to the so-called "better farmers" chosen for their loyalty to the colonial government, and some ability to absorb the costs of those interventions. These were the target groups which were also permitted to engage in cash crop farming on a limited scale.

83. The expectation of colonial authorities was that the African farmers would, through some sort of osmotic process, absorb the benefits of experiments conducted by the "better farmers". This never really happened, particularly since no attempts were made to integrate these interventions into the overall colonial economy. The contribution of these strategies towards the alleviation of widespread poverty in the African areas even among the "better farmers" themselves, was therefore minimal.

84. The most comprehensive intervention, however, came in the mid 1950s in the form of reform of African land tenure. This particular intervention started in 1954 when the colonial government published a

white paper on the "Intensification of African Agriculture" through, *inter alia*, individualisation of land tenure. The "Swynnerton Plan"[18] as the intervention came to be known, was based on the assumption that African land tenure systems were, by virtue of their community orientation, inherently incapable of facilitating the development of modern agriculture. The solution, it was argued, lay in the conversion of those systems to individualised tenure arrangements. This is the origin of tenure reform in the Trust land areas. In the high and medium potential areas this programme remains central to agricultural development strategies in Kenya today.

Essential Characteristics of the Land Question

The Legacy of History

85. The argument that has been presented above is that the land question in Kenya was for over a century shaped by economic, political, social and legal parameters. These, in turn, point to the essential elements which colonialism stamped on that question.

86. First, since the economy was dependent on land, issues about tenure, access, distribution and regulation of use, were always at the centre of that question.

87. Second, control of that economy emerged, over time, as an important basis of administrative and political power. The land question was in that sense an important political issue throughout Kenya's history.

88. Third, the continuing nexus between land and social structure in African agrarian relations also meant that the land question was an important issue for the African economy as well. Fourth, and finally, as the settlers themselves realised quite early, the land question, as it was then evolving, needed to be secured in law, not only to give it legitimacy, but also to entrench it. A legal advisor in the British Foreign Office had warned as early as 1899 that the administration of land, "if not put on legal lines may give rise to much future trouble".[19]

89. That explains the excessive, if sometimes, pretentious legalism with which decisions affecting land at every stage of development were taken. Thus the legal infrastructure involving land became extremely

---

[18] Swynnerton, R J M A Plan to Intensify the Development of African Agriculture in Kenya, Government Printer, Nairobi, 1955

[19] See generally Okoth-Ogendo, H W O Tenants of the Crown Evolution of Agrarian Law and Institutions in Kenya, ACTS Press, Nairobi, 1991

comprehensive. At the time of independence for example, there were three substantive regimes in property law[20] governing land of various tenures, five registration systems,[21] and an elaborate structure of administrative agencies dealing with land and related issues. The purpose of that infrastructure was to perpetuate a dual system of economic relationships consisting of an export enclave controlled by a small number of European settlers and a subsistence periphery operated by a large number of African peasantry. Specifically, that duality was manifest, in terms, *inter alia* of the following characteristics:

- systems of land tenure based, in the one case, on principles of English property law and, in the other, on a largely neglected regime of customary property law;
- a structure of land distribution characterised by large holdings of high potential land, on the one hand, and a highly degraded and fragmented small holdings on the other;
- an autonomous and producer controlled legal and administrative structure for the management of the European sector, as opposed to a coercive control structure for the African areas; and
- a policy environment designed to facilitate the development of the European sector of the economy by under-developing its African counterpart.

The Independence Settlement

90. It was expected that the transfer of power from colonial authorities to indigenous elites would lead to fundamental restructuring of that legacy. This however did not fully materialise. Instead what happened was a general, re-entrenchment, hence, continuity of colonial land policies, laws and administrative infrastructure. Explanation for this lies primarily in the conduct of the decolonisation process itself and the opportunity which it accorded the new power elites to gain access to the European economy.[22]

---

[20] Namely, the regimes established by the Transfer of Property Act of India, 1882, the Registered Land Act (Cap.300), and Customary Law.

[21] Namely those operating under the Registration of Documents Act (Cap.285) and the Registration of Titles Act (Cap. 281), the Government Lands Act (Cap.280), the Land Titles Act (Cap.282) and the Registered Land Act (Cap.300).

[22] See Wasserman,G. "The Independence Bargain: Kenyan Europeans and the Land Issue," 1960—1962, Journal of Commonwealth Political Studies, 1973, Vol. II No. 2.

91. As early as the 1950's, colonial authorities had realised that the most optimum protection for white settlers was the incorporation of the emerging politically active African elite into the principles of colonial agriculture. This is the reason, for example, why Swynnerton's blueprint was dubbed a plan for the intensification" of African agriculture. It also explains the many development schemes accompanied by extensive organisation of produce marketing that were instituted in the African areas especially in the very volatile Kikuyu country. A new Agriculture Ordinance promulgated in 1955 set the legal framework for these incorporation projects by stipulating that access to government assistance and subsidies would henceforth be based, not on racial categories, but on levels of income obtained from agriculture. The colonial authorities were convinced that once firmly inducted into the settler economy, the African elites would be prepared to defend it after independence.

92. With that strategy in place, colonial authorities proceeded to negotiate a power transfer arrangement based on the principle that the settler economy would not be dismantled or otherwise destabilised. The final outcome of that negotiation was an independence settlement plan that provided limited scope for land redistribution by removing racial barriers to land ownership in the settler areas, while at the same time confirming and safeguarding property rights acquired during the colonial period. The one aspect of the plan consisted of land resettlement schemes designed as much to take the lid off pressure for land redistribution exerted by the landless and squatter, as to introduce the African elite directly into the settler economy. This was the primary rationale for the Million Acre, "Yeoman", and "Z" schemes of the early 1960's and the "Squatter", "Haraka", and similar programmes towards the end of that decade. These soon gave way to more organized market-driven redistribution mechanisms supported by the Land and Agricultural Bank (later merged with a revamped Agricultural Finance Corporation) and the Agricultural Development Corporation. Entry by the elites into and consolidation of interest in the settler economy after independence through the above programmes and private purchase ensured not only that they now had sufficient stake in it to be able to protect and defend it, but also that the machinery of the State would continue to be used to support development in that sector. The effect of this is that the bulk of State resources allocated to the agricultural sector continued to flow to that economy. [23]

[23] Okoth-Ogendo, H.W.O. in Tenants of the Crown op cit.

The Contemporary Situation

93. A number of developments in the last forty years have brought the land question into much sharper focus than it was in 1963. The first of these is rapid population growth, particularly in the small farm sector, formerly known as the "Trust land" areas.

94. An important effect of this has been severe land pressure and fragmentation of holdings in many areas of the country. These areas include most of Central and Western Kenya, and the Eastern slopes of Mount Kenya. The second is the persistent spread of HIV/Aids pandemic throughout the country and its impact on land use and productivity in the rural areas. Emerging trends are suggesting that HIV/Aids has not merely reduced the capacity of the rural labour force for work in agriculture, it has also led to widespread abandonment of productive land in many parts of the country. Land abandoned or vacated by the high incidence of mortality due to HIV/Aids is not easily recycled into production due to the fact that such land remains held of particular communities or ethnic groups. The third is the general deterioration of production and productivity in all areas of the country particularly in the large farm sector. Quite clearly many Kenyan land owners do not appear to have developed a professional calling for farming.

95. The fourth is the systematic breakdown in land administration and land delivery procedures throughout the country, top-down over-concentration and over-centralisation of management and administration of land and inadequate participation by communities in the governance and management of land and natural resources. The fifth is rapid urbanisation leading to uncontrolled development and general disregard for land use planning regulations in those areas. The sixth is creeping desertification especially in the ASALs due, *inter alia,* to global climate change. The seventh is general poverty which is due to lack of capacity to gain access to clearly defined, enforceable and transferable property rights. Enabling access to such rights in the land context is therefore one means of addressing poverty and hence puts the land question into focus. The eighth is the multiplicity of legal regimes that relate to land. The ninth is gross disparities in land ownership and gender discrimination in succession, transfer of land and the exclusion of women in land decision making process. The tenth is the confusion caused by involvement of unauthorised persons in land matters. The eleventh is the poor management of essential infrastructure that inhibits sustainable

development of rural areas, particularly roads, communications, power and water supplies.

96. The impacts of these developments have been many and varied. The more important of these include:

- severe land pressure manifested, *inter alia*, in terms of fragmentation and sub-economic parcelation of land particularly in the high potential areas of the small farm sector and changes in land use patterns;
- deterioration in land quality as a result of poor land use practices;
- twin issues of squatters and landlessness;.
- unproductive and speculative land hoarding, especially by the elite;
- disinheritance of women and at times, biased decisions by disputes tribunals, committees and boards;
- under-utilisation and abandonment of agricultural land especially in areas severely ravaged by the HIV/Aids pandemic;
- poor health, malnutrition, non-productive labour force leading to low economic growth and productivity;
- uncontrolled urban squalor and, especially, environmental pollution as a result of lack of proper solid and liquid waste disposal;
- severe tenure insecurity due to the existence of overlapping rights especially at the interface between rural and urban areas;
- wanton destruction of forest, catchment areas and areas of unique bio-diversity;
- severe competition between wildlife's needs and those of human settlements;
- more recently, inter-ethnic resource conflicts especially in areas originally expropriated for re-settlement; and
- confusion of the public by the many land statutes.

The Need For a Land Policy

97. Immediate and systematic attention to the land question, in all its manifestations, both historical and contemporary, is clearly necessary if its social, economic, cultural and political ramifications are to be fully addressed. What this requires, in the first instance, is comprehensive land policy development. Although policies indeed exist on various aspects of the land question, these are eclectic, sectoral and inconclusive in many respects. Besides, as much policy as may be discerned from the large body of legal and institutional structures governing land and related resources, is largely out of touch with contemporary research and discourse in land development both regionally and internationally. A rationalising framework consisting of a comprehensive set of policy principles is therefore necessary.

CHAPTER 4

A LAND POLICY FRAMEWORK FOR KENYA

Conceptual Parameters

98. The development of land policy requires conceptual clarity at several levels. Firstly, the context-giving rise to policy development must be fully elaborated. In the case of Kenya that context is defined by a number of parameters, chief among which are:

- the centrality of land in the economy;
- the political sensitivity of land as outlined above;
- the social and cultural complexity of the land question, particularly the fact that for many communities land relations are also social relations as land assumes many forms that order relationships between people, both the living and the dead;
- the overall governance framework in which land issues are played out and resolved.

99. Secondly, account must be taken of other macro and micro-economic policies affecting the land sector. These include policies on industrialization, the environment, infrastructural development, urbanisation and more recently poverty reduction and Aids impact interventions. The success or failure of the resolution of the land problems in Kenya's future development will to a large extent depend on the success or otherwise of these other policies.

100. Thirdly, an adequate framework for land policy development must take into account the current international discourse on land and the environment. The concern here is to ensure that emerging global principles are incorporated into and domesticated as part of national land policy.

101. Finally, land policy principles must address not only specific components of the land question, but more importantly, the essential values which society seeks to promote or preserve. Ultimately, it is these values which define optimum and sustainable land development.

The Process of Land Policy Development

102. Policy development is a deliberate act that involves a number of steps not necessarily in sequential order.[1] The first of these, usually is public enquiry guided by clear terms of reference set by the State. The second is public debate on the conclusions arrived at through that enquiry. The third is the formulation of principles reflecting public consensus arising from that debate, and the fourth, is authoritative determination of policy which can then be used as a basis for legislation or administrative decision-making. Only in Tanzania have all these steps been taken in that order. Most countries in East, Central and Southern Africa have not been that systematic. Nonetheless, it is clear that in those countries where land policy instruments have been developed, the process of development has been information based, interactive, participatory and issue-oriented. Land Policy development in Kenya must pay attention to these factors.

Land Policy Principles for Kenya

103. Provided below are guidelines for the development of a comprehensive land policy for Kenya in accordance with the parameters previously set out. This is done in the context of specific issues some of which were raised by the public, which an adequate land policy should address. The most important of these relate to the goals, objectives and principles of land policy; sovereignty over land, the classification of land, land tenure, tenure of land based resources, productive and sustainable use of land, management and development of land, land rights delivery, land administration and the settlement of land disputes. These are analysed sequentially in the following chapters.

The Overall Goal, Objectives and Principles of Land Policy

Diagnosis (analysis of issues)

104. The design of an adequate land policy must in the first instance draw its goal, objectives and fundamental principles from the overall national development framework and strategies of the country. Land policy must in this regard identify the specific issues which the land sector is expected to address as its principal contribution to that development. Over the years Kenya has, in numerous documents,[2] set out a number of development policies towards which various sectors of the political economy are expected to strive. These include industrialisation[3] the

---

[1] See Okoth-Ogendo, H W O "Land Policy Development in East and Southern Africa. An analysis of drivers, processes and outcomes" Paper delivered at an international Conference on land policy, Cape Town, South Africa, 1998.

2 For example in development plans going back to the early 1960s

3 The Sessional Paper No. 2 of 1996 on Industrial Transformation to the year 2020, Government Printer.

modernisation of agriculture,[4] the environment[5] participatory governance,[6] urbanisation,[7] tourism,[8] and, more recently, poverty reduction[9] and HIV/Aids impact interventions.[10]

105. Although the attainment of the overall objectives of these policies could remain elusive, due to the general economic recession that has hit the country, they, nonetheless, give a clear indication of the country's long-term aspirations. More importantly those policies identify the land sector as an important catalyst in the attainment of the specific goals.

Policy Principles (Goal and Objectives)

- **the goal of land policy in Kenya should be to establish a framework of values and institutions that would ensure that land and associated resources are held, used and managed efficiently, productively and sustainably;**
- **the overall objective of land policy should be to establish a land system that is economically efficient, socially equitable, environmentally sustainable and operationally accountable to the Kenyan people; and**
- **the specific objectives of land policy should be to facilitate:**
  - **efficient, transparent and participatory land administration and management system;**
  - **adequate infrastructure should be developed and maintained to facilitate productive land use;**
  - **protected and other ecologically sensitive areas should be conserved, managed and protected, efficiently, effectively and sustainably;**
  - **equitable distribution and access to land and associated resources;**
  - **security of land rights within and across generations;**

---

4 The Ministry of Agriculture and Rural Development is in the process of preparing an agricultural sector strategy paper.

5 There are numerous policy documents on the environment in addition to the recently enacted Environmental Management and Coordination Act 1999.

6 Most policy documents now mainstream issues of governance; see for example Chapters 2.7, 7 and 8 of the National Development Plan 2002 - 2008. op.cit.

7 See chapter 2.10 of the National Development Plan, 2002-2008 op.cit.

8 see Chapter 4 of the National Development Plan, 2002 – 2008, op.cit.

9 See the Poverty Reduction Strategy Paper, Government of Kenya, Nairobi 2001.

10 See Aids in Kenya, Background Projections Impact Interventions Policy, sixth edition, 2001, Ministry of Health, Government of Kenya.

- **efficient and orderly land use planning and development of public land resources to promote rapid socio-economic development;**
- **efficient and cost effective delivery of land rights;**
- **socially acceptable resolution of land rights disputes;**
- **development of efficient and sustainable infrastructure;**
- **efficient and cost effective decision making in terms that are socially accountable and responsive to changes in technologies of production;**
- **the sound conservation, management and protection of protected areas such as wildlife sanctuaries, forests, coastal and marine zones, wetlands , water catchments, and other ecologically sensitive areas;**
- **gender equity;**
- **adequate infrastructure should be developed and maintained to facilitate productive land use; and**
- **protected and other ecologically sensitive areas should be conserved, managed and protected, efficiently, effectively and sustainably.**

106. The fundamental principles on which that goal and objectives should be founded are that: -

- **since land is the common heritage of all Kenyans, it is their duty to ensure that it is responsibly administered, managed and productively used;**
- **all citizens of Kenya, irrespective of gender, should have equal opportunity of access to the land, whether this is through the market, or through any system of inheritance, customary or statutory;**
- **it is the duty of public officers to ensure that land is administered transparently and that they remain accountable to Kenyans at all times;**
- **sustainable management of land is a prerequisite to security of access to that land, hence poor or unproductive land use is unacceptable;**
- **efficient operation of the land rights market at all levels is fundamental to land development hence market distortions of whatever nature, legal or otherwise, must be eliminated; and**

- **comprehensive land use planning and fidelity to the plan are integral to land development especially in the urban and peri-urban areas.**

Principles Regarding Sovereignty over Land

107. One of the most fundamental issues which land policy must clarify is the question of sovereign control of land resources. Kenya, along with all former British colonies, has inherited a body of theory which regards this issue as an integral part of political jurisdiction. In more recent times, however, that perspective has come under serious question.[11]

108. There are at least four aspects to this issue. These are, the location of radical title, the power of compulsory acquisition , the scope of the regulatory power of the State, and the system of derivation of title.

The Location of Radical Title

Diagnosis

109. The importance of the issue as to where ultimate or radical title should be located, is that this is what determines the derivation, security and the integrity of land rights. This is the reason why colonial expropriation of land started with the resolution of this issue. Note has been taken of the fact that outside the Ten-Mile Coastal Strip, colonialism had relocated radical title from indigenous communities to the imperial sovereign thus making the former *de jure* tenants at will of the latter. After intense political pressure, however, radical title to land reserved for African occupation was, in 1938, severed from the colonial sovereign and transferred to a Trust Board set out specifically for that purpose. Radical title to areas not so reserved, then classified as 'Crown Lands', remained in the colonial sovereign, irrespective of the nature of the title granted to the landholders.

110. The position in the Ten-Mile Coastal Strip was slightly different. Radical title to land recognised as privately held under the Land Titles Ordinance was, arguably held by individuals identified under that legislation. The rest was appropriated to the sovereign. At independence, radical title to land occupied by Africans including small pockets of land in Kwale and Kilifi, now styled Trust lands was again relocated from the Trust Board, which was abolished, to county councils. Crown land, now styled "Government Land", was held of the Government.

111. Further confusion was introduced into this matter by the Swynnerton reforms which introduced a new form of land holding called

[11] The most recent attack on that perspective is in Uganda's 1995 Constitution and 1998 Land Act

"absolute proprietorship". One effect of the registration of any part of Trust land in absolute proprietorship is that it does not extinguish radical title held by the county council in respect of such land[12] but it merely vests in the registered person the absolute ownership of the land.[13]

Policy Principles

112. That issue should be resolved in accordance with the following principles: -

- **all public land[14] should vest in, and be held of, a national institution on behalf of the people of Kenya, created by legislation and entrenched in the Constitution;**
- **the core functions, duties and powers of the national institution should be defined in the Constitution;**
- **all private land whose registered title was derived from or granted by the Government should vest in and be held of the national institution and all private land whose registered title was derived from Trust Land should vest in and be held of community based institutions created by legislation and entrenched in the Constitution;**
- **all commons[15] vested in county councils should vest in and be held of community based institutions created by legislation and entrenched in the Constitution.**

The Power of Compulsory Acquisition

Diagnosis

113. The power of compulsory acquisition is concerned with the issue as to whether the State should have the power to extinguish or acquire any title or other interest in land for public or any other purpose. A subsidiary aspect to this issue is whether any organ, other than the State itself, should have such a power.

114. The power of compulsory acquisition is derived from the feudal notion that as sovereign, the State holds the radical title to all land within its territory. Acquisition of land is, therefore, regarded merely as a form of re-possession by the State of that which is its own. In Kenya, the power of compulsory acquisition is as much a derivation of the theory of

[12] See section 120 of the Constitution of Kenya.

[13] See section 27 of the Registered Land Act (Cap 300)

[14] See definition of "Public land" under Classification by Territory under paragraph 122

[15] See definition of the "Commons" under Classification by Territory under paragraph. 122.

sovereignty as it is from the Constitution. Thus Section 75 of the Constitution provides *inter alia,* that no property or interest of any description may be compulsorily acquired unless the taking is necessary in the interest of defence, public safety, public order, public morality or the promotion of the public benefit; the necessity, therefore is such as to afford reasonable justification for any hardship arising from such taking; and law exists for the prompt payment of full compensation in respect of that taking. That power is vested only in the State and is, under the Land Acquisition Act (Cap. 295) exercisable on its behalf by the Minister acting through the Commissioner of Lands. As regards Trust Land, Chapter IX of the Constitution permits a modified and rather simplified form of acquisition referred to as "setting apart" which may be activated by the Head of State or county councils.

Policy Principles

115. Because compulsory acquisition is such an important power, it should be delinked from issues relating to the location of radical title. Its exercise should therefore be guided by the following principles: -

- **the power of compulsory acquisition should vest, and vest only in the State;**
- **the conditions necessary and sufficient for the exercise of that power in respect of any category of land or interest therein should be clearly defined by law and should, in addition, provide for consultation with the local community or land owners including cities and municipalities;**
- **the law should provide that preparation of an Environmental Impact Assessment should be part of a feasibility study before any compulsory acquisition or setting apart is commenced if the project will have significant impact on the environment;**
- **the law should establish a single mode for the exercise of that power irrespective of the tenure category in respect of which the land is held;**[16]
- **a uniform set of principles for the determination of compensation should be applied to all categories of land acquired irrespective of their tenure status;**

[16] This means that even if the category of "Trust land" were to continue, the procedure of "setting apart" of land would be abolished.

- **the law should prohibit the taking of possession of any land or interest in land acquired, before full and fair compensation, either in cash, or in terms of land of equivalent value or size is made; and**
- **where the public purpose or interest justifying the compulsory acquisition fails, the law should provide for the original owners, or their descendants, of the property or interest to be given first option of restitution on condition that original compensation is refunded.**

The Scope of the regulatory power of the State

Diagnosis

116. The regulatory power of the State derives from its residual duty to ensure that proprietary land use does not sabotage the public welfare. Indeed that power is no more than an extension of the doctrine of public nuisance. Its purpose, therefore, is to suppress or limit the use of private property while in the owner's hands, in order to protect public welfare from dangers arising from its misuse. As is the case with compulsory acquisition, the regulatory power of the State is firmly anchored in section 75 of the Constitution. This power has not been used extensively to control or otherwise regulate the use of agricultural or urban land and to enforce sustainable environmental land use practices throughout the country. Currently the country has no clear land use policy to guide development.

Policy Principles

117. The regulatory power of the State is no longer merely an incident of political sovereignty. Its legitimacy is now derived from the Constitution. Its exercise therefore should be guided by the following principles: -

- **in addition to the State in its corporate capacity, all planning authorities in the country should have the inherent power to regulate the use of land in the public interest;**
- **legislation embodying that power may be general or sectoral but must, in either case, establish clear standards which override proprietary land use practices, and which landowners, occupiers and holders of interests in land would be required to comply with;**

- **such legislation should embody international and national policies relating to the sustainable use of land and the preservation of environmental values;**
- **the exercise of the regulatory power at any level should take into account local or community values on land use and environmental management; and**
- **any law or by-law expressing the regulatory power of the State or of a planning authority, should, in addition to the usual procedures of publication, be fully and effectively discussed by the public or by local communities before they are enacted or promulgated.**

Derivation of Title

Diagnosis

118. The issue of derivation of title relates to the modalities through which land rights of whatever category, are created, acquired or otherwise originate from radical title. Without addressing this issue directly, a number of jurisdictions merely declare that land rights may be held in accordance with specific tenure categories. The all-important question of how access to those categories may be obtained, is thus not addressed. In Kenya land rights may be derived from radical title in one of several ways. The first is by grant from the State; the second is through membership in the community that recognizes the principles of customary law and, the third is through the process of adjudication and registration. Rights thus acquired may then be transferred, transmitted or otherwise disposed of to other parties. Derivation, *per se*, is, therefore, not a problem. What is problematic is that the extent of land rights security varies widely from one to another system of derivation. For while rights obtained by way of State grant or registration after adjudication, are technically secure, that security is sometimes compromised when those rights are transmitted from one generation to another in accordance with customary law rules of succession. Similarly, although land rights obtained by reason of community membership are always socially secure, this is often of little value in the context of commercial transactions.

119. There is need therefore for institutions to be established by legislation and entrenched in the constitution from which all land rights will originate at both national and community levels to ensure that all systems of derivation of land rights confer adequate security.

Policy Principles

120. To ensure that all systems of derivation of land rights confer adequate security, attention should be paid to the following principles: -

- **all land rights, depending on tenure category, should originate from either a national institution to be known as the Kenya National Land Authority or a community based institution to be known as a District Land Authority;**
- **the National Land Authority should devise a suitable mechanism, whether documentary or otherwise, for the ascertainment of land rights under each tenure category;**
- **a flexible mapping mechanism should be developed to identify and map all existing customary land rights at different levels, collective, household and individual;**
- **existing land rights obtained by grant or registration should be deemed to have been derived from the National Land Authority or District Land Authorities as the case may be; and**
- **the process of verification of land titles, where appropriate, should be commenced by the National Land Authority, and a comprehensive register under each category, prepared accordingly.**

Principles Regarding Classification of Land

Classification by Territory

Diagnosis

121. Because of Kenya's peculiar history, radical title to land is vested either in the government and classified as Government Land or in the county councils and classified as Trust Land. That classification is a reflection of the fact that since 1938, radical title to land has always been and remains split between these juridical entities. "Government Land" on the one hand, consists of all un-alienated land in the country including gazetted forests, national parks, rivers and lakes, public roads and road reserves, marine reserves, the territorial seabed, protected areas, and land occupied by government or quasi-government institutions and installations. It is important to add that this category also includes all land held under private title i.e. freeholds, government leaseholds and some absolute proprietorships created under the Registered Land Act (Cap.

300). "Trust land", on the other hand, consists of land held by County Councils on behalf and for the benefit of persons ordinarily resident on that land and some absolute proprietorships. The size and location of territorial units of Trust land have seen considerable variation in the last seventy years.

Policy Principles

122. That classification has outlived its purpose. What Kenya needs is a property system based on the following principles: -

- **Constitution should classify all land in Kenya simply as public, commons or private;**
- **Public Land should comprise all land currently held as unalienated government land except such land within the Coast Province that became Government land through the application of the Land Titles Act (Cap. 282) (excluding land within the boundaries of any City or Municipality and the foreshore) and all land used or occupied by any Ministry, Department or Agency of the Government or a Statutory Corporation and all public roads and roads of access as defined in the Public Roads and Roads of Access Act (Cap.399) (whether gazetted or not), all rivers, lakes, the territorial sea and the seabed and the reversionary interest in all Government freehold and leasehold titles;**
- **The Commons should comprise all land currently defined as:**
  - **Trust Land under the Constitution and the Trust Land Act other than land already registered under the provisions of the Registered Land Act (Cap.300) and all land that is currently unalienated Government land within the Coast Province that became Government land through the application of the Land Titles Act (Cap. 282) (excluding land within the boundaries of any City or Municipality and the foreshore) and should include all land held by county councils consequent upon a reversion of a freehold and leasehold title;**
  - **held and managed as community forests, water sources, grazing areas, and shrines identified as such by specific communities; and**

- **ceded to the commons by any process of alienation or transmission.**
- **any land registered in the name or reserved for the purpose or use of a local authority.**

♦ **Private land should comprise all land:**

- **currently registered under the existing land registration statutes including Group Ranches; and**
- **otherwise acquired by mechanisms which confer exclusive occupation thereof.**

Classification by Tenure

Diagnosis

123. Land tenure refers to the terms and conditions under which access to land rights are acquired, retained, used, disposed of, or transmitted. An examination of land tenure is therefore central to the formulation of an adequate land policy. There are three ways of classifying land tenure regimes in Kenya.

124. The first is in terms of the location of the radical title (ultimate ownership) to specific territorial land units as indicated above, i.e. whether "Government" or "Trust" land. As a form of tenure, the classification of land as "Government" has, erroneously or by design, tended to be interpreted to mean that such land is "Private" to the Government and may be, and has been in practice, used and disposed of as such. In as much as there is no legal requirement under the Government Lands Act for the Government to respond to any public obligation as regards the stewardship or utilisation of land so classified, it is to be noted that Kenya's system of government is patterned on the representative model, where the President and other political leaders are elected by the people and the President is vested with the executive authority to constitute offices and make appointments to such offices or abolish them as situations may demand. It could not have been the vision or desire of the people to elect representatives into positions of authority merely for them to pursue individual interests or be wasteful of public property. It must at least be implied that the people's representatives, both elected and appointed to the Government, are put there to run governmental affairs and administer public property including land prudently in trust or for the benefit of the people.

125. The classification of land as "Trust" means, at least in terms of the Constitution and the Trust Land Act, that such land must be held for the

benefit of the people resident in those territorial units. The legal regime governing tenure relations in all Trust land units is, therefore, customary law. The vesting of both radical title and control in respect of Trust land in county councils, coupled with the allocation of administrative responsibility therefor in the Commissioner of Lands, means, however, that customary tenure principles are hardly ever respected. There are instances of violation of the constitutional and statutory provisions relating to the setting apart and adjudication of Trust land; overstepping by the Commissioner of Lands of his agency mandate under the Trust Land Act; and abuse of trusteeship and fiduciary obligations by county councils, civic leaders and council officials of their positions by causing alienation of Trust land contrary to the provisions of the Constitution and the Trust Land Act. Indeed the constitutional contempt of Trust lands evidenced, *inter alia,* by the lack of security for customary land rights particularly those of women and its perception as a transitory domain to be phased out at the earliest opportunity through privatisation of ownership rights, has led to the expropriation of community property in many parts of the country.

126. The second way in which tenure regimes may be classified is in terms of the legal regime governing land relations i.e. whether that regime is statutory or customary. And the third is in terms of the quantum of rights held i.e. whether as freehold, leasehold or commonhold. As in the case with the first, these two regimes are also governed by distinct bodies of law comprising their own unique modes of derivation, alienation and ascertainment. As a result, the system of property law in Kenya remains one of the most fragmented, complex and pluralistic in the region.

Policy Principles

127. The problems of multiplicity and complexity of tenure regimes can be eliminated if the legal incidents of public land, the commons, and private land are defined in a single piece of comprehensive[17] legislation. Attention should be paid in such legislation to the following principles:

- **As regards public land,**
  - **such land to be held by the National Land Authority in trust for the citizens of Kenya;**
  - **the National Land Authority to hold such land in terms of specific legislation setting out the terms and conditions of trust governing such holding;**

[17] See, for example, Uganda's Land Act 1998.

- clear procedures for allocation of public land that would eliminate incidents of gender bias, misallocation or multiple allocations be established by legislation and rigorously enforced;
- the State should provide for adequate infrastructure prior to allocating public land the cost of which should be borne by the allottee;
- where proof of irregularity in acquisition of public land is established any such land should not be protected by the Constitution but should be re-possessed by the National Land Authority without compensation;
- under no circumstances should there be allocation of protected areas and reserved land such as forests, water catchment areas, *kayas*, road reserves, public access to beaches, fish landing sites, foreshore, wildlife corridors, historical sites and monuments among others; and
- where there is proof of disregard and abuse of existing laws and practices relating to public land, the law should provide for stiff penalties against the offenders.

♦ As regards the commons,

- such land to be held by the District Land Authorities in trust for the indigenous residents of the districts;
- clear procedures for allocation of land within the commons that would eliminate incidents of gender bias, misallocation or multiple allocation be established by legislation and vigorously enforced;
- such land to be held in terms of a legal regime based on customary law principles which provide effective and equitable land rights security for all holders, occupiers and users without discrimination;
- where proof of irregularity in acquisition of the commons is established any such land should not be protected by the Constitution but should be repossessed by the District Land Authorities without compensation;
- such land to be administered by District Land Authorities in accordance with principles of responsible and sustainable management founded on customary

laws that do not discriminate against women, the broad principles of which should be codified;

- **clear principles be established in the relevant legislation defining the domains of individual and community rights to specific parcels of land comprised within the commons;**
- **procedures for the conversion of land comprised within the commons to public or private land, or re-conversion from such land categories be provided; and**
- **where there is proof of disregard and abuse of existing laws and practices relating to the commons, the law should provide for stiff penalties against the offenders.**

♦ **As regards private land,**

- **such land to be held on terms that are clearly subordinate to the doctrines of compulsory acquisition and the regulatory power of the State;**
- **such land to be exclusively held, freely alienable and transmissible without discrimination on grounds of sex, ethnicity or geographical origin; and**
- **such land to revert in the first instance to the District Land Authorities or to the National Land Authority, in conditions of escheat or bona vacantia.**

128. Broadly speaking, therefore, the substantive principles of land tenure in Kenya, will continue to be governed by two legal regimes, namely, English Property Law as embodied in local statutes and the customary land law of indigenous peoples. The principles of land tenure set out below are based on this understanding.

Principles Regarding Land Tenure

Statutory Tenure Regimes

129. There are at least three statutory tenure regimes in Kenya. These are freeholds, absolute proprietorships and leaseholds.

Freeholds and Absolute Proprietorships

Diagnosis

130. As a relic of feudalism, the freehold connotes the largest quantum of land rights which the sovereign can grant to an individual. Being held of the sovereign, however, the freehold is technically a tenancy hence subject to resumption by the State. This means that, in theory any surrender of a freehold interest on sub-division does not entitle the holder to an automatic regrant of an interest of equivalent quantum. Nonetheless the freehold interest is said, to confer unlimited right of use, abuse and disposition. Typically, such interests are individually held, under either the Registration of Titles Act, the Land Titles Act or Government Lands Act.

131. These technicalities may be of interest to an academic study of freehold tenure. In practical terms, however, such matters have little impact. And while it may be argued that the State has generally left freeholders to their own devices thus conceding that there is a more or less absolute estate, an examination of the laws shows that there has been continuing erosion of such "rights" if they ever existed. The introduction of directives under the Agriculture Act, planning legislation, soil conservation practices and land control legislation, all show that freeholders had and have no such total freedom of choice when it comes to the use of their land.

132. The introduction of Absolute Proprietorships as a separate land tenure category by the enactment of the Registered Land Act (Cap.300) was intended to extinguish customary tenure and replace it with rights that would be individually and exclusively held. Whatever reasons there may have been at the time to distinguish between Absolute Proprietorship and Freehold tenure have become irrelevant and the difference now is a cause of confusion. The creation of two distinct forms of title conceivably can lead to the misconception that one form of tenure is inferior to the other This misconception is reinforced when the two different types of title deeds created by the Registration of Titles Act (Cap.281) and the Registered Land Act (Cap.300) are compared. The first contains a full history of the transactions affecting the land while the second is the state of the register at the time of issue of the title.

133. There is no need to continue these two separate classifications of what is essentially the same form of land tenure. The two should be merged with the best attributes of each being kept and any unnecessary or confusing feature dispensed with. The only problem remaining is which of the two should be kept and which abandoned. As the concept of "freehold" title is widely understood throughout the world whether or not there has been a direct progression from feudalism in the country

concerned, it is recommended that the term "freehold" should continue and "Absolute Proprietorship" be dispensed with. This change should be brought about by legislation that should simultaneously provide for a form of Title Deed under the Registered Land Act that gives the same information as one registered under the Registration of Titles Act.

134. Although most urban properties are held on leasehold tenure, there are in some urban areas, pockets of freehold properties. There is a need to standardise the tenure system in these areas.

135. In addition, attempts to convert customary land tenure into a regime equivalent to the freehold system has led to a number of important consequences. The first is the potential for extinction of trans-generational rights upon registration whenever present registered proprietors desire to exercise their power of disposition. The second is the emergence of serious incongruities between law and social reality due to the fact that registration alone has not triggered any changes in community perceptions towards land. This is particularly evident when it comes to the transmission of registered land upon death or in the context of ordinary land market transactions. The third is that the individualization of tenure is not really suitable for land in the pastoral areas. Initial attempts to apply that formula to the Maasai areas led to serious land grabbing and displacement of indigenous communities. Corrective measures taken in the late 1960's in terms of group registration also failed for lack of appreciation of culture and ecology in these areas. Other consequences include the widespread abuse of the adjudication and registration processes, intrusion into complex social and cultural matrices especially among nomadic and pastoral communities, the marginalisation of women and children, and the general breakdown of land administration in areas under tenure reform.

Policy Principles

136. There is need to review the essential merits and value of the freehold tenure system within Kenya's political economy. That review should take account of the following principles:

- **freehold tenure should be the only primary estate capable of creation under the property law of Kenya;**
- **the incidents of freehold tenure should be modified so as to permit resumption of family ownership of land converted from customary tenure, co-ownership of land acquired during marriage, prohibition against the sub-division of land held in family ownership and removal of the principle of absolute sanctity of first registration;**

- **land in urban areas should progressively and gradually be converted from either freehold or absolute proprietorships into leasehold;**
- **land in pastoral areas should be held as community property and where required by the community a form of corporate title should be created;**
- **a modern law providing protection for married women and for children should be drafted promptly.; and**
- **except as embodied in local property statutes, the application of the English Common Law, the Doctrines of Equity and the Statutes of general application, in so far as they are relevant to the interpretation of property rights in Kenya, should be discontinued.**

Leaseholds and Tenancies

Diagnosis

137. The leasehold is a device that is known to every system of land tenure. It involves the derivation of rights from a superior title for a period of time certain or capable of being ascertained and the enjoyment of such rights in exchange for specific conditions including, but not limited to, the payment of rent. Statutory leaseholds in Kenya are created either by the State, in respect of land it holds directly under the Governments Lands Act, by County Councils in respect of land they hold or Trust land or by proprietors who hold freeholds, absolute proprietorships or other leases.

138. The leasehold is a flexible device which many jurisdictions have found useful for a number of reasons. First, the term of lease is usually variable and may be defined in terms of specific developments planned by the prospective leaseholder. Second, the supervision of land use which lies mainly in the domain of contract is a matter of fulfillment of reciprocal rights and obligations agreed to by the parties. Third, the leasehold permits access to land by a much larger range of users and use categories than either the freehold or the absolute proprietorship. In addition, leaseholds facilitate a wide range of economic enterprises ranging from commercial, industrial, residential to cultural and social activities. Where control is necessary in the public interest, this is usually done through legislation expressing the regulatory power of the State. In Kenya, such legislation include the Rent Restriction Act (Cap. 296) and the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap. 301).

139. Tenancies are another device through which access to land on a temporary basis may be obtained. A large number of people in rural and urban Kenya hold land as tenants at will or at sufferance, usually for long periods of time.

Policy Principles

140. The leasehold is an important tenure category which provides for optimum control of land use without necessarily compromising freedom of land owners to use specific parcels of land. It should therefore be strengthened in Kenya's property system. Account should be taken, in that regard, of the following principles:-

- **All leases to citizens should be issued for a standard period of 100 years;**
- **land within urban areas should be held on leasehold tenure only. This means that as urbanisation expands all rights to land coming within an urban area should automatically be converted to leasehold, subject to the payment of adequate compensation;**
- **on no account should leases in respect of public land extend beyond 100 years and where such leases exist these should be converted to 100 years from the date of conversion;**
- **unless determined for good cause, leases in respect of public land or the commons should be renewable subject to general planning requirements;**
- **clear policy on the regularisation of the tenure status of those who hold land as tenants-at-will or at sufferance, on public or private land should be developed; and**
- **non-citizens of Kenya should hold land on leasehold tenure for significant investment purposes only, as recommended by the Investment Promotion Centre, for a period not exceeding 50 years.**

Customary Tenure Regimes

Diagnosis

141. Customary land tenure is a complex system of land relations the incidents of which are not always capable of precise definition. The underlying commonality in all customary tenure systems, however, is that rights are derived by reason of membership in a community and are

retained as a result of performance of reciprocal obligations in that community.

142. It has long been appreciated that customary tenure arrangements have important positive attributes. The land allocation system, which is generally designed as part of the political organisation of the community, is an important factor in ensuring inter and trans-generational equity among members of that community. And because kinship rights and obligations are reproduced in the land tenure system, equilibrium between social, political and economic processes is generally maintained. This is sustained, *inter alia*, through the resolution of land disputes as part of the community process of reconciliation.

143. The development of customary land tenure in Kenya over the past century, however, has been influenced by a number of overlapping factors. The most important of these are territorial fixity of Trust land units, population growth, and technological stagnation. The fact that Trust land units grew from reserves designated for occupation by particular ethnicities, led easily to the view that these were exclusive domains for each such group. As a result of this, cross ethnic land transactions never developed, internal land rights conflicts began to intensify, and political agitation for expansion of ethnic territory became common. Recently, these developments have led to widespread resource conflicts in certain parts of the country.

144. Population growth has been and remains an important drive in land relations in the Trust land areas. Growth rates had, until recently continued to rise, as have total fertility in particular areas of the country. Family sizes, therefore, remain fairly large, implying constant demand for land resources; the basic means of livelihood in these areas. This phenomenon, acting on a fixed quantity of land available to each farming community, has led to a number of important developments. These include constant sub- division of land parcels irrespective of any rules governing the maintenance of minimum sizes, increased land pressure in many areas especially in Western Kenya, the Meru highlands and Taita Taveta and parts of Central Province, and radical transformation of land rights systems in order to accommodate increased demand for land. Systematic assessment of the extent to which the HIV/Aids pandemic has altered this scenario is yet to be made.

145. Lack of adaptation to changing technologies of production in the Trust land areas is a result of deliberate policy during the colonial period to suppress African agriculture and the persistence of a hostile policy environment in the post-colonial era. This has exacerbated land pressure in these areas as a result of the inability of land users to intensify production.

146. Because of these and other factors, customary land tenure has been criticised, *inter alia*, for its inability to support capital generation in agriculture; lack of clearly defined land rights leading to internecine land disputes; gender insensitivity, especially in societies organised on the basis of patreliniality and hostility to physical planning unless such planning is in accord with cultural principles.[18]

147. Since the majority of Kenya's population hold, use and transmit land rights in terms of this tenure regime, there is need to rethink its status in Kenya's property system.

Policy Principles

148. Account should be taken in that regard of the following principles:-

- **the broad principles of customary land tenure should be recorded and incorporated into a "framework" law designed to facilitate the orderly evolution of customary land law;**
- **the framework law should address, *inter alia*, the following issues:-**
  - **recognition of two distinct estates under customary tenure, namely the commonhold as the primary estate and the customary leasehold;**
  - **inheritance of land under customary tenure;**
  - **land rights protection for women, children and the disabled;**
  - **the relative position of individuals in communities in which they live;**
  - **the re-establishment of authority structures for land management in areas under customary tenure; and**
- **a system for the documentation of customary land transactions which communities can operate and manage should be designed;**
- **there is need to develop a clear pastoral land use policy which would recognise land and promote pastoralism as a viable economic activity with adequate linkages with other sectors; and**

---

[18] These arguments are more fully developed in Okoth-Ogendo, H.W.O. "The Tragic African Commons - A Century of expropriation, suppression and subversion", Keynote address delivered at a workshop on Public Interest Law and Community-Based Property Rights held in Arusha, Tanzania on August 1–4, 2000.

- **recognition of customary practices whereby the communities enter into reciprocal arrangement for the use of each other's land and resources particularly in times of drought and other natural calamities.**

Reform of Land Tenure

Diagnosis

149. In the last five decades the most important land policy project in Kenya has been the reform of customary land tenure i.e. the conversion of customary land rights into rights amounting to statutory ownership. That project was and still is based on an old orthodoxy, namely, that by changing tenure *per se* rather than the agrarian structures and conditions under which production relations operate, it is possible to generate efficient land use practices. This proposition is founded on the thesis that ownership, *per se*, especially if it is individualized and is secure against State interference, is the foundation of economic initiative.

150. That argument has been sold by free enterprise economists and planners in Africa on two complimentary fronts. First it has been offered as the explanation for the alleged inability of indigenous tenure institutions to stimulate agricultural development, it being contended that because of their communal nature, these institutions are inherently incapable of accommodating modern production methods, techniques and practices. This was the premise behind the Swynnerton Plan. Second, it has been offered as the panacea for the morass of underdevelopment which continues to plague agriculture throughout Africa. The implication, therefore, is that salvation lies along the path of privatisation of land ownership rather than in the public control of land use. This argument draws no distinction between high potential and marginal lands or between agricultural and pastoral areas.

151. Although a number of countries in Africa have accepted this and have in consequence invested staggering resources in tenure reform programmes, there is evidence that its wider political and economic consequences have not always been assessed or fully appreciated. In particular the impact of tenure reform on the economic, political and social organisation of rural society has never been fully weighed against its alleged contribution to rapid growth in the agricultural sector. More recent studies including a major empirical exercise by the World Bank, have now established that these assumptions are misleading.[19] They demonstrate

[19] See Bruce, John and S.E. Migot – Adholla (Eds.), Searching for Land Tenure Security in Africa, Kendall Hunt, 1994.

beyond any doubt that what is required is comprehensive agrarian reform; that is to say, that beyond the property structure, there is need to reform production structures and support services infrastructure, for example, efficient marketing system, extension services, training and credit among others.

152. In Kenya's context, therefore, reform must address a number of specific issues. First, it must address issues of unequal access to land due to chaotic tenure regimes and social and cultural factors. Second, it must rectify the phenomenon of skewed distribution of land across and within large and small scale farming communities. Third, it must resolve the problem of sub-economic parcelation of land, particularly in the former Trust land areas. Fourth, it must seek to correct land market distortions. Fifth, it must deal with the fact of substantial landlessness arising from historical and contemporary causes. Sixth, it must confront the state of dilapidation of infrastructure especially in the rural areas and seventh it must design a special tenure regime for the pastoral or arid and semi-arid areas of the country especially those originally brought under group ranching.

Policy Principles

153. Consideration should be given, in that respect, to the following principles: -

- **land rights security for all land users, irrespective of tenure category, should be guaranteed;**
- **in the case of the former Ten-Mile Coastal Strip, consideration should be given to a general enfranchisement of all occupiers on land registered under the Land Titles Act;**
- **rural-rural migration and the acquisition of permanent land rights across ethnic territories should be encouraged;**
- **discriminatory practices relating to access to and control of land and the acquisition of land rights through inheritance should be eradicated;**
- **a system for the periodic consolidation of land sizes, account being taken of ecological and technological factors, should be designed; and**
- **support services infrastructure, especially credit, marketing, extension and technological services to agriculture should be strengthened.**

Historical Claims

Diagnosis

154. The rights founded on historical claims based on colonial or recent expropriations are at present a serious phenomenon in Kenya. They could receive legitimacy as a result of pressures being exerted by representatives of certain communities particulary the *Maasai*, the *Pokot*, the *Sengwer*, the *Endorois*, the *Pokomo*, the *Orma*, the *Ogiek*, the *Talai*, the *Bajuni*, the *Boni* and the *Mijikenda* communities. These communities make the point that they have systematically been dispossessed not only by the colonial regime (i.e. Sultanate of Zanzibar and the British Government) but also in recent times through land market transactions and the process of land adjudication, consolidation and registration, and in the case of the Rift Valley, the resettlement programme. Though not always expressly articulated, such claims are part of the cinder, which keeps igniting ethnic clashes[20] in the Rift Valley and the Coast provinces.

Policy Principle

155. In order to resolve these claims, consideration should be given to the following principle:

- **As part of the process of tenure reform, mechanisms be provided for investigation and resolution of historical claims by communities especially in the Coast and Rift Valley Provinces.**

Principles Regarding Tenure of Land Based Resources

The Problem of Resource Tenure

Diagnosis

156. Tenure of land based resources, as opposed to that of the land itself, has become an important issue in contemporary land policy. These resources include water, forests, minerals, mineral oils, wildlife and marine resources. The issue of tenure arises from the fact that in colonial Africa these resources were carefully appropriated to the State, hence access to them was only possible through a complicated system of licences and permissions operated by the State bureaucracy. Community participation in the utilisation, protection and development of these resources was therefore generally outlawed. And it should be evident that the management of many land based resources such as water, forests and

[20] Report of the Judicial Commission appointed to inquire into Tribal Clashes in Kenya, Government Printer, 1999.

even wildlife can be and often is a lot more sustainable if communities contiguous to them are actively involved or derive substantial benefit from income drawn from their utilisation. Even in respect of certain categories of mineral and mineral oils, allocation of benefits derived from them to communities on whose land they are located, can enhance management by taking the lid off socio-political pressure arising from expropriation of such land.

157. There is plenty of evidence to show that the degradation of certain categories of land based resources in Kenya is the result, *inter alia,* of the fact that communities are not only resentful of their exclusion from the utilisation of these resources; they regard them as the responsibility of someone else and not their own. Further, there is clear evidence of mismanagement by the State itself. This is due, *inter alia,* to politically motivated appropriation of certain resources such as forests, water and minerals, failure to control land based pollution, and poor environmental auditing.

Policy Principles

158. There is need, therefore, to rethink policies regarding the utilisation, protection and development of land based resources. The following principles should therefore be appropriate:-

- **subject to the principle next following, ownership of the soil should always entail ownership of all resources on, above and below its surface;**
- **control and management of land based resources should continue to vest in and be exercised in terms of the compulsory acquisition and regulatory powers of the State;**
- **as a general rule, the exploitation of land based resources by the State should take into account the need to share benefits or to co-manage such resources by contiguous communities;**
- **where land belonging to individuals or communities is taken or reserved for purposes of mineral development, full compensation representing loss to present and future generations must be given;**
- **there is need to develop a comprehensive resource tenure policy as part of an overall land use policy for the country;**
- **in the formulation of a resource tenure policy, substantial value could be drawn from customary tenure principles relating to the common utilisation, protection and development of land based resources;**

- **existing laws should be revised so as to ensure that communities contiguous to these resources are fully involved in their management and development;**
- **community principles regarding the utilisation of water, forests and wetlands should be strengthened;**
- **natural forests and mangroves should be conserved and protected;**
- **the principle governing the protection of forests, and wildlife, embodied in the concept of gazettement and national parks, respectively, should be re-examined. These resources should be protected by reason of their intrinsic value to the nation, and not through physical exclusion from human contact;**
- **mineral oils should be owned, controlled and managed by the State, but water, forests and wetlands should be managed by the communities contiguous to the resources in accordance with sound environmental principles;**
- **adequate compensation ought to be provided where land owners are displaced as a result of exploitation or utilization of land based resources;**
- **environmental impact assessments by independent persons should be carried out before the commencement of any exploitation or utilization of land based resources; and**
- **the local communities should be consulted before the projects are initiated and their sentiments included in the environmental impact assessment.**

Sensitive Eco-systems

Diagnosis

159. Sensitive eco-systems such as catchment areas, wetlands, marine resources, mangroves, sand dunes, biodiversity colonies, mountains and river basins and banks, require a special proprietary and management regime. This is because of their fragility and exceptional value in the maintenance of eco-system stability and vitality. Ownership and management of these eco-systems on the basis of exclusionary principles is therefore appropriate, except where access by specific communities or resource users would not compromise the stability of a particular eco-system e.g. the use of wetlands by pastoral communities.

Policy Principles

160. These principles should include: -

- **the vesting of ownership of sensitive eco-systems directly in the National Land Authority or the District Land Authority as appropriate;**
- **the management of those eco-systems by an independent environmental management agency with adequate powers to protect them;**
- **comprehensive and integrated land use planning in areas around sensitive eco-systems;**
- **strict control of development activities in all contiguous areas, and specific control of:-**
  - **agricultural activities in catchment and mountain areas;**
  - **hotel and tourist development in areas contiguous to marine parks and reserves; and**
  - **activities in areas governed by international conventions relating to wetlands and bio-diversity colonies.**

Historical Sites and Monuments

Diagnosis

161. The importance of historical sites and monuments should be recognised as a national heritage that presents the value of preserving evidence of our past. In the Kenyan context, the National Museums of Kenya (NMK) have had a mission of collecting, preserving, documenting and studying Kenya's past.

162. In the recent past these historical sites and monuments have been affected by illegal allocations, encroachment by human settlement, wildlife, damage, and vandalism. The Antiquities and Monuments Act (Cap. 215) empowers the NMK to declare and gazette historical sites and monuments on private lands but does not empower NMK to manage them.

163. There is need therefore to review policies regarding the protection and management of historical sites and monuments.

Policy Principles

164. The following principles should therefore apply: -

- **where proof of irregularity in allocation of public land on which historical sites and monuments stand is established, any such land should be repossessed by the National Land Authority;**
- **legislation should be put in place requiring Land Registrars/Registrars of Title to protect properties that have been declared historical sites or monuments; and**
- **the Antiquities and Monuments Act (Cap. 215) should be suitably amended to give more powers to the National Museums of Kenya to ensure that historical sites and monuments on private land are secured and protected.**

Principles Regarding Productive and Sustainable Use of Land

The Contemporary Land Use Context

Diagnosis

165. Ultimately the success of any land policy is determined by the extent to which it facilitates the productive and sustainable use of land. While important strides have been made in Kenya to ensure that the land is indeed productively and sustainably used, there are still a number of problems which need to be addressed at the level of both policy and law. Five of these require immediate attention: The first is chronic under-utilisation of land especially in the large farm sector. This phenomenon which goes back to colonial times has been exacerbated by accumulation of land by elites who merely wish to hold it as social investment or for speculative purposes, rather than for production. On average not more than 40% of all land in the large farm sector is under productive use. The second is the phenomenon of land deterioration due, among other things, to population pressure, massive soil erosion arising from bad land use practices and variability in climatic patterns. This has led to rapid depletion of land use cover and creeping desertification, especially in the Arid and Semi-Arid areas. That in turn has affected the capacity for regeneration of Kenya's water catchment areas.

166. The third is abandonment of agricultural activities due to a number of factors. Two of these are worth mentioning. One is the incidence of HIV/Aids in the rural areas. Whereas the full effect of this pandemic is yet to be established, there is reason to believe that vast areas of agricultural land are lying idle as a result of its debilitating impact. The other is poor

infrastructure for agricultural produce such as rural access roads, marketing facilities, financing and extension services. This is particularly acute in areas where agricultural production is dependent on the agro-industrial sector. The collapse of the cotton, sugar, rice and, more recently, coffee sectors are due largely to this factor.

167. The fourth is the emergence of serious land use conflicts between crop production and other activities including pastoralism, forestry and wildlife. This is particularly serious in areas that lie at the interface between high potential and marginal lands. In more recent times this conflict has led to serious political and social consequences.

168. The fifth is increased squalor in urban areas due to rapid population growth and the spread of spontaneous or unregulated settlements. Most of these settlements, especially those on public land are characterised by extremely high densities, relatively haphazard physical layouts, abject poverty, poor social infrastructure such as health, education, sanitation and shelter, and severe land tenure insecurity. Important effects of these include a general breakdown in zoning and sub-division control, and increased pressure on the capacity of urban authorities to deliver services to residents in these settlements.[21]

Policy Principles

169. There is clear need for a policy framework that would address these and related problems. What is required is a framework that should facilitate:-

- **a clear land use policy to be developed to guide rural and urban development;**
- **the attainment of orderly, productive, and sustainable land use through sound land use practices;**
- **the conservation and enhancement of the quality of land and land based resources;**
- **the improvement of the condition and productivity of degraded lands in rural and urban areas;**
- **the development by the State of a set of guidelines for adoption by planning authorities throughout the country in order to ensure uniformity in the exercise of the State's regulatory power;**

[21] See "A Development Strategy for Nairobi's Informal Settlements" - A Report by the Nairobi Informal Settlements Co-ordinating Committee, October, 1997.

- **appreciation of the essential linkages between the environment and development and the promotion of individual and community participation in environmental action;**
- **the provision and maintenance of adequate infrastructure particularly the promotion of agricultural development;**
- **the proper management of demographic and health parameters in the country and especially in the rural areas;**
- **integrated land use planning through information based and participatory processes;**
- **the provision of social, economic and other incentives to induce the sustainable use and management of land; and**
- **the dissemination of agricultural research results and experience to the farming communities.**

Rural Land Uses

Diagnosis

170. Because the majority of the people of Kenya still live on and draw their livelihood from the rural areas, adequate policy must address the major activities in that sector, namely agricultural and livestock development. Agriculture, that is crop farming, is found mainly in the medium to high potential areas of the country and on irrigated land in the semi-arid areas. The major agricultural activities in the country include grain production, coffee, tea, sugar cane, pyrethrum, cotton, cashewnuts, coconuts and horticulture. Livestock development, which is responsible for the country's dairy and beef requirements, is an activity that is carried out in all agro-ecological zones. Over 50% of the country's livestock is, however, reared in the arid and semi-arid areas. Agriculture and livestock development between them account for 30% of the country's Gross Domestic Products (GDP), over 70% of her foreign exchange earnings, and at least 75% of employment, food security needs, and raw materials for agro-based industries.[22]

171. Currently the primary instrument of State regulation in rural land use is the Agriculture Act (Cap.318). The Act gives the Minister the power to make orders for the proper management of agricultural land and to cause the same to be compulsorily acquired and sold in default thereof. The Act further controls agricultural operations right down to the stipulation of what crops and livestock specie are suitable to be grown or

[22] See the National Development Plan, 2002 – 2008, Government Printer, 2002.

reared in specific areas. Indeed the Act contemplates the promulgation of land development orders and schemes in those circumstances where it is considered necessary for proper husbandry.

172. In addition to the Agriculture Act, there are also other instruments of a crop specific nature which are relevant to rural land use. As a result of this, rural land use is literally inundated with laws, institutions and bureaucratic agencies all concerned with one aspect or another of agriculture or livestock development. These instruments notwithstanding, a number of problems peculiar to rural land use still remain. These include uncontrolled subdivision of agricultural land, overstocking in the range lands, mismanagement of water resources and destruction of catchment areas, imports that threaten local farmers, limited extension services and shortage of agricultural finances and inputs and poor management generally. These call for a re-examination of the social, economic, legal and ecological contexts in which rural land use operates.

Policy Principles

173. That re-examination should build on the following principles: -

- **the need to re-establish an enabling environment for agriculture and livestock development, especially as regards research, extension services, finance and infrastructure including marketing, agro-processing, rural electrification and farmers' training;**
- **the need for realistic policies for the management of rural population growth, particularly as regards rural-rural migration;**
- **the institutionalisation of mechanisms designed to induce land owners to put their land to productive use;**
- **the intensification of land use in the high potential, densely populated areas, through the application of efficient technology;**
- **the need to control agricultural imports that threaten local farmers and industries;**
- **periodic consolidation of holdings and re-organization of rural settlements as a method of controlling sub-economic parcelation of rural land;**
- **the need to review the desirability of reducing/consolidating the existing multiple laws and institutions and bureaucratic agencies dealing with agriculture and livestock development and marketing;**

- **the application of cost effective irrigation methods in areas of low agricultural potential;**
- **the need for a clear policy for the comprehensive development of the livestock sector; and**
- **the need to restore the management and control of commodity boards and institutions established under the Agriculture Act and associated legislation to producers.**

Urban Land Uses

Diagnosis

174. Kenya is rapidly urbanising. Census figures over the last two decades indicate that between 1979 and 1999 the urban population has risen from 2 million to 6 million.[23] This is approximately 22% of the country's population. Many people who move into urban centres are young, unemployed and lacking in technical skills. Even with industrialisation, which is yet to be realised, these people cannot easily find gainful employment in the urban areas. In addition the indiscriminate extension of urban boundaries has brought within them population clusters living in areas of land which are still used predominantly for agricultural and livestock development purposes. An important effect of this is that land use in Kenya's urban areas is hardly in conformity with existing zoning, sub-division, and building regulations. As a result[24] of rapid urbanisation the country is currently experiencing major problems of proliferation of urban informal settlements, insecurity and violence, environmental degradation and deteriorating public health standards. These informal settlements are to a lesser extent on private land. These settlements are a creation of illegal allocations by officials of the Provincial Administration and local authorities creating some form of quasi-legal tenure through temporary occupation licences, or letters from chiefs on public land or agreements with land owners on private land. The majority of residents are renters and are of low income, and they earn their living in the informal economic sector, in small businesses ranging from hawking to service and production enterprises. Informal settlements are therefore an integral part of the economy. A large proportion of the households are female headed. Since urbanisation is an inevitable process there is need for planned growth on a long term basis

[23] Provisional Report of the National Census, 1999, Government Printer

[24] See "A Development Strategy For Nairobi's Informal Settlement" – A Report by the Nairobi Informal Settlements Co-ordinating Committee, October 1997.

Policy Principles

175. Planning for the urbanisation process should take account of the following principles: -

- **the need to undertake an audit of the informal settlers and renters;**
- **the need to provide legal security of tenure;**
- **the need for designing a comprehensive national plan for low income and high density housing and shelter development with well defined targets and financing mechanism as a strategy for minimising informal settlements in the long run;**
- **the need to empower the disadvantaged groups to access decent environmentally acceptable and affordable shelter;**
- **the need to provide funding or to mobilize resources for up-grading of informal settlements;**
- **the need to create an enabling environment for urban development through the establishment of transparent, accountable, sustainable, comprehensive and participatory governance structures and decision making processes;**
- **the integration of comprehensive urban plans into long range national development plans so as to ensure harmony between the urban centres and the rural areas;**
- **the development of secondary towns as a means of stimulating agro-industrial development, thus easing pressure on demand for urban services;**
- **the provision of services such as electricity that would stimulate the growth of secondary towns as a basis of agro-industrial development, thus easing pressure on demand for urban services;**
- **the need for protection of agricultural land from indiscriminate extension of urban boundaries and other encroachments and the re-planning of peri-urban areas for agricultural or pastoral communities;**
- **the control of spatial growth in order to generate an economic and social environment for urban development;**
- **the reconceptualisation of zoning and sub-division control, not as exclusionary mechanisms within and across**

residential areas, but as tools for the creation of integrated viable urban communities sharing common services;

- **the provision of efficient amenities for urban settlements;**
- **the provision of resources for the upgrading or gentrification of existing slums, and the discouragement of further slum development;**
- **the reservation of green and recreational areas within urban centres beyond the pale of speculative land grabbing; and**
- **the need to encourage urban agriculture.**

Principles Regarding the Management and Development of Land

Diagnosis

176. Although it is generally argued that proprietary land use, particularly under tenure regimes that grant rights to individuals, will guarantee the proper and sustainable management of land, this clearly has not been the case in Kenya. Evidence abounds to the effect that the sustainable use and management of land, is a partnership between proprietors, occupiers and the State. Thus, in addition to the proprietor's own efforts, the use of the regulatory power of the State is necessary if the land use problems identified in this section are to be resolved. This may take several forms; all of which are consistent with the exercise of the regulatory power of the State.

177. The first is through productivity facilitation by way of the provision of support services and infrastructure. The second is the conservation and protection of sensitive ecosystems through the creation of parks and reserves. The third is land use planning in the form of framework or detailed implementation plans. The fourth is land-auditing measures that are directed at ensuring that land use practices are continuously monitored and evaluated. And the fifth is public education through the school system or the provision of extension services. Authority to monitor and evaluate land uses through the application of many of these mechanisms already exists in the law. However, they are not successful due to laxity of the implementing officers, corruption and political interference.

Policy Principles

178. There is need to revisit the issue of land management in terms of the following principles:

- because comprehensive land use planning is essential for sustainable land use, every effort must be made to develop and periodically update a national land use plan, regional plans and local and area specific plans;
- the planning process should :-
  - facilitate orderly management of both urban and rural land;
  - empower land users and occupiers to make better and more productive use of their land;
  - promote efficient and environmentally sound land use practices;
  - promote participatory involvement by all stakeholders in land use planning;
  - ensure security and equity in access to land resources;
  - facilitate overall micro-level planning while taking into account regional and sectoral considerations;
  - provide for intersectoral coordination at all levels of land use development; and
  - make use of political and administrative resources available at national, regional, district and other local levels.
  - planning authorities and administrators must ensure that the physical planning process works and that urban land holders and occupiers respect approved urban development plans;
  - because comprehensive land use planning will require a land information system, this must be developed and operationalised nationwide;
  - an innovative framework for land auditing in rural and urban areas will need to be designed and implemented;
  - the management of rural-urban migration will require an integrated settlement policy for those land use sectors;
  - clear environmental standards will be necessary so as to guide agricultural, livestock, urban, mineral and tourist development, such standards to incorporate strict environmental impact assessment procedures; and

- **the need for public education and sensitisation through the school system.**

Principles Regarding Land Rights Delivery

The Overall Framework

Diagnosis

179. Land rights delivery is a process which entails the mobilisation of institutional mechanisms and personnel for ascertainment of rights, registration, demarcation and/or survey, the preparation of cadastres and land market regulation among others. These are processes which, in Kenya, are run as part and parcel of public administration. The operation of the specific modalities established for this purpose, therefore, has always been overtly political. At the territorial level, Government and Trust lands are administered by the Commissioner of Lands directly or in the case of the latter on behalf of county councils. This means that ultimately access to land in Kenya is controlled by the Commissioner. Although procedures exist in the Government Lands Act for the proper notification to the public of land available for grant and for the assessment of applications, these are routinely ignored or by-passed by public officers in the Commissioner's office. Private (i.e. registered) land, is administered by the proprietors themselves but under the facilitation of a complex bureaucracy consisting of staff from central government line ministries, local political functionaries and local or traditional administrators. The overall effect is that decision making on these issues is often contradictory and ineffectual. Need therefore exists to rationalise and simplify this system.

180. The Land Consolidation Act (Cap.283) was enacted to provide for ascertainment of rights and interests and for the consolidation of land in the Special Areas (former native lands); for registration of title to; and of transactions and devolutions affecting such land and other land in the Special Areas.

181. The process of land consolidation is long and cumbersome, and at times entails abandonment of development on one's land; and to many it has outlived its usefulness.

182. The land adjudication process is provided for under the Land Adjudication Act (Cap.284). It involves the ascertainment and recording of existing rights and interests in Trust land. The customary rights and interests of the people ordinarily resident in an adjudication section have been ignored, sometimes due to corruption thus creating landlessness and

poverty. The provisions of the Act, after the publication of the adjudication register, are sometimes ignored when objections are entertained long after the mandatory period provided for by the Act has expired. These actions result in unnecessary disputes and subsequent delay in registration of adjudicated land.

183. The Act also provides for appeals to the Minister by those aggrieved by objection determinations. The Minister has delegated his powers of hearing these appeals to the District Commissioners who, however cannot cope with the large number of appeals before them. The consequence is a serious backlog of appeals and subsequent delays of registration of titles.

184. Settlement schemes are created by the Government under the Agriculture Act to alleviate landlessness, poverty and to address the squatter problem. Some of the problems encountered in these schemes are that allocation procedures are not defined, leading to manipulation of the lists of allottees; the results of which are that the landless and the poor are marginalised, land is not fairly distributed and a few people end up amassing land at the expense of many deserving persons. Some of this land is not put to productive use and therefore is idle for speculative purposes. Other settlement schemes lie idle due to climatic, geographical, economic and ecological conditions.

185. At the Coast some land was either obtained through adjudication process under the Land Titles Act or through grants from the colonial or independent governments to individuals that have never been resident on or utilised their land. Some of these "land owners" have either left the country or died without heirs or possess but do not utilise the land. While others merely collect rent through "agents". This group of land owners are commonly referred to as absentee landlords. This category of land is invariably occupied or utilised by "squatters" who, in most cases, are original owners of the land under their customary laws but who, unfortunately, have no measure of statutory protection and have therefore been victims of eviction.

Policy Principles

186. Consideration should therefore be given to the following principles: -

- **all land delivery functions should be centralised in the proposed National Land Authority. The Authority should have the power to create a decentralised system of land registries drawing, where possible, on community level structures and organs of government;**

- **the process of land delivery should itself be democratised by ensuring full and informed participation by land rights holders at all levels; so that routine land functions such as boundary marking, ascertainment of rights, and record keeping devolve to communities;**
- **land delivery functions should be insulated from politics so that land can be appreciated as property and not as political service;**
- **the Land Consolidation Act (Cap.283) should be replaced and all the processes under the Act should be carried out under the Land Adjudication Act (Cap.284);**
- **the process of land adjudication should be improved in order for it to contribute to an efficient land delivery system;**
- **a strict verification process to be put in place to ensure that only squatters, the landless and deserving cases are settled;**
- **the National Land Authority should be empowered by legislation to inspect, co-ordinate and direct the development and use of idle land and if necessary to repossess such land taking into account climatic, geographical, economic, ecological and speculative factors;**
- **the Minister for the time being responsible for Agriculture should invoke the provisions of the Agriculture Act and make reservation, development and/or management orders over idle and underutilised land; and**
- **the Constitution and the relevant law should be amended to facilitate taking over of land belonging to absentee landlords and allocate the same to the "squatters".**

Land Demarcation and Cadastral Survey

Diagnosis

187. Land Demarcation and Cadastral Survey are processes that are integral to an efficient registered land delivery system.

188. Demarcation procedures are concerned with the physical marking or identification of existing boundary marks in the presence of parties. Demarcation is an important procedure in the context of land adjudication

as boundaries recognized under customary law such as land marks, rivers, trees and other natural features are captured in the registration system. This system coupled with simple survey methods has been used to bring large areas hitherto under customary law onto the register, under the so-called general boundary system. In order to avoid land disputes and to define a land unit, boundaries must be maintained.

189. Lost boundaries under this system can only be determined through a judicial system. Attempts by authorities over the years to encourage land owners to plant hedges along their boundaries have not been successful in spite of the fact that the requirement has even been legislated. With increasing subdivisions, the whole system is in danger of collapse as disputes have increased exponentially and systems for resolving them were too slow to cope. Proposals for an improvement in these systems are contained in this policy framework.

190. Demarcation procedures supported by simple survey methods are cheaper and faster in bringing large areas into the register for the first time. This is indeed important for areas that are going through land adjudication which usually require personnel trained in simple survey techniques to assist in capturing interests in land onto the register. Lack of resources and trained personnel has considerably slowed down land registration under this system in large parts of rural Kenya. Areas that have undergone registration are mired by incessant disputes due to lack of maintenance of boundaries between land owners. To complicate matters further, lack of trained personnel, high costs of subdivision and strong influence of customary law on land transactions have resulted in many transactions happening without being brought onto the register.

191. Cadastral Survey procedures on the other hand are concerned with the capturing of boundaries as they exist on the ground on a plan or the fixing of boundaries, on the ground, as they exist on a theoretical layout plan and bringing them into the register. Cadastral Survey procedures have been used extensively in Kenya to support the register under the Torrens System[25] of Registration especially in urban areas and the former White Highlands.

192. Cadastral Survey provides greater certainty of boundaries for the future and although demarcation of surveyed boundaries is part and parcel of the survey procedure, the physical existence of boundaries is not essential for their relocation nor is a judicial process involved in their determination.

---

[25] A system of issuance of titles under the Registration of Titles Act (Cap. 281).

193. The procedures are reliable with little or no subsequent disputes over boundaries. The procedures are however expensive and require highly trained personnel and sophisticated equipment and are therefore presently more suitable for urban environments and other areas of limited size.

194. The shortage of trained personnel, the high cost of cadastral surveys, the centralization of cadastral processes and requirements by law for authentication of plans are stifling development as procedures are very slow, cumbersome and thus costly in time. This has partly contributed to the chaotic developments in peri-urban areas.

195. Demarcation and Cadastral Survey Systems require rationalization and strengthening, in order to contribute to an efficient land delivery system.

Policy Principles

196. Consideration should be given to the following principles:-

- **the need to train more personnel in survey since this is a function that is integral to an efficient land delivery system;**
- **the need to ensure that the processes of demarcation and survey in the context of land adjudication are more participatory to avoid disputes;**
- **the need, in the light of increasing population and intrusion of customary law in the process of transmission of land in registered areas, to re-demarcate boundaries and resurvey these areas in order to capture the reality of land ownership on the ground;**
- **the desirability of strengthening of customary demarcation procedures in the process of re organizing customary land tenure;**
- **the need to use modern and faster survey systems (e.g. Global Positioning Systems) to gradually overhaul the general boundary system and bring it under more accurate survey systems in order to increase certainty of boundary relocation and thus reduce disputes;**
- **the need to amend the Survey Act (Cap.299) in order to remove the control of cadastral survey procedures (through authentication of plans) from the Government and to make the licensed surveyors wholly accountable for their work.**

Preparation and Maintenance of Cadastres (Land Records)

Diagnosis

197. An efficient system of land delivery requires that capability should exist for the preparation and maintenance of cadastral information indicating not merely who owns what interest in what land but other details such as land capability, uses, size distribution and topographical characteristics. For reasons including lack of resources and trained manpower, no such facility exists in Kenya. There is clear need to rectify this situation.

Policy Principles

198. The following principles should guide such an effort:

- **the infrastructural apparatus for land delivery must be modernized through computerization or the use of other electronically linked system throughout the country;**
- **personnel in land registries and survey offices will need training and re-training so as to operate modernized infrastructure; and**
- **an accessible land information system will have to be installed as a back-up to the cadastral system.**

Land Market Regulation

Diagnosis

199. In classical economic terms, land is capital. As land is developed whether for agriculture in the rural areas or for commerce, industry, or residential estates in urban areas, the capital value of the land increases. As land becomes more valuable, its protection and planning of its use become more important both for the owner and for the community at large. Security generally and security of tenure in particular become stronger political forces. These lead to a more stable society and are the basis for a stronger form of democracy.

200. The freedom to transfer or otherwise dispose of rights over land is generally considered to be an integral part of a robust property system. For not only does it facilitate access to and exit from the land economy, it also enables proprietors to raise capital for land development. Because the transfer and disposition of land should ideally be undertaken within a free enterprise system, an effective policy must guarantee that the land market is liberated from impediments that would fetter its smooth and expeditious

operation in the context of an accessible and efficient land information system.

201. In practice, land markets operate in the context of different levels of regulation, both direct and indirect at national, district and divisional level. A powerful, but indirect mechanism of land market regulation, is the land use plan. Because the plan has a bearing on the present and future value of property rights, it is not merely a facilitative guide; it is part and parcel of the constitution of property. Land taxes such as land rates and rents are also important as indirect means of market regulations. More direct mechanisms forming part of the regulatory power of the State are also applied. In Kenya both direct and indirect methods of land market regulation apply depending on whether the land is for agricultural or non-agricultural use.

202. The history of agricultural land market regulation goes back to 1944 when the colonial government, alarmed at the spectre of speculation, decided to subject all transactions in agricultural land to a system of official consent. In 1958 this mechanism was extended to African areas that were then undergoing tenure reform on the argument that if not guided, the new individual African proprietors might render themselves landless by engaging in indiscriminate transactions through the market. The procedure then established was to apply for and obtain the prior consent of a land control board before any transaction in agricultural land could proceed.

203. After more than four decades of the regulation of agricultural land markets through land control boards it is clear that there exists glaring shortcomings. Most meet at the whim and behest of the district officers or district commissioners who chair them, and often without proper notice to parties involved. The fact that these boards are themselves controlled by public administration officers has opened them to constant political manipulation, usually to the detriment of the party who may wish to offer land for sale or to object to particular transactions.

204. The law has been abused and disregarded, *inter alia*, through the convening of "special" board meetings, either without a quorum or proper notice or held in a place other than a public place. Bribery is common and has been ascribed, *inter alia*, due to low remuneration paid to members. The delay in the formal establishment by the Minister of some land control boards and the appointment of their members sometimes leads to persons nominated for appointment actually attending meetings prior to their formal appointment. The long service by members results in accumulation of unabated power and subsequent abuse of the same. Provisions of the law setting out the criteria to be taken into account by boards when considering applications are often ignored. The boards hardly consult

technical officers in their deliberations resulting in authorization of uneconomic, inaccessible and poorly planned land units. Women who form the bulk of those who work on the land, are either not represented or lack adequate representation on the board. The level of education of most board members is so low that they can hardly comprehend the law governing the transactions before them. Sale of family land has been done by crafty members of the family at times rendering the whole family landless. Such actions could be prevented if there is wider presence of family members at the board meetings.

205. It is proposed that functions of land control boards will be taken over by District Land Authorities which, as envisaged, will be institutions accountable to the people and professionally run.

Policy Principles

206. The following principles should therefore apply:-

- **there is an urgent need to update the property register in all former Trust land areas that have been under title registration for at least four decades. This will require a programme of title adjudication, as opposed to land adjudication;**
- **in order to facilitate transparency in registered land marketing an accessible and efficient land information system will need to be installed and decentralised to the district land registries;**
- **land used predominantly for agriculture in urban and peri-urban areas should, by zoning regulations, protect through legislation the integrity of agricultural use unless, and until such land is converted to other uses;**
- **in areas still governed by customary land tenure, an attempt should be made to design a functional system of land rights records to facilitate the operation of customary land markets;**
- **until such a time as District Land Authorities take over the functions of land control boards there is an urgent need to review and reorganise the establishment and appointment of Land Control Boards, and appointment of members including representation of women, chairing of such boards by non public officers and adequate and prompt remuneration to board members;**

- **in order to bring about economic and efficient land use planning the boards or their successors should seek relevant technical advice; and**
- **the law should be amended to require the approval of the applicant's spouse, adult children and beneficiaries in respect of controlled transactions.**

Principles Regarding the Settlement of Land Disputes

The General Nature of Land Disputes

Diagnosis

207. A robust property system will always generate its measure of disputes. In the context of customary land tenure, disputes are often part and parcel of the continuous process of constitution and reconstitution of social and cultural relations in a given territorial system. In non-customary systems, disputes are often seen as instruments for the clarification and vindication of land rights between individuals and other potential claimants. Either way, disputes can be short or protracted depending on their history, subject matter or political or economic ramifications. Where disputes are protracted, however, a lot of time, money and production opportunity are often lost in an attempt to resolve them. Sometimes disputes can go on for generations, a matter which is clearly detrimental to social and economic relations.

208. The public has lost faith and confidence in the existing land dispute settlement mechanisms and institutions, because they are characterised by delays, incompetence, corruption, nepotism, political interference and overlap of roles and functions, leading to conflict, confusion and unnecessary bureaucracy especially when there is a low participation of the local people in land disputes resolution mechanisms.

209. The first principle to establish is that land disputes, like any other dispute that is submitted to a trial process for resolution, will vary from a quite straightforward argument to a highly complex series of differences of opinion involving the interpretation of documents and questions of intention and motive.

210. Thus the first step is to classify land disputes into those that can be resolved quickly and cheaply without resort to expensive and protracted court processes. Inevitably, this classification will result in questions of jurisdiction but there is no reason why these questions cannot be kept short and simple. Questions of appeal from the decision of a court or tribunal of first instance should be limited to specific matters in order to speed up the process and keep costs down so far as the litigants are concerned. If

further appeals are contemplated, they should only be permitted on extraordinary grounds.

211. For the hearing of land disputes that are likely to involve more complex questions of law or fact or where the subject matter in dispute would be beyond the competence of the tribunal dealing with the more straightforward cases, a section of the normal courts of justice should be established so that a body of decisions and practitioners specialising in the subject could be built up. There is need, therefore, to design an efficient, cost effective and socially reconstructive dispute processing mechanisms irrespective of the tenure category of the land that might be involved.

Policy Principles

212. The following principles should be useful in the design of such mechanisms: -

- **for the more simple disputes, questions of jurisdiction should be simplified and clarified;**
- **the tenure system governing the land in dispute should not affect jurisdiction;**
- **the choice of law rules should allow for the application of customary or received law depending on the circumstances and the facts of the case;**
- **once a decision is reached it should be final and subject to appeal on limited grounds only; and**
- **the mechanisms should be devoid of delays, incompetence, corruption, nepotism and political interference.**

The Resolution of Customary Land Disputes

Diagnosis

213. Customary land disputes in Kenya often arise in one of four contexts. The first are disputes founded on inheritance or similar intra-family feuds. These are the most numerous. Such disputes will arise whether or not the estate against which claims are made is the subject of a will, and despite powers of disposal having been vested in registered proprietors by relevant legislation. The reasons are that succession to agricultural land is still governed by customary law irrespective of the registration status of the land and, that generations which have come into existence after tenure reform in the Trust land areas are beginning to challenge the so-called indivisibility of registered title.

214. The second is over boundaries, especially because these are not, as a general practice, accurately marked. Boundary disputes are a phenomenon which occurs both at individual, family and ethnic levels. When it occurs at the last of these levels it can easily degenerate into conflict on a grand scale. The third is in response to population pressure. The fourth is conflicts over resources e.g. water, grazing, etc.

215. The most worrying thing about customary land disputes is that normal judicial mechanisms and procedures have not been successful in resolving them. In some parts of the country such as Kisii and Meru these disputes are simply settled violently at home. Attempts by the government to design a special dispute mechanism for customary land, including the present Land Disputes Tribunals Act No.18 of 1990 have not been successful. This mechanism does not take into account traditional dispute resolution institutions and is characterised by illiterate members who have poor understanding of the law. Members of the Tribunals are not regularly appointed and at times are not gazetted as required by law and are poorly remunerated. In most tribunals women are not represented. The term of office of members of the tribunals is not specified in the law. Members of these tribunals solicit illegal fees. The Act compels the Magistrates' courts to enter judgement in accordance with the awards made by the tribunals without giving the courts discretion even to correct errors on the face of the award or inquire into the procedure adopted by the tribunals. The tribunals have not been established in the newly created districts. Proceedings of the tribunals are not properly recorded and kept. Under the Act the tribunals entertain matters outside their jurisdiction. There is conflict between this Act and the Registered Land Act.

216. There is need therefore for a carefully designed customary land dispute management system; after a thorough examination of the reasons why the Act does not perform the functions for which it was designed.

Policy Principles

217. The design of such a system should take account of the following principles: -

- **Customary land laws should be researched into and codified by the National Land Authority to facilitate identification of mechanisms for settlement of land disputes;**
- **customary land disputes should always be determined, in the first instance by institutions which have authority over the community in accordance with custom and tradition;**
- **because inheritance disputes are socially the most fractious, consideration should be given to the possibility of enacting**

a set of uniform rules for the inheritance of land throughout the country;

- **in order to discourage the progression of certain customary land disputes from generation to generation, a record of the final determination of any dispute should be maintained by relevant community organs;**
- **women's rights to land should become part of the fundamental principles of the National Land Policy;**
- **legislation should be enacted which assures gender equity with respect to access and control of resources and land;**
- **a proportionate number of women representation should be constituted in all the land bodies at all levels;**
- **until District Land Authorities that will nominate members of land disputes tribunals are constituted, there is need to provide for appointment of members who are people of high integrity with basic education, who also have a reasonable understanding of both the land issues of the relevant community and of the law and who are vetted by the National Land Authority;**
- **the Land Dispute Tribunals should be properly constituted, promptly gazetted, established in all districts and chaired by persons knowledgeable in law;**
- **the law should recognise community based conflict resolution mechanisms; and**
- **custom that has been observed over a long period of time and is of general application should be recognised by statute and taken judicial notice of except that customs relating to inheritance which discriminate against women should not be recognized.**

The Resolution of Disputes Over Registered Land

Diagnosis

218. Most disputes over registered land are transactional, more often than not they are generated by the failure of land delivery systems to clearly record or effectively transmit property rights in contractual situations. They may also arise as a result of imperfect land market conditions. Because many of these involve corporate entities and well connected elites and their agents, litigation often occurs in fora which are well understood and accepted by the protagonists. However, the majority

of the litigants who are ordinary folk cannot access the established dispute resolution mechanisms. In the court system dispute resolution mechanisms are cumbersome, expensive and take too long. Involvement of advocates in land cases complicates matters for ordinary people. Courts are not sensitive to the needs of widows, unmarried daughters and women heads of household. Provisions for settlement of disputes are scattered in several Acts. Some disputes involve boundaries, succession and inheritance. Section 143(1) of Registered Land Act (RLA) disallows the challenging of first registration of titles in any court of law. Irreparable damage has been caused to individuals, families and at times whole communities by the provisions of this Act.

219. Also adversely affected members have found it almost impossible to challenge a first registration where the registered trustee proprietor is a trustee under section 126(1) of RLA which prohibits the entry of particulars of any trust in the register.

220. What is required is to improve the efficiency of these courts.

Policy Principles

221. Attention should therefore be paid to the following principles:-

- **the level of complexity and procedures and expenses associated with litigation over registered land should be reduced;**
- **land registry records should be periodically updated so as to reflect the position on the ground;**
- **there is need to create a special division in the High Court decentralised to the lowest court in the districts to handle land cases as a means, inter alia, of developing a consistent and rational jurisprudence on Kenya's property law;**
- **where disputes over registered land entail the determination of deeply rooted social and cultural rights these should first be resolved in an appropriate forum before the technical issues based on the relevant legislation are determined;**
- **there is need to uphold integrity and improve efficiency in the Court System;**
- **Section 143 (1) of the Registered Land Act should be amended to allow for challenge in any court of law where registration of title (other than a first registration completed and registered prior to the commencement of the Act) has been obtained, made or omitted by fraud or mistake; and**

- **Section 126(1) of the Registered Land Act should be amended to provide that a person acquiring land, a lease or a charge in fiduciary capacity must be described by that capacity in the instrument of acquisition and must be registered with the addition of the words "as trustee" together with particulars of any trust.**

CHAPTER 5

LAND POLICY IMPLEMENTATION

General Principles

Diagnosis

222. Note has been taken of the fact that the process of policy development must be participatory and information based; it is important that any policy on a matter as important as land should be owned by the public who are the ones that will be affected by it either as owners or users. On the basis of public consensus on all the aspects of the policy, one expects that a policy document would be discussed by Cabinet and presented to Parliament for approval. The policy should then be disseminated and internalized before critical aspects of it are administered or legislated.

Policy Principles

223. Attention should be paid to the following strategies in an effort to develop a national land policy in accordance with the principles set out in the previous Chapter: -

- **depending on the extent to which the diagnostic aspects of this framework reflects the empirical characteristics of the land question in Kenya, the guidelines presented here will need to be converted into a draft national land policy document;**
- **the draft national land policy document should be published to facilitate discussion by the public as they are the ones affected by this policy.**

Legislating Land Policy

Diagnosis

224. Although it is neither necessary nor desirable to legislate all aspects of a national land policy, this is an area in which a great deal of legislation may be necessary. This can be done either in terms of the enactment of new laws or the revision of existing ones.

Policy Principles

225. Clear guidelines are therefore necessary for the formulation of an adequate legislative programme. These should include:

- **the entrenchment, in the Constitution, of aspects of land policy, particularly those relating to the location of radical title, the power of compulsory acquisition, the nature and**

- **mode of exercise of the regulatory power of the State, and the protection of national heritage;**
- **the revision and rationalisation of existing property statutes in the light of the policy principles set out above;**
- **the revision of sectoral legislations in accordance with the national land policy; and**
- **the design of a legislative framework for the orderly development of customary land tenure.**

Institutional Responses

Diagnosis

226. The process of legislating land policy often involves the creation or reorganisation of institutional structures. These are necessary to provide an adequate framework for the regulation of the property system, the administration of production structures and the provision of support services infrastructure. Kenyans face numerous land related problems that call for immediate attention. The urgent challenge is to rationalize the existing laws and institutions relating to administration of land.

Policy Principles

227. The following responses should therefore apply: -

- **the restructuring of the land administration system in such a way as to ensure that it functions under the National Land Authority and the District Land Authorities;**
- **the privatisation of non-core land administration functions where appropriate;**
- **greater use of traditional community mechanisms in such matters as land delivery, dispute processing and sectoral management of land based resources; and**
- **capacity building for an efficient and cost effective management system.**

PART III

LEGAL MECHANISMS TO ESTABLISH A NEW LAND ADMINISTRATIVE STRUCTURE

CHAPTER 6

CONSTITUTIONAL POSITION OF LAND

Historical Development

228. Land has always occupied a central place in the whole of human history and under African customs land was a means of economic empowerment, political control and also had a spiritual dimension. Whoever controlled land controlled the political economy. At the onset of colonialism in Kenya, whether by the British or by other foreign powers that preceded the British, the first laws to be put in place were those dealing with expropriation of land from the indigenous Africans. The land acquired whether through conquest, treaty making or through outright cheating was secured and entrenched in law to give the acquisition legitimacy.

229. In legalising the acquisition and occupation of foreign lands, the British Parliament promulgated two laws, namely, the British Settlements Act 1887 and the Foreign Jurisdiction Act 1890. Whereas the former provided for the extension of power of "Her Majesty" to provide for the government of acquired settlements, the latter gave the sovereign jurisdiction over Her subjects in a foreign country where there was no formal government from whom Her Majesty might obtain jurisdiction.

230. While laws were made to secure land to the settlers, African customary property laws were ignored and separate colonial laws were made to govern areas occupied by Africans. A historical overview of colonial land legislation is set out in the principles of a national land policy framework in Part II of this Report herein. The dual legal approach began with the enactment of the East African Land Regulations of 1897 and all other legal regimes affecting land continued the same way up-to 1963 when Kenya attained independence. During this time radical title to all land in Kenya was vested in the British Sovereign save for Native Reserves where radical title was vested in a Trust Board from 1938. At independence radical title in trust lands was relocated to county councils while title to former Crown lands was split between the Regional Governments and the Central Government[1]. However, with the abolition

[1] Legal Notice No. 718 of 1963 - The Kenya Independence Order in Council 1963 (Sections 204-208).

of Regions in 1964, land that was formerly vested in the Regions was relocated to the Government of Kenya .

231. In 1965, the Constitution was further amended to provide for the administration of both Government Land and Trust Land[3] and provided thus:-

Section 17 "Subject to the provisions of any law, the President or any person or authority authorised in that behalf by the President may make grants or dispositions of any estates, interests or rights in or over land that are for the time being vested in the Government of the Republic of Kenya."

Section 19(1) "The Commissioner of Lands shall be deemed for the purposes of section 53 of the Trust Land Act to have been authorised upon the commencement of this Act by every County Council to administer the Trust Land for the time being vested in it".

Sections 17[4] and 19[5] were purportedly repealed in 1968 through two ordinary statutory amendments. The validity of the repeal of these two sections is doubtful taking into account the requirements of a constitutional amendment.

232. The Constitutional amendments herein completed the centralisation of land administration in Kenya. The local communities were not given any say as far as the overall administration of land was concerned. This sad state of affairs obtains to this date and Kenyans have called for the decentralisation of State control over their basic resource.

What Kenyans said

233. During the Commission's hearings across the country some people raised a significant number of issues that called for the entrenchment in the Constitution of the following aspects of land:-

(i) That the protection of private property accorded by section 75 of the Constitution is good but the people pointed out that there are many cases where people have abused the law in acquisition of property. The people were categorical that the

---

[2] The Constitution of Kenya (Amendment) Act, 1964, Act No.28 of 1964 (section 21).

[3] The Constitution of Kenya (Amendment) Act, 1965, Act No. 14 of 1965 (sections 17 and 19).

[4] The Land (Amendment of Laws) Act 1968 Act No. 39 of 1968 (section 17).

[5] The Trust Land (Amendment) Act 1968 Act No.43 of 1968 (section 6(2)).

protection accorded by the Constitution should not apply to public land that has been irregularly acquired and the said section should be rewritten so that it is clear that no protection is accorded to irregularly or improperly acquired land.

(ii) That a Kenyan should be able to live anywhere in Kenya as provided for in section 81 of the Constitution and be protected by law from harassment by local communities. It was pointed out that land clashes are partly a manifestation of the intolerance, sometimes deliberately promoted, of other Kenyans by local communities in areas where they chose to go and live.

(iii) That there has been abuse of trust by the Government and the county councils, its officials and councillors in the irregular allocation of public and community land without following legally laid down procedures that ensure appropriateness, transparency and fairness. This abuse has led to massive grabbing of land reserved for public use e.g. school grounds, cemeteries, playgrounds, parks and forests, to name but a few.

(iv) That there should be a provision in the Constitution to address issues of ancestral claims, by various aggrieved parties who in the course of the history of the country have been deprived of their ancestral lands.

(v) That institutions should be established both at a national and community level and entrenched in the Constitution which will hold and administer land on behalf of Kenyans, professionally and without political interference.

234. While the Constitution has some provisions in respect of some of the issues raised others may need constitutional amendment to incorporate them. Key to this is the re-organisation of administration of land and devolution of this administration to local communities.

The Way Forward

Land and the Constitution

235. Land to Kenyans is an emotive issue. It was at the core of resistance to British rule at the turn of the last century and subsequent agitation for land thereafter up to the time of the struggle for independence. It is therefore a central category of property in the lives of

Kenyans and as such requires special treatment in the Constitution. Kenya's independence Constitution contained an entire Chapter on land comprising twenty six sections (sections 187 to 212) with detailed specific provisions on land. In the current Constitution, land is given some limited but nonetheless specific treatment in Chapter IX on Trust Land and Chapter V on the bill of rights.

236. Examples of countries that have included land in their Constitutions include Uganda with 7 articles dealing with land, Philippines with 3 articles, Malaysia with 3 articles and Lesotho with 3 articles.

237. As land is already a Constitutional issue in Kenya no meaningful reforms can be undertaken in the absence of relevant Constitutional changes. To quote Justice S. P. Bharucha, Chief Justice of the Supreme Court of India on this issue when addressing this Commission:-

> "Any meaningful land reforms ought to be accompanied or at least preceded by relevant Constitutional changes".

238. The Commission is of the view that any meaningful land reforms to be undertaken in the country have to be accompanied by relevant Constitutional changes in order to have a firm foundation.

239. The entire corpus of land law cannot be written into the Constitution. The Constitution can only set out broad principles on land and establish an institutional framework for the ownership, administration and management of land. From the peoples' comments and in the Commission's opinion the following issues should be provided for in the Constitution:-

(i) ownership of land;

(ii) protection of title ;

(iii) power of compulsory acquisition by the State;

(iv) regulatory power of the State over land;

(v) redress of ancestral claims;

(vi) control of land based natural resources; and

(vii) administration of land.

Ownership of Land in Kenya

240. At present, there are three categories of land in Kenya namely Government land, Trust land and Private land. As earlier observed, the classification of land into the three categories is as a result of historical development of land laws in Kenya since 1897.

(a) The Kenya Independence Order in Council 1963 provided that all land that was vested in Her Majesty or in the Governor shall be deemed to have vested in the Regions or the Government of Kenya on 12th December, 1963[6]. However, land that previously vested in the Regions was relocated to the Government of Kenya in 1964 and this situation continues to this date[7]. Government land includes all unalienated government land held and occupied by government agencies, all water bodies as defined by the Water Act (Cap. 372) the territorial sea and sea bed, all public roads whether gazetted or not and land that remained unadjudicated under the Land Titles Act (Cap. 282).

(b) Trust land is defined in Part IX of the Constitution and the Trust Land Act (Cap. 288).

(c) Private land is all land with registered title in accordance with any registration statute.

241. In the three categories the basic or radical title vests either in the Government for both Government land and registered titles granted by the Government or in the county councils for both Trust land and registered titles derived from Trust land.

242. Whereas the vesting of basic title of Trust Land in county councils is clearly set out in the Constitution, the vesting of Government land in the Government is not so explicit as the relevant provisions of the Independence Constitution as amended by the Constitution of Kenya (Amendment) Act 1964[8], do not appear in the 1969 printed edition. There is no apparent explanation for this omission.

243. It is proposed that the land in Kenya should be categorised into three tenure categories: public; commons; and private and be clearly vested by the Constitution appropriately as outlined below.

---

6 See Footnote No.1.
7 See Footnote No.2.
8 See Footnotes No.1 and 2.

Categories of Land and Tenure

Public Land

244. Public land shall include:-

(i) all land held as unalienated government land [except such land within the Coast Province that became Government land through the application of the Land Titles Act (Cap. 282) but excluding land within the boundaries of any city or municipality and the foreshore] and any land held by the Government consequent upon a reversion thereof of any freehold or any leasehold estate;

(ii) all land used or occupied by a Ministry, Department or Agency of government or Statutory Corporation;

(iii) all public roads and roads of access as defined under the Public Roads and Roads of Access Act (Cap. 399), whether gazetted or not;

(iv) all water bodies as defined under the Water Act (Cap. 372) including such riparian land as defined by various relevant statutes;

(v) the territorial sea and sea bed and the territorial area of any lake situated partly within the territorial boundaries of Kenya including the foreshore and riparian land as defined in the various statutes.

245. Public land shall be held by the National Land Authority under public tenure. The radical title to public land shall vest in the National Land Authority to be established by legislation and entrenched in the Constitution as trustee for the citizens of Kenya. The legislation shall define the structure, functions and powers of this Authority.

Commons

246. Commons shall comprise all land:-

(i) currently defined as Trust land under the Constitution and the Trust Land Act (Cap. 288);

(ii) registered in the name of any local authority or reserved for the purposes of a local authority;

(iii) held and managed as community forests, game reserves, water sources, grazing areas, shrines identified as such by specific communities;

(iv) within the Coast Province that became government land through the application of the Land Titles Act (Cap. 282) (excluding land within the boundaries of any city or municipality and the foreshore);

(v) held by county councils consequent upon a reversion of a freehold or leasehold estate; and

(vi) ceded to the Commons by any process of alienation or transmission.

247. Commons shall be held under customary tenure or public tenure as the case may be.

248. The radical title to the Commons shall be vested in District Land Authorities established by legislation and entrenched in the Constitution as trustees for the communities occupying or using such land. The structure, functions and powers of the District Land Authorities shall be set out in the legislation.

Private Land

249. Private land shall be any land that:-

(i) is the subject of a title registered in accordance with any written law but shall not include any land held on a title registered in the name of a Government Ministry, Agency or State Corporation; the Permanent Secretary to the Treasury (Incorporation) or any local authority;

(ii) otherwise acquired by mechanisms which confer exclusive occupation thereof.

250. Private land shall be held under freehold or leasehold tenure.

251. The radical title to private land shall vest either in the National Land Authority or in the District Land Authorities depending on where the title is derived from.

252. If radical title is to be vested in the National Land Authority and the District Land Authorities created by legislation and entrenched in the Constitution as outlined above, other than in the State, certain consequential but pertinent matters must clearly be defined in the Constitution to avoid confusion. These are the power of compulsory acquisition and the regulatory powers of the State over land.

Power of Compulsory Acquisition

253. Section 75 of the Constitution provides a basis for the exercise of this power while the Land Acquisition Act (Cap. 295) sets out the procedure to be followed if the power is to be exercised.

254. Notwithstanding the divestiture of the radical title from the State to other bodies created by the Constitution the power of compulsory acquisition should still vest and vest only in the State and be exercised by the President. The conditions for the exercise of that power shall be clearly defined by legislation and such power should be exercisable irrespective of the tenure category of land. The power is necessary to allow the State access to land that is required for public purposes.

255. Section 75 of the Constitution, in addition to providing the basis for the exercise of the power of compulsory acquisition, defines the meaning of public purpose for which the power can be exercised. The definition of public purpose in the Constitution is rather limited and should be expanded to include "public interest" which should be expressed as the State's commitment to address historical and other injustices. This expansion is necessary to accommodate ancestral/historical claims and to effect land reform programmes, a subject that will be addressed herein.

256. In order to avoid creating unnecessary tension between the State and communities, the exercise of compulsory acquisition over commons shall only be exercisable after due consultation with and approval of the District Land Authority within whose jurisdiction the land is situate. In such a case, however, there should be provision to override any objection from communities only on grounds of exceptional national interest. Even then the communities and any other person having an interest in or right over the land in question shall have the right of direct access to the High Court or any other tribunal that may be established for the purpose of determination of the legality of the proposed acquisition, and obtaining prompt payment of just and full compensation.

Regulatory Power of the State

257. While leases contain covenants binding the lessor to use his land in accordance with the stipulated conditions so that he does not, among other things, interfere with enjoyment of land by other land owners, a person holding a freehold or an absolute title may not have such covenants imposed on his title. The assumption is that a freeholder or an absolute proprietor is left to his own devices to use his land as he wishes. However, this is not the legal position whether one holds a freehold title, absolute title or a leasehold title. The State, under the Constitution, has power to regulate the use of all classes of land and this is what is known as the regulatory power of the State. The State enforces sustainable land use standards and practices using this power, through legislation.[9]

258. That power should be retained by the State but be exercised through the National Land Authority. However, in order to ensure uniformity in the exercise of the power throughout the country the State should enact legislation to empower the National Land Authority to develop guidelines and clear standards for adoption by District Land Authorities and other planning authorities. Such guidelines must incorporate national policies relating to sustainable use of land and environmental preservation and must also take into account local and community values on land use and sound environmental management.

Protection of Title

259. Section 75 of the Constitution protects rights to private property and confers what is popularly known as sanctity of title. However, members of the public complained that the provision protects private property regardless of the manner in which property was acquired and that therefore it could be argued that it protects illegally acquired title. They recommended that sanctity of title be tied to the legitimacy of the process or procedure used in its acquisition and that titles be honoured and protected only where such titles have been acquired in accordance with the laws and procedures prevailing at the time of their acquisition.

260. We recommend that section 75 of the Constitution be suitably amended so that protection only applies to property legally and procedurally acquired.

---

[9] For example the Physical Planning Act, Act No.6 of 1996, the Land Control Act (Cap 302), the Agriculture Act (Cap. 318)

New Institutions for Land Administration

261. For land to be administered professionally, it is proposed that the National Land Authority and the District Land Authorities shall be established by legislation and entrenched in the Constitution to hold and manage land on behalf of the citizens of Kenya.

262. The National Land Authority will take over the functions of the current technical departments of the Ministry of Lands and Settlement namely: Survey, Physical Planning, Lands and Land Adjudication and Settlement. The establishment of this Authority will be on the same lines as that of the Kenya Revenue Authority in 1995.

263. The said Authorities shall be run professionally and be insulated by the Constitution from political interference and shall be answerable to the people at the local level through an elective representation.

264. The structure, functions and powers of these Authorities shall be set out in legislation.

265. The Authorities shall control their own finances and shall account to the Minister in charge of land matters at regular intervals during the financial year. Legislation shall set out strict standards to ensure that the proposed Authorities comply with accepted financial discipline.

266. To facilitate smooth operation without unnecessary confusion, District Land Authorities shall be accountable to the National Land Authority and the Minister in some respects and the National Land Authority shall be accountable to the Minister.

Redress of Ancestral/Historical Claims

267. In order to deal with grievances of past historical injustices over land as expressed by people in various fora especially at the Coast and in the Rift Valley Provinces , it is proposed that the Constitution be amended to provide that:

(i) legislation be passed for review of ancestral/historical land claims and disputes including those dating back to 1895 with a view to reaching a just and peaceful resolution of the same, taking into account the nature of the unresolved claim or dispute and the current needs and interests of the nation;

(ii) the ancestral claims and disputes shall be investigated by an Ancestral/Historical Land Claims Tribunal to be established by legislation and which shall sit in public and comply with

the fair hearing requirements of the Constitution and the common law;

(iii) That legislation must be passed and all such claims and disputes investigated and resolved within two (2) years from the date of commencement of the Constitutional amendment.

268. This is an emotive matter which has been one of the reasons for the frequent land clashes especially during electioneering period[10]. In other places it is a ticking time bomb which can explode with grave consequences. The issue therefore must be faced and addressed squarely.

Natural Resources

269. The Constitution should provide for the ownership, protection and ownership of all natural resources including minerals and mineral oils, wildlife, forests, fisheries and marine resources, water etc.

270. We recommend that all natural resources should belong to the citizens of Kenya and be vested in the National Land Authority and District Land Authorities, as appropriate, as trustees for the citizens of Kenya.

271. The protection and exploitation of such resources should take into account and pay special regard to the interests of and confer benefits on the communities affected by virtue of their occupation of and or historical connection with the area involved. So far as reasonably possible the administration of such resources should include the participation of the local communities but the interests of the nation as a whole, the protection of the resources and their development must be given due consideration.

[10] Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya, Government Printer 1999.

CHAPTER 7

NEW INSTITUTIONAL FRAMEWORK FOR LAND ADMINISTRATION

Introduction

272. Kenya contains one of the most diverse ecological zones of any country in Africa. It ranges from tropical beaches at the Coast to lava deserts in the North East to high altitude rain-forests in the Central part and to major wildlife sanctuaries on open savannah plains in the South. The country has highly productive agricultural areas ranging from sea level to 3000 metres or more above sea level. Within these geographical zones is a highly diverse population from a multitude of ethnic communities varying between nomads and pastoralists in the arid and semi-arid lands (ASALs) to the settled communities of all races at the Coast, the Highlands and the Lake Basin.

273. In spite of this wealth of diversity, successive governments have made no attempt to create a comprehensive general policy for the administration of land. While there have been attempts over the years to introduce fragmented policies to deal with specific problems as they arise, such as land reform programmes of the late fifties and sixties, there has been no overall, co-ordinated policy for the development, use and administration of urban or rural land throughout Kenya.

274. The consequences of the lack of a comprehensive policy, is a land administration system that has failed to meet the aspirations of Kenyans.

275. Wherever the Commission travelled throughout Kenya, there were widespread complaints by members of the public about the administration of land in all its aspects. Whether the subject was allocation of public utility land, government housing, commercial plots in townships, land adjudication, the resolution of disputes by Land Disputes Tribunals, the distribution of settlement scheme plots or whatever, the public were visibly angry at the way the administration of land was conducted.

276. Land administration in this country is governed, by and large, by systems that were put in place by the colonial administration and little has changed over the years inspite of changes in the general development of the country. The systems are characterised by a multiplicity of laws, a highly centralised administrative structure and archaic ways of doing things. It is notable that although there have been efforts in the past to

effect some policy reforms, there has seldom been any review of the laws governing land.

277. This position has created both legal and administrative bottlenecks that have resulted in negative and costly effects.

278. Due to social and political pressure, short term measures and ad hoc policies to resolve land problems that have developed over time have been introduced. These measures are sometimes wholly devoid of a legal basis or firm policy principles. The legal procedures for the allocation of Government land, for example, are clearly set out in the Government Lands Act (Cap. 280). In practice, however, many of these procedures have not been followed for decades. Instead, the Office of the Commissioner of Lands has adopted procedures that are not only in breach of the law, but are also flawed in many other respects. Planning procedures are frequently ignored. Survey procedures allowing for infrastructure development are often overlooked, for example plots are surveyed on road reserves and deed plans produced. The selection of allotees is carried out in a number of different ways most of which are neither transparent nor in accordance with the law and established procedures[1]. Letters of Allotment are treated as binding contracts that can be dealt with as if they were marketable securities[2]. This, coupled with unprocedural systems of land allocation has created the very basis of illegal land speculation at the expense of the public of Kenya.

279. Furthermore, most ordinary Kenyans find the Ministry of Lands and Settlement not readily accessible. A few privileged citizens, who have access to the senior officers in the Ministry, have exploited the inherent loopholes to grab land. The grabbing in turn has been followed by rampant forging of documents as the stock of valuable land dwindles posing a serious threat to the security of title[3]. It is not uncommon to hear of forged titles finding their way to a land registry and Registered Land Act (Cap. 300) green cards being pulled out of registers and being replaced by fake ones. Similarly, deed files in land registries are insecure and frequently tampered with.

---

1 For example the establishment of plot allocation committees.
2 See Public Notice by the Commissioner of Lands dated 20th September 2002 (appearing in the East African
3 Standard of 1st October, 2002).
See footnote No.2.

280. The immediate consequence of this mess is that the people of Kenya have lost confidence in the system of land administration. The value of a registered title has been seriously compromised. This has grave consequences for the economy of Kenya. It is a situation that demands immediate reform both institutional and legal.

What Kenyans said about the Existing System

281. Problems and complaints from the public relating to land were so numerous and varied that it became necessary to condense and itemise them into summarised issues which are listed in Annex 2 of this Report. However, by separating the issues into identifiable geographical areas, the complexity of the problems and the reasons for the proposals as to how the problems can best be solved become slightly easier to understand

282. To begin with, the problems that concern residents of urban areas are different from those that concern residents of rural areas. The occupants of arid and semi arid lands have very different problems from any one else. And the residents of the Coastal areas of Kenya have their own peculiar problems to a large extent based on historical events that have been largely ignored and that are quite different from other areas of Kenya.

283. Nevertheless, a number of complaints are common to all areas. In particular a universal grievance was the concentration of power over land in the hands of the President and the Commissioner of Lands. Everywhere, people demanded the decentralisation of power over the administration of land. Similarly, throughout Kenya, people were visibly angry over the 'grabbing' of public and private land by persons of influence who seem to be immune from legal action. The people demanded the repossession of land improperly or illegally obtained in this manner. Another almost universal complaint was against the destruction of forests, water catchments and other sensitive areas of land that are vital to the environment and the well-being of the country as a whole.

284. In urban areas throughout Kenya there were overwhelming complaints that planning requirements were not observed at all. If a part development plan had been prepared it was frequently disregarded and the views of the local residents were neither sought nor taken into account even where such views had been obtained. The deliberate invasion of unoccupied Government land, local council land or private land by squatters brought by politicians with promises of free land has created

nearly insoluble slum development problems. The wholly unplanned proliferation of kiosks in every township, however large or small, is another aspect of this practice.

285. In rural areas, distances to land registries were an obstacle to the smooth running of the system and, what was far worse from the point of view of the public was the fact that some Registrars seldom knew what they should be doing and were charging excessive and unlawful fees for carrying out their duties.

286. The interference in all land matters by the Provincial Administration was universally condemned. Instead of monitoring the appointment of Land Control Board members and the proper running of Board meetings, the Administration was conniving at illegal meetings, granting illegal consents and thus dispossessing families of their land.

287. The resolution of disputes by land disputes tribunals is not well understood either by the members of the tribunals themselves or by the Provincial Administration officials who select the members and manage the operation of the tribunals. The results are very dissatisfied members of the public.

288. The whole concept of Settlement Schemes to alleviate the problems of squatters and landlessness has degenerated into a semi-official method of land grabbing by local and central government officials and politicians. The whole process of selection of allotees of settlement scheme plots is riddled with discrimination. These particular abuses have caused more distress than anything else in those areas – particularly the Coast and the Rift Valley – where such schemes have been introduced in the past twenty years or so.

289. The Coast reveals the anguish felt by local residents when the sanctity of areas of traditional and cultural significance such as *kayas* is totally ignored. Public access to beaches, the foreshore reserve, fish landing sites, coastal forests, mangrove forests and other sensitive ecosystems are destroyed in a rush to acquire private title to land in areas hitherto quite rightly reserved for the public benefit.

290. Issues that have been and still are major problems at the Coast include absentee landlords and tenants-at-will. Investigations on these

issues have been done in the past, reports[4] made and recommendations put forward to the Government but no steps have been taken to resolve them.

291. Turning briefly to ASALs, the inability of the officials whose job it is to administer land matters in such areas is devastating. Nomads and pastoral peoples have a lot to offer Kenya. As noted in Chapter 2, over 50% of Kenya's livestock is located in the ASALs. There used to be, in these areas, successful programmes for the improvement of the quality of livestock and its marketing. The reintroduction of these programmes is long overdue. The almost unplanned and unsupervised creation of camps for tens of thousands of refugees in the Northern and Eastern parts of the country has only made matters worse.

292. In summary, the overall lack of policy, the destruction of the infrastructure, the interference in land matters by the Provincial Administration and most of all the failure to heed the views and the needs of the local residents has brought land administration into total disrepute in the eyes of Kenyans. The Ministry of Lands and Settlement has failed in most areas of land administration, planning, development and protection. Instead, some Ministry officials have been involved in the destruction of a sound and working system of land tenure, land ownership and land development. The Ministry has failed to comply with the law or amend the law to cater for new developments. Instead it has connived at and enabled a system of speculation and land grabbing to flourish throughout the country. In its turn, this cavalier attitude has brought the sanctity of title to land wholly into disrepute with a very negative effect on the economy as a whole.

The Way Forward

293. What Kenyans raised above are not new issues and problems. Some of them have been worrying them for many years. Some have only appeared in the past decade or so. What is particularly worrying is that no single Government Department or Ministry is systematically dealing with these problems. Sometimes the Department of Settlement implements a plan for settlement of some people in an area and this in itself has sparked off resentment and even violence. Sometimes the Ministry of Lands and Settlement decides on a new shift in the way it administers a particular

---

[4] See for example, "The Report of the Select Committee on the Issue of Land Ownership along the Ten-Mile Coastal Strip of Kenya." Government Printer, 1978.

matter such as Absentee Landlords or Tenancies at Will at the Coast but it does not carry out an in depth study of the problem and its attempts to solve or ease the situation often make matters worse. At times, the Ministry of Environment and Natural Resources fails to protect a sensitive ecosystem in a bid to ease some other land related problem. Overall, there is no proper coordination of the activities of Ministries or Departments dealing with land or land related matters. All the time, new problems come into existence demanding a solution and this diverts the attention of the Ministry of Lands and Settlement from the old problems. Meanwhile, the constraints imposed by lack of funds and untrained personnel all add to the pressure.

294. As land is at the base of the economy of Kenya, these problems must be solved and a better way of doing things found.

295. The time, therefore, has now quite clearly come for a reorganisation of the whole system of land administration. To do this effectively, this Commission has adopted the recommendation of very many individuals and institutions throughout Kenya to set up a restructured land administration and management mechanism.

296. As Chapters 2 to 5 of this Report show, the Commission has drafted a framework of policy principles that need to be developed and consolidated into a National Land Policy and implemented for better administration and management of land in Kenya.

297. To go with the framework of policy principles, it is necessary to create institutions necessary to bring the policies into effect. The institutions must of necessity be different and do things differently from the way they have been done in the past.

298. It is proposed to set up independent institutions both at the national and local levels to direct, supervise, monitor and control the administration of all land matters currently handled by the technical Departments of the Ministry of Lands and Settlement (i.e. the Department of Lands including all Land Registries; the Department of Surveys; the Department of Physical Planning; and the Department of Land Adjudication and Settlement) and by county councils and other local authorities.

299. Why, one may ask, cannot the present Ministry of Lands and Settlement be directed to introduce and manage the new policy? The answer is illuminating and shows in considerable detail just what happens when ad hoc policies are the basis for the day to day administration of as

complex a subject as land tenure, land use and land administration generally in a population that has for decades been using a large number of often conflicting customary and statutory land laws and practices.

300. In today's Kenya to write a letter to the Ministry of Lands and Settlement and receive a response by mail is to many Kenyans a dream; files are deliberately hidden and clerks have to be bribed to produce them; rents are collected, if at all, in an ad hoc manner; management of rates by local authorities leaves a lot to be desired; obtaining information on time on any piece of land is a nightmare. Land statutes are hardly reviewed, and when done it takes years to operate properly. Land disputes take years to resolve as ordinary citizens are taken round in circles that never seem to end. Civil servants have become civil masters of the people rather than the other way round. All these in a country in the 21st Century hoping to develop rapidly to compete globally with other nations and also satisfy the ever rising aspirations of her people.

301. Land is central to people's lives and must be managed in a sober, focussed and professional manner, backed by sound, concise policies and laws that are frequently updated to be in tune with developments in other sectors of the economy of the nation as is happening in other countries of the world.

302. The chaotic manner in which land is now managed by the various sectors must be overhauled, as it is a recipe for disaster.

303. Efficient and focussed systems, that are sensitive and responsive to the needs and aspirations of Kenyans need to be put in place. This can only be done not by the current civil service structure that has all manner of bureaucratic bottlenecks and inefficiency, but by an organisational structure that runs more-or-less along private sector lines yet at the same time is accountable to the people and responsive to their needs.

304. It is proposed to set up a National Land Authority at the National level and District Land Authorities at the District level as outlined below.

305. The concept of devolved land administration is not new. It has been done or is being done in other countries that have undertaken land reforms. These include Botswana, Uganda, Malawi, Tanzania and Ghana.

306. The National Land Authority as earlier stated will take over technical departments of the Ministry of Lands and Settlement and the District Land Authorities will take over some of the functions of county councils and other local authorities, all functions of the land control boards

and nominations of members of the land disputes tribunals and other local institutions that deal with land. It will be necessary to carry out constitutional amendments to entrench the proposed institutions.

The Proposed Institutions

Basic Principles

307. It is conceptualised that there is overwhelming need to establish a new institutional framework for land administration in the country to bring about:-

- community participation in land administration and the decision making processes;
- efficiency;
- transparency; and
- accountability.

308. The proposed National Land Authority and District Land Authorities will accomplish this.

309. In order to ensure their independence and isolate them from political interference and manipulation, it is proposed that the Authorities be entrenched in the Constitution. In addition the members of the National Land Authority be granted security of tenure in the Constitution so as to ensure that they discharge their duties without fear. However, members of the District Land Authorities need not be given security of tenure as they shall be elected by and therefore answerable and accountable to the people at the local level.

310. At present, the basic (radical) title to land in Kenya is, in respect of Government land, held by the Government and, in respect of Trust land, by the County Councils. It is proposed that basic title to Government land shall vest in the National Land Authority while that of Trust land shall vest in the District Land Authorities. This relocation of title will have to be done through a Constitutional amendment.

311. The powers, structure and functions of the National Land Authority and the District Land Authorities will be set out in legislation to be enacted by Parliament. The draft of such legislation is Annex 1 of this Report. Enactment of this legislation will no doubt entail many consequential amendments to various legislation. Thus, the draft legislation provided in this Report merely provides the basic foundation of

the proposed institutional framework. Outlined below is the structure of the proposed institutions and how they will relate to each other. The present structures will be absorbed into the new structure as earlier explained.

The National Land Authority and District Land Authorities

312. The National Land Authority will operate at the national level and will be responsible for originating policies and legislation on the administration of all land in Kenya. It will also hold and administer all public land as specified in Annex 3 of this Report.

313. The members of the board of the National Land Authority will be appointed by the President according to transparent guidelines and criteria relevant to the functions of the Authority and stipulated by law. The management of the Authority on a day-to-day basis will be in the hands of a chief executive appointed by the Board and will be assisted by heads of the various technical departments of the Authority. This will include at least initially the current technical departments of the Ministry of Lands and Settlement.

314. The Authority will collect revenue from sale and lease of land among other services it will render and will use the revenue for its purposes to serve the nation. The revenue and expenditure will be accounted to Parliament, and surplus funds will be remitted to the Government.

315. The District Land Authorities however will have boards elected by the people from the local area subject to guidance from the National Land Authority on the suitability of the candidates seeking office.

316. The District Land Authorities will perform their functions independent of but will, where appropriate, get technical and some financial support from the National Land Authority. They will also raise their own revenue from services they will render. In the performance of their functions the District Land Authorities will take into account national policies on land. They will hold and administer the categories of land listed in Annex 3 of this Report.

317. To ensure integrity and accountability it is proposed that District Land Authorities finances will be audited by independent auditors appointed by the National Land Authority. They may, in exceptionalcircumstances, be suspended or dissolved by the National Land

Authority for failure to effectively discharge their functions. During the period of suspension or dissolution, which shall not exceed one year, a caretaker board comprising of qualified local residents shall be appointed to perform the functions of the District Land Authorities other than land allocation. District Land Authorities should be able to appoint their own staff to ensure efficient service to the local community notwithstanding technical assistance they shall receive from the National Land Authority.

318. Many Kenyans pointed out that customary laws have a great deal of influence on the management of land and need to be codified and applied. This is an area where the District Land Authorities will play an important role particularly on issues of inheritance, dispute resolution and land adjudication.

ANNEXES

ANNEX I *(Paragraph 311)*

The Kenya National and District Land Authorities Bill 2002

A Bill for

An Act of Parliament to establish the Kenya National Land Authority and District Land Authorities as the bodies for land administration and management at national and district levels; and for connected and incidental matters

ENACTED by the Parliament of Kenya as follows:-

Part I - Preliminary

Short title and commencement

1 This Act may be cited as the Kenya National and District Land Authorities Act 2002, and comes into force as provided by the Minister by notice in the *Gazette*, and the Minister may appoint different days for different provisions of this Act.

Interpretation

2 In this Act –

"Authority" means the Kenya National Land Authority established by section 3;

"Board" means the Board of Commissioners established by section 7;

"Chairman" means the Chairman of the Board;

"Commissioner" means a person so designated and appointed to the Board under section 7;

District means an administrative district as defined in the Districts and Provinces Act or a city or municipality; No. 5 of 1992

"District Land Authority" means an authority established under section 11;

"Minister" means the Minister responsible for matters relating to land;

"Specified Departments" means the Departments of the Ministry for the time being responsible for lands, physical planning, surveys, land adjudication and settlement.

Part II – Establishment, Functions and Powers of the Authority

Establishment of the Authority

3 (1) There is established an authority to be known as the Kenya National Land Authority.

(2) The Authority is a body corporate with an official seal, which may sue and be sued and which has the functions and powers set out in this Act.

Seal of the Authority

4 (1) The seal of the Authority must be authenticated by the signature of the Chairman, or a member authorised by the Board, and the Secretary to the Board.

(2) In the absence of the Secretary, the person for the time being performing the functions of the Secretary may authenticate the seal.

(3) The Board must provide for the safe custody of the seal, which may be used only by authority of the Board or a committee of the Board authorised for that purpose.

(4) A document purporting to be an instrument issued by the Authority and sealed with the seal of the Authority authenticated in the manner provided by subsection (1) or (2) is to be presumed until the contrary is proved to be such an instrument and is to be received in evidence without further proof.

Functions of the Authority

5 (1) Despite the provisions of any other written law, the Authority is to be responsible for the administration and enforcement of the written laws, and of the specified provisions of the written laws, set out in the First Schedule:

Provided that the Authority may delegate to a District Land Authority the responsibility for the administration and enforcement of any of the written laws, and of the specified provisions of the written laws, set out in the First Schedule.

(2) The Authority has in addition the following particular functions –

(a) to review and formulate policies on the administration and management of land, land use planning, and the administration, management and exploitation of all land based natural resources;

(b) to co-ordinate the activities of all bodies concerned directly or

indirectly with land matters and serve as a channel of communication between those bodies and the Government;

(c) to establish and operate an integrated information system countrywide specifically to act as a central depository for all research material and information on land;

(d) to recommend and undertake land reform programmes, review existing land laws and propose new or amending legislation necessary to implement its recommendations;

(e) to be responsible for the preparation, registration and issue of titles for all categories of land under the Acts referred to in the First Schedule;

(f) to administer the renewal and extension of leases in respect of Government leasehold titles, and to order, well in advance of the expiry of those leases, the planning of areas where the renewals or extensions are to take place;

(g) to carry out valuations of all categories of land where legally required to do so;

(h) to control and manage the collection of land survey data for the production of maps, plans and charts, and to promote the introduction of whatever technological systems that may be developed to obtain the data in as reliable, cheap and accurate a

manner as possible for use in registration of titles, tourism, defence, education, planning, health, agricultural and industrial development and any other purpose it considers suitable;

(i) to formulate and prepare national, regional and local physical development policies, plans, guidelines and strategies, and initiate and undertake or direct studies and research into matters concerning physical planning, and to advise local authorities, and public and private developers on the most appropriate use of both public and private land;

(j) to undertake research into, and formulate national policies on, human settlement and to initiate and continue programmes and projects for urban and rural settlement;

(k) to establish settlement schemes and to provide for their administration and management;

(l) to promote the advancement of research and scientific knowledge in land matters and encourage the development of technology to ensure protection of beneficial use and the maintenance of the quality of land, and to prevent or minimise adverse effects that endanger human health or welfare;

(m) to initiate or commission studies, research or inquiries for the identification, harmonisation or codification of the customary land laws and land tenure systems of the various communities in Kenya, and to recommend whether and the extent to which those laws and systems may be incorporated into existing or new legislation;

(n) to undertake and promote general educational programmes in land matters for the purpose of creating an enlightened public opinion regarding land and the role of the public in its protection and improvement.

Powers of the Authority

6 (1) The Authority is to exercise the powers vested immediately before the commencement of this Act -

(a) in the President under the Government Lands Act and the Land Control Act;

(b) in the Minister under any of the written laws set out in the First Schedule other than the power to make rules;

(c) in the Specified Departments under any written law.

(2) The Authority may do all things that are incidental or conducive to the carrying out of its functions and in particular may -

(a) enter into contracts;
(b) acquire, hold and dispose of real or personal property;

(c) erect buildings and structures and carry out works;
(d) with the approval of the Minister, determine, impose and levy land rents, charges or fees for services provided by it;
(e) appoint officers and staff as it considers necessary for the efficient discharge of its functions;
(f) appoint agents;
(g) engage persons with such knowledge or expertise in land or land related fields as the Authority may determine, and either for specific assignments or for general purposes;
(h) appoint committees, whether of its own members or otherwise, for such tasks as it may require, but whose decisions must be confirmed by the Authority;
(i) borrow money in accordance with section 27.

(3) The Authority may delegate to a District Land Authority the responsibility to administer and enforce any of the written laws, and of the specified provisions of the written laws, set out in the First Schedule.

Part III – The Board of Commissioners

Board of Commissioners

7 (1) There is established a Board of Commissioners as the governing body of the Authority, consisting of the following-

(a) a Chairman appointed by the President;
(b) five Commissioners appointed by the President from a list of eleven names nominated and submitted to him by the Minister;

(c) three Commissioners appointed by the President from a list of seven names nominated and submitted to him through the Minister by the Association of Professional Societies in East Africa;

(d) two Commissioners appointed by the President from a list of five names nominated and submitted to him through the Minister by the Kenya National Council of Voluntary Agencies established under the Non-Governmental Organizations Co-ordination Act; No. 19 of 1990

(e) the Permanent Secretaries of the Ministries for the time being responsible for lands and settlement, agriculture, environment, natural resources, local government and finance, as *ex-officio* Commissioners:

Provided that the Minister may, on the advice of the Authority, by notice in the Gazette, replace the nominating bodies referred to in paragraphs (c) and (d) of this subsection where they have ceased to exist with their successors or bodies discharging similar functions.

(2) No person is qualified to be appointed as Chairman or a Commissioner, other than an *ex-officio* Commissioner, unless he -

(a) holds at least a first degree from a university recognised under the Universities Act and has, in the opinion of the President and the relevant nominating body, adequate knowledge and experience in any field relevant to the functions of the Authority; Cap. 210 B

(b) is at least 35 years of age; and

(c) is, in the opinion of the President and the relevant nominating body, a person of honesty and integrity.

(3) In nominating and appointing persons under this section, the President and the nominating bodies must -

(a) have regard to –
  (i) Kenya's geographical, cultural, social and economic diversity; and
  (ii) Gender equity;

(b) ensure that the total number of persons nominated or appointed under subsection (1)(b), (c) and (d) comprises at least one and not more than three persons from each of the eight provinces of Kenya.

(4) The Board is responsible for –

(a) the formulation and review of the policies of the Authority in terms of its functions;
(b) monitoring the performance of the Authority in carrying out its functions; and
(c) the discipline and control of staff of the Authority.

Tenure of office and termination

8 (1) The Chairman and Commissioners, other than *ex-officio* Commissioners –

(a) hold office for a period not exceeding three years on terms and conditions, including remuneration, specified in their instruments of appointment;
(b) are eligible for reappointment for one further term of three years;
(c) may resign their office by written notification, signed by the person concerned and addressed through the Minister to the President.

(2) The President may terminate the appointment of the Chairman or a Commissioner if he -

(a) is unable to perform the functions of his office by reason of mental or physical infirmity;

(b) is declared or becomes bankrupt;

(c) is convicted of a criminal offence and sentenced to a term of imprisonment of not less than six months;

(d) without reasonable cause to the satisfaction of the President, is absent from three consecutive meetings of the Board;

(e) fails to comply with section 9 in any particular case, or if there is in the President's opinion any other sufficient cause.

(3) In the event of the office of the Chairman or a Commissioner becoming vacant for whatever reason, the President must appoint some other person to be Chairman or Commissioner, as the case may be, provided that in making such appointment the President must be guided by the criteria set out in section 7 (2) and (3) of this Act.

Disclosure of interest

9 (1) A member who has a direct or indirect personal interest in a matter being considered by the Board must, as soon as possible after the relevant facts concerning the matter have come to his knowledge, disclose the nature of his interest to the Board.

(2) A disclosure of interest under subsection (1) must be recorded in the minutes of the meeting of the board, and the member must not, unless the Board determines otherwise in respect of that matter -

(a) be present during any of the board's deliberations on that matter; or

(b) take part in any decision of the Board on the matter.

(c) When the Board deliberates on a determination under subsection (2), the member concerned must not –

(i) be present or take part in the determination; or

(ii) attempt to influence another member taking part in the making of the determination.

Meetings of the Board

10 (1) The Second Schedule applies to the meetings of the Board and the related matters provided for in that Schedule.

(2) The Board may co-opt a person to participate in its deliberations, but the person co-opted has no vote.

(3) The Minister may, by notice in the *Gazette*, amend the Second Schedule.

Part IV – Establishment, Functions and Powers of District Land Authorities

Establishment of District Land Authorities

11 (1) There is established a District Land Authority for each of the administrative districts of Kenya, or for such other administrative areas as the Minister may by notice in the *Gazette* prescribe.

(2) Each District Land Authority is a body corporate, with an official seal, which may sue and be sued and which has the functions and powers set out in this Act.

(3) The Authority is to provide policy guidelines, and may provide technical and other necessary support, to District Land Authorities for planning,

surveying, land administration and valuation, and title registration.

(4) In exercising their functions, the District Land Authorities are to be guided as far as practicable by customary land laws, but subject to the overall land policies formulated by the Authority.

Membership of District Land Authorities

12 (1) A District Land Authority is to consist of not less than seven and not more than eleven members. made up as follows –

(a) At least seven members elected, under the supervision of the Authority, by the people resident in the District in accordance with regulations made under section 29(2) of this Act;

(b) two members nominated by the local authority or authorities in the area of jurisdiction of the District Land Authority:

Provided that where there are more than two local authorities within the area of jurisdiction of a District Land Authority, the two members must be determined by lot.

(2) The members elected under subsection (1)(a) must elect a chairman from among their number.

(3) Members of a District Land Authority-

(a) hold office for a period not exceeding three years on terms and conditions, including remuneration, specified in their instruments of service;

(b) are eligible for re-election for one further term of three years;

(c) may resign their office by a written

notification signed by the person concerned, addressed to the Authority through the Secretary of the District Land Authority

(4) In the event of the office of Chairman or member of a District Land Authority becoming vacant for whatever reason, the Authority must cause the vacancy to be filled in accordance with subsection (2) of this section and in accordance with regulations made under section 29(2) (f) and (g).

Disclosure of Interest

13 Section 9 applies, with the necessary modifications, to members of District Land Authorities.

Secretary and Staff of District Land Authorities

14 (1) There is to be a secretary for every District Land Authority seconded to it by the Authority.

(2) The Secretary is to -

(a) be the executive officer of the District Land Authority;

(b) keep the records of the District Land Authority;

(c) keep custody of the seal of the District Land Authority;

(d) perform such other functions as the District Land Authority may direct..

15 (1) The Authority must, where appropriate, establish, for each District, a District Land Office comprising –

(a) The District Land Officer;

(b) The District Land Registrar or, as the case may be, Registrar of Titles;

(c) The District Surveyor;

(d) The District Physical Planning Officer;

(e) The District Valuer;

(f) The District Land Adjudication and Settlement Officer;

(g) The District Registrar of Group Representatives.

(2) The District Land Office shall provide technical services to the District Land Authority and facilitate it in the performance of its functions under this Act.

Functions of District Land Authorities

16 (1) A District Land Authority has the following functions within its area of jurisdiction -

(a) as agent of the Authority, to administer and allocate Government land;

(b) to facilitate the ascertainment, recording and disposition of customary interests in land;

(c) to control and regulate transactions in land;

(d) to take over the role and exercise the powers of -

(i) the Commissioner of Lands, County Councils and Divisional Land Boards under sections 53 and 4 of the Trust Land Act; Cap. 288

(ii) the land control boards under the Land Control Act; Cap. 302

(e) to manage and control all land based resources owned by the community;

(f) to assist the Authority in carrying out land use planning, title surveys and title registration;

(g) to nominate candidates for appointment to land disputes tribunals under the Land Disputes Tribunals Act; No. 18 of 1990

(h) despite anything in the Trust Land Act, the Local Government Act or any other written law, to be responsible for the administration and disposal of land owned by a local authority within the meaning of the Local Government Act; Cap. 265

(i) to manage the adjudication and registration of interests and rights in or over land under the appropriate written laws in the First Schedule;

(j) to perform such other functions as may be delegated, and deal with any other matters connected with land that are referred, to it by the Authority.

(2) Despite the provisions of any other written law, the District Land Authorities, as representatives of local communities, must participate in the management, conservation, protection and exploitation of all other natural resources within their areas of jurisdiction.

Powers of District Land Authorities

17 A District Land Authority may do all things that are incidental or conducive to the carrying out of its functions and in particular may -

(a) with the approval of the Authority, determine and impose charges or fees for services provided by it;

(b) appoint staff as it considers necessary for the efficient discharge of its functions;

(c) engage persons with such knowledge or expertise in land or land related fields as the Authority may determine, and either for specific assignments or for general purposes;

(d) appoint committees, whether of its own members or otherwise, for such tasks as it may require, but whose decisions must be confirmed by the District Land Authority.

Funds of District Land Authorities

18 (1) The funds of a District Land Authority, which must be applied solely in furtherance of the functions set out in section 16, are to consist of -

(a) sums provided by the Authority for the purposes of the District Land Authority;

(b) charges and fees imposed by the District Land Authority for services provided by it;

(c) donations, grants and bequests received.

(2) Part VI applies, with the necessary modifications, to the funds of, and accounting by, a District Land Authority.

Removal of Members of District Land Authorities and Appointment of Caretaker Boards

19 (1) Where the Authority is of the opinion that a District Land Authority has failed to exercise its functions under this Act properly, the Authority may, by notice in the *Gazette,* and after holding an inquiry and hearing evidence, order-

(a) the removal from office of all members of such District Land Authority who must thereupon, despite anything to the contrary in this Act or any other written law, cease to be members thereof; and

(b) in place of such members and for the area of jurisdiction of such District Land Authority appoint not less than three persons from among qualified local residents to form a Caretaker Board for the purposes of carrying

on the affairs of the District Land Authority except allocation of land and disposition of interests in land, and shall appoint one such person to be Chairman of the Caretaker Board.

Provided that in no case must a Caretaker Board or Boards hold office for a period exceeding two years from the date of removal of members of the District Land Authority.

(2) Any resident of the District aggrieved by the removal from office of members of the District Land Authority may, within 21 days of such removal, appeal against the removal to a subordinate court, within the area of jurisdiction of the District Land Authority, whose decision must be final.

Part V – Director-General, Officers and Staff of the Authority

Director-General

20 (1) There is to be a Director-General of the Authority appointed by the Board on the terms and conditions specified in his instrument of appointment.

(2) No person is qualified to be appointed as Director-General, unless he -

(a) holds at least a first degree from a university recognised under the Universities Act;

(b) is at least 35 years of age; and

(c) in the opinion of the Board –

(i) has sound professional training in legal, land, agricultural or environmental fields or in any other field relevant to the functions of the Authority;

(ii) has adequate experience in the management of government and public affairs, or has served in a senior management position in the private sector; and

(iii) is a person of honesty and integrity.

(3) The Director-General is the chief executive of the Authority and Secretary to the Board and, subject to the general supervision and control of the Board, is responsible for -

(a) the day to day operations of the Authority;

(b) the management of the funds, property and affairs of the Authority;

(c) the administration, organisation and control of the staff of the Authority;

(d) arranging the business of the Board's meetings, and keeping records of those meetings and proceedings of the Board;

(e) performing such other duties as the Board may direct.

(4) The Board may terminate the appointment of the Director-General for –

(a) misbehaviour in terms of the code of conduct prescribed under section 29;

(b) inability to perform the functions of his office by reason of mental or physical infirmity; or

(c) any other sufficient cause.

Appointment of Directors, other officers and staff

21 (1) The Board is to appoint to the service of the Authority the following other officers –

(a) Director of Land Administration and Valuation;

(b) Director of Surveys;
(c) Director of Physical Planning;
(d) Director of Land Titles Registration;
(e) Director of Land Adjudication and Settlement;
(f) Director of Legal, Research and Policy affairs;
(g) Director of Human Resources;
(h) Director of Finance and Administration;
(i) such other Directors as it considers necessary.

(2) The Board is also to appoint -

(a) heads of internal audit, investigation, research and training;

(b) as required by the Authority for the efficient performance of its functions, other functional heads and all other members of staff.

(3) The terms and conditions of service of all persons employed by the Authority are to be determined by the Board.

(4) Except as the Board may otherwise determine in a particular case, a Director referred to in subsection (1), or in his absence his immediate deputy, is entitled to attend and participate in deliberations of a meeting of the Board but does not have a vote.

Employees personally liable for wrongful acts or omissions

22 A person employed by the Authority is personally liable for an act done or omission made in the performance of his functions under this Act if, having regard to the circumstances of the case, the act or omission -

(a) is done or made dishonestly;
(b) is attributable to the negligence of that person;
(c) is done or made in contravention of a provision of this Act, regulations made under it, or any other written law.

Part VI – Financial Provisions

Funds of the Authority

23 (1) The funds of the Authority are to consist of–

(a) the proceeds of sale of unalienated Government land, as defined in the Government Lands Act;
(b) the proceeds of leasing of all leasehold land;
(c) levies, charges, dues and fees imposed by the Authority for services provided by it or on its behalf;
(d) donations, grants and bequests received;
(e) other money which may, with the approval of the Minister, be received by or made available to the Authority.

(2) The funds of the Authority must be applied solely in furtherance of its functions.

(3) At the end of each financial year the Board must order the transfer to the Consolidated Fund any surplus remaining on the accounts of the Authority after providing for any planned development expenditure approved by the Board.

(4) The Authority is exempt from payment of Corporation Tax, Customs and Excise Duty, Value Added Tax and Stamp Duty.

(5) Stamp duty collected by the Authority may be retained by the Authority and applied in furtherance of its functions.

Estimates of income and expenditure

24 (1) The Director-General must, not later than three months before the end of each financial year, prepare and submit to the Board for its approval estimates of the income and expenditure of the Authority for the following financial year, and may, at any time before the end of a financial year, prepare and submit to the Board for its approval estimates supplementary to the first-mentioned estimates.

(2) No expenditure is to be made from the funds of the Authority unless that expenditure is part of the expenditure approved by the Board according to the estimates, or the supplementary estimates, for the financial year in which the expenditure is to be incurred.

(3) If in any financial year the Authority needs to make a disbursement not provided for, or of an amount in excess of the amount provided for, in the annual budget for that year, the Board must at a meeting pass a supplementary budget detailing that disbursement.

(4) The annual budget and every supplementary budget must be in the form and contain the details that the Board directs.

Accounts, audit and annual report

25 (1) The Authority must keep accounts and records of its transactions and affairs, and in particular must ensure that –

(a) money received is properly brought into account;

(b) payments out of its funds are correctly made and properly authorised;

(c) adequate control is maintained over its

property and any liabilities the Authority may incur under this Act

(2) The annual accounts of the Authority are to be audited by the Controller and Auditor-General.

(3) The Authority must within three months after the end of each financial year submit -

(a) to the Minister, an annual report in respect of that year containing –

(i) financial statements of the Authority;

(ii) the Authority's performance indicators and any other related information;

(iii) a report on the operations of the Authority;

(iv) such other information as the Minister may require.

(b) to the Controller and Auditor-General, the accounts of the Authority for the financial year and the annual report referred to in paragraph (a).

(4) The Controller and Auditor-General is to audit the accounts of the Authority within two months after receiving them and submit his report on them to the Minister and to the Board.

(5) The Minister is to cause a copy of both the annual report and the Controller and Auditor-General's report to be laid before the National Assembly within 15 sitting days of the Assembly after he has received them.

Quarterly accounts and reports

26 The Authority must every three months prepare and publish -

(a) an income and expenditure account; and

(b) general report on the activities of the Authority in respect of that period.

Borrowing powers

27 (1) The Authority may, for the carrying out of its functions, and with the consent of, and on terms approved by, the Minister responsible for finance–

(a) borrow money by the issue of loan stock;

(b) otherwise borrow money or obtain credit in Kenya or abroad.

(2) Unless the instrument or note evidencing or supporting the loan otherwise provides, stock issued, money borrowed or credit obtained under subsection (1), and interest and other charges payable in respect of them, are, by operation of this subsection and without further charge or instrument, to be charges on all the property, undertaking and revenue of the Authority.

(3) Except as provided by this section, the Authority must not execute a mortgage or charge over any of its property by way of security for a loan.

Part VII – Miscellaneous and transitional provisions

Exemption

28 The Authority is exempt from the provisions of the State Corporations Act. Cap. 446

Subsidiary legislation

29 (1) The Minister may, in consultation with the Authority, make regulations for the better carrying out of the provisions of this Act.

(2) The Authority may make regulations providing for -

(a) the terms and conditions of service, including pensions, gratuities and other retirement benefits of members of staff of the Authority;

(b) procedure for the appointment of members of staff of the Authority;

(c) a code of conduct and discipline;

(d) administration and funds of the Authority;

(e) performance targets for the Authority;

(f) prescribing the qualifications and terms of service of members of District Land Authorities and the procedures for their election and the conduct of their business;

(g) prescribing procedures for election, meetings and removal from office of members of District Land Authorities.

(3) Regulations under subsection (2) need not be published in the *Gazette*.

Transfer of assets, liabilities, proceedings and staff

30 (1) At the commencement of this Act –

(a) all property, which immediately before the commencement of this Act was vested in the

Government for use by the Specified Departments, is to vest in the Authority, subject to all interests, liabilities, charges, obligations and trusts affecting that property.

(b) all liabilities of the Specified Departments become liabilities, of the Authority;

(c) all legal claims and proceedings pending and instituted by or against the Specified Departments are to continue by or against the Authority.

(2) Unless the Authority otherwise determines, all persons, being public officers employed by the Government for the purposes of the written laws specified in the First Schedule, are to be treated, as from the commencement of this Act, as being on secondment to the Authority until -

(a) they are employed in the service of the Authority in accordance with regulations under section 29(2); or

(b) their secondment otherwise ceases in accordance with its terms.

Construction and modification of other written laws

31 As from the commencement of this Act, in the written laws specified in the First Schedule, or any other written law -

(a) a reference to the Commissioner of Lands, the Director of Surveys, the Director of Physical Planning, the Chief Land Registrar, the Principal Registrar of Titles, the Principal Registrar of Government Lands, the Senior Collector of Stamp Duty, the Recorder of Titles, the Registrar of Group Representatives or the Director of Land Adjudication is to be construed as a reference to the Director General of the Authority;

(b) a reference to the Specified Departments or any one or more of them, is to be construed as a reference to the Authority;

(c) except as provided in paragraph (a), a reference to an officer of any of the Specified Departments is to be construed as a reference to the equivalent officer of the Authority.

FIRST SCHEDULE [section 5(1)]

1. The Physical Planning Act - No. 6 of 1996
2. The Survey Act - Cap. 299
3. The Government Lands Act - Cap. 280
4. The Registration of Documents Act - Cap. 285
5. The Registration of Titles Act - Cap. 281
6. The Land Titles Act - Cap. 282
7. The Registered Land Act - Cap. 300
8. The Sectional Properties Act – No. 21 of 1987
9. The Stamp Duty Act – Cap. 480
10. The Trustee (Perpetual Succession) Act - Cap. 164
11. The Land Control Act – Cap. 302
12. The Land Consolidation Act – Cap. 283
13. The Land Adjudication Act – Cap. 284
14. The Land (Group Representatives) Act – Cap. 287
15. The Trust Land Act – Cap. 288
16. The Trusts of Land Act - Cap. 290
17. The Equitable Mortgages Act – Cap. 291
18. The Wayleaves Act - Cap. 292
19. The Distress For Rent Act - Cap. 293
20. The Trespass Act - Cap. 294
21. The Land Acquisition Act - Cap. 295
22. The Rent Restriction Act - Cap. 296
23. The Landlord and Tenant (Shops, Hotels and Catering Establishments) Act - Cap. 301
24. The Land Disputes Tribunals Act - No. 18 of 1990
25. Part XI of the Agriculture Act - Cap. 318

26. Sections 144 and 145 of the Local Government Act Cap. 265 so far as they relate to acquisitions and/or dealings in land.

SECOND SCHEDULE [section 10(1)]

Meetings of the Board and Related Matters

1. (a) The first meeting of the Board must be convened by the Chairman and, subsequently, the Board must meet as often as necessary for the transaction of business at such places and at such times as may be decided upon by the Board but it must meet at least once every month.

(b) At its first meeting, the Board must elect a Vice-Chairman from among its members, excluding ex-officio members.

(c) The Chairman, or in his absence the Vice-Chairman, must preside at all meetings of the Board but in the absence of the Chairman and the Vice-Chairman, the members present must elect one of their number to preside at that particular meeting.

(d) The Chairman, or in his absence the Vice-Chairman, may at any time convene a special meeting of the Board and must do so within three days of receipt by him of a written requisition signed by a majority of the Board.

(e) Notice of every meeting of the Board must be given in writing to each member at least seven days before the day of the meeting.

Quorum

2. (a) Subject to subparagraph (b), nine members must constitute a quorum for the conduct of business at any meeting of the Board.

(b) When there is no quorum at, or for

the continuation of, a meeting of the Board only because of the exclusion of a member under section 9 of the Act from the deliberations on a matter in which he has disclosed a personal interest, the other members present may if they deem it expedient so to do—

(i) postpone the consideration of that matter until there is a quorum without that member; or

(ii) proceed to consider and decide the matter as if there was a quorum.

Decisions of the Board

3. (a) All questions proposed at a meeting of the Board must be decided by a majority of the votes of the members present and voting, and in the event of an equality of votes, the person presiding must have a casting vote in addition to his deliberative vote.

(b) A decision may be made by the Board without a meeting by circulation of the relevant papers among the members of the Board and by the expression of the views of the majority of the members in writing but any member must be entitled to require that the decision be deferred and the matter on which a decision is sought be considered at a meeting of the Board.

Minutes of Proceedings

4. (a) The Board must cause minutes of all proceedings of its meetings to be recorded and kept, and the minutes of each meeting must be confirmed by the Board at the next meeting of the Board and signed by the

Chairman or the person presiding at the meeting.

(b) The Chairman of the Board must submit to the Minister a copy of the minutes of each meeting of the Board as soon as the minutes have been confirmed.

Board to Regulate its Procedure

5. Subject to the provisions of the Act, the Board may regulate its own procedure.

ANNEX 2 **(Paragraph 281)**

SUMMARY OF LAND AND LAND RELATED ISSUES RAISED BY KENYANS

The following briefly outlines **ISSUES** that were raised by the public at Commission's hearings in their condensed but raw form and not refined in any way throughout Kenya. The issues raised by Kenyans covered almost every aspect of land ranging from land administration, land allocation, adjudication, survey, settlement, land registration, land control boards, land disputes tribunals to Constitutional issues on land. The intensity of complaints on the various issues varied from one region to another but the overall message was that the way land is administered must change. The detailed proposals to resolve these and other issues will be contained in the Commission's **FINAL REPORT**. The resolution of these issues in the past has either not been attempted by the Ministry of Lands and Settlement or, if it has, political interference, corruption, incompetence and lack of resources have prevented any satisfactory and lasting solution from being put into effect. His Excellency the President must thus be commended for his wisdom and courage in setting up this Commission to look into the land issues afflicting Kenyans and make suggestions on the way forward.

(i) Land Administration

- Lack of competent staff and equipment;
- Too much centralisation in the Ministry and the Lands Department at Nairobi;
- Too much power concentrated in the hands of the President and the Commissioner of Lands when land is being allocated;
- Too little communication between the people at the grassroots level and their Local and Central Government representatives;
- Failure by the Lands Office to observe current legislation;
- Failure by the Ministry to amend or repeal current legislation or to introduce new consolidated legislation;
- Too much interference by the Provincial Administration in land matters;

- Lack of services in some areas.
- Breach of trust by county councils and Commissioner of Lands;
- General inefficiency in land offices; and
- As the current administrative and institutional arrangements are inappropriate, a Permanent Land Commission should be established.

(ii) **Land Registration Systems**

- There are too many Registration Acts and very little attempt has been made to convert titles to the Registered Land Act (Cap. 300); (RLA);
- Section 143 (1) of the RLA has been abused to deprive people of their property;
- The Sectional Properties Act 1987 should be brought into use;
- The Land Registries staff and Registrars are inefficient and there is too much corruption and lack of supervision;
- Poor services;
- The Concept of "Absolute Proprietorship" is not understood by both the public and the Registrars and other officials;
- That pre-existing customary land rights being extinguished on registration of title to land is a misnomer; and
- Government Lands Act (Cap. 280) (GLA), Registration of Titles Act (Cap. 281) (RTA), Land Titles Act (Cap. 282) (LTA) and Registration of Documents Act (Cap. 285) (RDA) registries should be decentralised through converting titles to RLA.

(iii) **Land Survey**

- Poor quality staff results in inaccurate and outdated maps;
- Survey costs are too high;

- The general boundary system as used at present is inadequate, inaccurate and should be modernised;
- Titles issued before amendment of Registry Index Maps causing confusion; and
- Some surveyors are corrupt, dishonest and greedy causing people to lose their land.

(iv) **Land Registration and the Preparation of Official Documents**

- The methods used in the Land Registries are outdated and often not understood by the public and the Registrars themselves;
- Too much documentation and too expensive;
- Total lack of security of deed files leads to forgery and other malpractices;
- The registries are seriously out of date and do not accord with the facts on the ground;
- Too many Government departments involved and no co-ordination; and
- Land delivery procedures are too long and cumbersome.

(v) **The Storage and Retrieval of Documents**

- Files are deliberately hidden and only "found" on payment of a bribe; and
- There is a need for computerisation.

(vi) **Land Valuation**

- Some valuation e.g. for change of user and extension of lease done in Nairobi only even where the land is elsewhere;
- There is a lack of understanding about valuation that needs to be eradicated;
- Valuation for compulsory acquisition is improperly carried out;

- The effect on property values caused by the arbitrary extension of municipal boundaries should be investigated and corrected; and
- Rates charged by municipalities are too high.

(vii) **Land Control**

- The membership of the land control boards, the corruption, the failure to impose restrictions on sub-economic subdivision, the manipulation of the Boards by politicians, the dishonesty and interference of the Provincial Administration, the miserable allowances, the lack of agendas and failure to announce sitting dates were all matters affecting proper functioning of land control boards; and
- Consent to charge/mortgage should extend to the remedy by realisation of the asset without further consent and, therefore, should involve family members as if the transaction were an actual sale.

(viii) **Expenses Relating to Land**

- There are too many charges incurred when dealing with land some of which are unauthorised;
- The Registries do not publicise the official charges and tend to charge far too much for their services;
- Clearance certificates are difficult to obtain and the public is penalised for the incompetence of Central and Local Government Departments; and
- Survey fees do not relate to the value of the property being subdivided

(ix) Settlement of Disputes

- The membership, their appointment and the jurisdiction of the disputes tribunals need to be simplified;
- The Provincial Administration should not interfere in this process;

- There should be a special Division of the High Court to deal with land cases;
- Conflict between Land Disputes Tribunals Act No.18 of 1990 (LDTA) and RLA on boundary disputes;
- Customary law applied in dispute settlement but not included in statute;
- Jurisdiction of the Land Disputes Tribunals (LDT) is limited and could be extended;
- Magistrate Courts lack jurisdiction to correct erroneous awards by LDT;
- LDT has become dumping ground for cases courts consider waste of time;
- Land dispute settlement mechanisms, structures, processes and institutions are characterised by delays, incompetence, corruption, illiteracy, nepotism, political interference, inadequate remuneration and poor understanding of the law; and
- Lack of harmony and overlap of roles between the organs, agencies and institutions that handle land disputes.

(x) **Lack of Integrity and Professionalism**

- The ignorance of the Land Registrars and even the Provincial Administration shows up in many forgeries in Land Registries and Survey offices. Maps are altered, boundaries are moved on the ground, beacons are stolen and no one does anything about it;
- Lack of professional ethics and integrity by persons dealing with land matters; and
- However, the public too are dishonest and indulge in questionable practices i.e. there is a general lack of patriotism and morality.

(xi) **Land Allocation**

- The procedures for the allocation of both Government and Trust land have been disregarded and abused for decades.

There has been breach of trust by both central and local government;

- The allocation of public utility land to private developers is a disgrace and the allocations should be set aside and the land recovered;
- The allocating authority whether Central or Local Government should take the views of local residents into account or else the local residents should carry out the allocation functions themselves;
- Development Plans should be publicised, amended to conform to local requirements and adhered to by all authorities;
- The allocation of sensitive ecosystems, water catchments, forests, the foreshore, riparian land should cease;
- The sale of undeveloped plots should be prevented and abusers of the system should be punished;
- The allocation of Settlement Scheme plots has been seriously abused by the Provincial Administration and by Local Government Officers. They should be disciplined and improper allocations set aside;
- Plot allocation committees are not provided for in the existing laws;
- Minutes of plot allocation committees tampered with in Ardhi House; and
- The President and the Commissioner of Lands should have their powers of allocation devolved to the District level.

(xii) **Land Acquisition**

- The failure to pay prompt or adequate compensation caused anger;
- The failure to take over the land once acquired led to corrupt practices;
- There was a need to insist on an Environment Impact Assessment before completing the acquisition process; and

- When land acquired for a public purpose was no longer needed for that purpose, it should be offered to the original owners (or their descendants) in priority to anyone else.

(xiii) **Land Ownership**

- The sanctity of title should be respected;
- Beach plots should not interfere with the right of the public to have access to the beach;
- Where possible, communal titles to land held under customary law should be encouraged;
- Coast land ownership problems should be investigated and resolved in accordance with traditional land practices;
- Foreigners should only have leasehold titles and these only within urban areas;
- There should be a ceiling on land holdings to discourage hoarding and speculation in land; and
- Forests and other natural resources should be owned and managed by the local residents and exploited by and for the benefit of local residents in priority to others.

(xiv) **Extension of Leasehold Titles**

- The delay in granting a renewal of a lease should be minimised;
- The procedures should be publicised when considering a new lease;
- The differences between urban and rural leaseholds was not fully appreciated;
- The term of a leasehold title was not fully understood and the reasons for a lease and its length of term should be explained to the public;
- The necessity of planning urban areas when leases are shortly due to expire has not been appreciated by the public or the officials;

- The technical details of sub-leases and their renewal has not been understood by Land Office officials; and
- Need to do evaluation and involve local communities before leases are extended.

(xv) **Land Consolidation and Adjudication**

- The delay in deciding appeals by the Minister was causing distress and must be reconsidered and properly planned;
- The failure of taking gender issues into account during adjudication needed to be addressed;
- Due to corruption and political interference, adjudication has at times created landlessness;
- The environment should be protected during adjudication;
- The rights of "acceptees" should be taken into account;
- Objections to an Adjudication Register should not delay title issuance;
- Land given for a public utility purpose should not be interfered with and grabbed by other people;
- Land Titles Act (Cap.282) claims should be processed immediately;
- Local communities should be fully involved in the process of adjudication and no one else allowed to interfere; and
- Land consolidation has outlived its usefulness and as the majority prefer adjudication to consolidation, repeal the Act.

(xvi) **Land Tenure**

- Communal land tenure should be recognised and where individual land tenure is approved by local communities, only those local communities should benefit;
- The Coast land tenure problems should be treated as a separate problem and should be thoroughly investigated by the local people themselves before the problems are resolved;

- County Councils should no longer hold land in trust for the local communities as they have breached this trust; and
- The principal guideline should be the sustainable use of land.

(xvii) **Water Bodies**

- Water should be owned by a national authority and not by any individual or section of a community;
- Riparian land should not be allocated;
- Pollution of water bodies should be actively prevented and those responsible punished;
- Use of water should be carefully planned;
- Investigate the possibility of using Lake Victoria water for irrigation; and
- Access to water must be respected and properly administered.

(xviii) **Protection of the Environment**

- The protection of all sensitive ecosystems should become a priority;
- Forests must no longer be destroyed but must be restored;
- Arid and semi-arid lands must be treated differently from better quality land and the residents helped to exploit these special areas which have their own peculiar problems and a customary communal tenure system should be recognised;
- Waste disposal must be planned and controlled;
- Dams and hydro-electric schemes should be carefully monitored before they damage down-stream ecosystems; and
- Local residents should be consulted before setting up refugee settlements and compensation be paid by United Nations High Commission for Refugees (UNHCR) for degradation and destruction caused by refugees.

(xix) **Inheritance rights to Land**

- The rights of women and of children on inheritance must be respected by all irrespective of customary traditions;
- The duration and costs of succession proceedings should be minimised;
- The Kadhi in accordance with Islamic legal procedures should handle Islamic succession cases; and
- Writing of wills should be encouraged.

(xx) **Tenants-at-Will**

- The current system of tenants-at-will in the Ten Mile Coastal strip has no legal basis or foundation and legislation should be enacted to regulate the system; and
- The law should be amended to recognise the ownership of fixtures/crops separate from the soil.

(xxi) **The Constitutional Position of Land**

- Land should be accorded a special place in the Constitution;
- The protection offered by Section 75 of the Constitution should not apply to illegally acquired land;
- There is disagreement whether land in any particular area should be restricted to the people of that area or whether people should be allowed (or even encouraged) to buy land anywhere;
- The deliberate promotion of ethnic violence over land issues by politicians should not be tolerated in future;
- There should be constitutional mechanisms to address issues of ancestral claims lodged by any aggrieved parties;
- The Constitution should be amended to clearly define what is "government land" and provide for its trusteeship; and

- Chapter IX of the Constitution recognises only county councils as owners of land within their jurisdiction but not other local authorities and this should change.

(xxii) **Abuse of Laws**

- The widespread practice of land grabbing is a direct result of abuse of land laws, it must not be allowed to happen and grabbed land must be repossessed;
- Public utility land must be repossessed and put to the purpose for which it was intended;
- Since the Commissioner of Lands has abused his powers in land allocation, local persons should take charge of their land; and
- There should be strictly enforced codes of professional ethics.

(xxiii) **Land Distribution**

- There should be a fully implemented policy on maximum land holdings where land is not being developed or where it is being hoarded and used for speculation;
- Equally there should be a policy to prevent re-fragmentation of land and the subdivision into uneconomic units; and
- There is failure to address population growth vis-a-vis land distribution.

(xxiv) **Land Use Planning**

- There should be only a single planning authority whose decisions should be strictly implemented;
- The use of marginal lands by traditional groups was appreciated and should be properly administered with the best interests of the group members as the guiding principle and crop farmers should be kept away from these lands to avoid conflict;

- In urban areas, strict control of land development should follow proper planning to discourage haphazard informal developments.
- The spread of townships into agricultural areas should be properly planned and enforced;
- Infrastructure should be planned and implemented;
- Communities should become more involved with planning for the use and control of resources and their decisions heeded by officials;
- The Physical Planning Act 1996 conflicts with the Government Lands Act (Cap. 280) and the Land Control Act (Cap. 302);
- Role of Minister in approving physical development plans and gazettement is cumbersome and expensive;
- Land subdivided into un-economic units;
- Expansion of urban areas to rural areas without proper infrastructure;
- No land use plans;
- No policy on land use to guide development;
- Nairobi has become too large and unmanageable; and
- The Physical Planning Act 1996 should not apply to agricultural land as defined under section 2 of the Land Control Act (Cap.302).

(xxv) **Land Tax on Idle Land**

- Tax idle land;
- Use idle land to settle the poor and landless; and
- Criteria for determining what land is idle should be set out.

(xxvi) **Administration and Management of Protected Areas**

- Fish landing sites should be managed by Kenya Ports Authority;
- National Reserves should be owned and managed by local communities;
- Conflict between Kenya Wildlife Service and local communities over sharing of resources e.g. salt licks in parks;
- Communities bordering parks should share benefits of tourism and reciprocal rights of access for pasture;
- The legal ownership of wildlife both in protected areas and private land by the State to the exclusion of land owners and local communities has alienated wildlife from the people and caused resentment;
- Water catchment areas should be gazetted and titled and that local communities be educated in their conservation;
- Forest laws and policies be reviewed to allow communities to manage and conserve the forests and have access to revenue and to utilise forest resources for cultural, religious and medicinal purposes;
- There should be a buffer between settled areas and game parks to reduce conflict; and
- Historical sites and monuments should be managed by National Museums of Kenya.

(xxvii) **Provision of Infrastructure**

- Rural access roads should be maintained;
- Access roads are encroached upon;
- Land allocated without provision of infrastructure;
- Eastleigh Airbase should be relocated as its present site is dangerous to the public, the land should be planned for housing;
- Infrastructure should be provided for fish landing sites; and

- Since the collapse of the Kenya Meat Commission, there has never been a proper livestock marketing system and this has bred poverty in pastoral areas.

(xxviii)**Problems of Nomads and Pastoralists**

- Ownership of land in marginal lands should be communal and the land should not be subdivided;
- The land should be held by a land board conversant with land laws and special problems of such areas;
- Pastoralism should be accepted as a way of life and proper use made of such land;
- Migration from high potential areas to such areas should be controlled to limit damage on the environment;
- Abattoirs and a proper marketing system should be provided in pastoral areas so as to improve the pastoral way of life and integrate it in the national economy; and
- There is pressure on pastoral grazing land from wildlife and humans and livestock are normally injured by wildlife.

(xxix) **Landlessness**

Listed causes of landlessness:-

- displacement of communities from their ancestral areas by the slave trade and the colonial government;
- population increase;
- breakdown in traditional land-use systems;
- land clashes and banditry;
- some people owning too much land; and
- lack of a clear policy on landlessness.

(xxx) **Squatters**

- Squatters on public land should be settled freely;

- Squatters on private land should have prescriptive rights applied more easily and quickly;
- Encourage private owners to sell land to squatters;
- Squatters are spawned by unfair land allocation procedures;
- The application of the Land Titles Ordinance to the Coast made indigenous Coastals "squatters" by default; and
- Squatters have no legal rights and they are always harassed.

(xxxi) **Absentee Landlords**

- Land of absentee landlords should be repossessed and given to local residents;
- The practice of being an absentee landlord should be outlawed; and
- The existence of absentee landlords is an anomaly that has deprived the indigenous Coastals of their birthrights.

(xxxii) **The Problem of Acceptees**

- Acceptees should be able to acquire land by prescription; and
- Acceptors should take responsibility for the legal rights of acceptees.

(xxxiii)**Land Policy**

Kenya lacks a comprehensive land policy thus:-

- National Parks and game reserves occupy far too much land while many Kenyan remain landless;
- Some minorities have been deprived of their land;
- Boundaries of urban authorities are arbitrarily extended;

- Government has failed to confront population pressure on land, one result of which landlessness persists;
- The current mining laws and policies are exclusionist since mining activities do not benefit local communities and have led to environmental degradation; and
- Land Acts and policies do not recognise or incorporate concepts of African customary land laws and traditional land use/resources management techniques.

ANNEX 3 **(Paragraphs 312 and 316)**

CATEGORIES OF LAND TO BE ADMINISTERED BY THE KENYA NATIONAL LAND AUTHORITY AND DISTRICT LAND AUTHORITIES

(a) The following categories of land shall be administered by the National Land Authority:-

(i) public land as defined in Chapter 6 of this Report; and

(ii) all private land whose registered title was derived from or granted by the Government.

(b) The following categories of land shall be administered by the District Land Authorities:-

(i) all Commons as defined in Chapter 6 of this Report; and

(ii) all private land whose registered title was derived from Trust land

ANNEX 4

MEMBERS OF STAFF OF THE COMMISSION

NAIROBI SECRETARIAT

NAME	DESIGNATION
Peter Musyimi	Researcher
Stanley Manduku Kerandi	Researcher
Omar M.A. Mohammed	Admin. Officer
Dishon Saunya	Admin. Officer/Supplies Officer
Alice W. Githuka	Secretary
Eldah A. Asuza	Secretary
Rose A. Ondier	Secretary
Phyllis Kiragu	Secretary
Isaac G. Mwegwa	Accountant
Michael Ngoloma	Clerical Officer
Isaiah K. Langatt	Clerical Officer
David Wanjohi	Driver
Charles Mochama	Driver
Edward Muriuki	Driver
Joshua Ng'ang'a	Driver
Douglas I. Chalinga	Driver
Philip Mbuvi Nyoe	Subordinate Staff
Rodah Cheptoo	Subordinate Staff
Musili Muvengei	Corporal
Banjamin Nzomo	Corporal
Julius M. Kibwaga	Corporal
Francis W. Itegi	Constable
Vincent L. Mutsami	Constable
Serem Kiplalon	Constable
John Nziuko	Constable
Stephen Magame	Constable
Philip Opondo	Constable
Daniel Kimani	Constable
Moses M. Iyadi	Constable

MOMBASA SECRETARIAT
June, 2000-April, 2001

NAME	DESIGNATION
Constance N. Mwakio	Secretary
Olga J. Akoth Nzuki	Copy Typist
Michael M. Chikove	Accounts Clerk
George K. Dzombo	Registry Clerk
Hamisi Omari Komora	Driver
Hamis Omar Chome	Subordinate Staff
Japheth M. Mutunga	Constable
Antony Katana (Deceased)	Constable
John Macharia Kanyi	Constable
Mbarak Rashid Mbarak	Constable

REFERENCES AND BIBLIOGRAPHY

Statutes and International Legal Instruments

1. The Constitution.
2. The Permanent Secretary to the Treasury (Incorporation) Act (Cap.101)
3. The Trustees (Perpetual Succession) Act (Cap.164)
4. The Antiquities and Monuments Act (Cap. 215)
5. The Local Government Act (Cap. 265)
6. The Government Lands Act (Cap. 280)
7. The Registration of Titles Act (Cap. 281)
8. The Land Titles Act (Cap. 282)
9. The Land Consolidation Act (Cap. 283)
10. The Land Adjudication Act (Cap. 284)
11. The Registration of Documents Act (Cap. 285)
12. The Trust Land Act (Cap. 288)
13. The Trusts of Land Act (Cap. 290)
14. The Equitable Mortgages Act (Cap. 291)
15. The Wayleaves Act (Cap. 294)
16. The Land Acquisition Act (Cap. 295)
17. The Rent Restriction Act (Cap. 296)
18. The Survey Act (Cap. 299)
19. The Registered Land Act (Cap. 300)
20. The Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap. 301)
21. The Land Control Act (Cap. 302)
22. The Agriculture Act (Cap. 318)
23. The Maritime Zones Act (Cap. 371)
24. The Water Act (Cap. 372)
25. The Wildlife (Conservation and Management) Act (Cap. 376)
26. The Forests Act (Cap. 385)
27. The Public Roads and Roads of Access Act (Cap. 399)
28. The Lakes and Rivers Act (Cap. 409)
29. The Stamp Duty Act (Cap. 480)
30. The Transfer of Property Act of India 1882
31. The Foreign Jurisdiction Act (Britain) 1890
32. The Indian Land Acquisition Act 1894
33. The East Africa Protectorate Land Regulations of 1897

34. The East Africa (Lands) Order in Council 1901
35. The Outlying Districts Ordinance No.5 of 1902
36. The Crown Lands Ordinance No.21 of 1902
37. The Land Titles Ordinance 1908
38. The Crown Lands Ordinance No.22 of 1915
39. The Agricultural Advances Ordinance No.12 of 1930
40. The Land and Agricultural Bank Ordinance No.3 of 1931
41. The Agricultural Mortgagor's Relief Ordinance No.35 of 1934
42. The Farmers Assistance Ordinance No.18 of 1936
43. The Kenya (Native Areas) Order in Council, 1938
44. The Kenya Independence Order in Council, 1963
45. The Constitution of Kenya (Amendment) Act No.28 of 1964
46. The Trust Land (Amendment) Act No.28 of 1964
47. The Constitution of Kenya (Amendment) Act No.14 of 1965
48. The Land (Amendment of Laws) Act No.39 of 1968
49. The Sectional Properties Act No.21 of 1987
50. The Land Disputes Tribunal Act No.18 of 1990
51. The Constitution of the Republic of South Africa, 1993
52. The Government Lands (Amendment) Bill, 1994
53. The Physical Planning Act No.6 of 1996
54. The Environmental Management and Co-ordination Act 1999
55. The Constitution of the Republic of Uganda
56. The Land Act 1998 (Act No. 16 of 1990) Government of Uganda
57. The Survey Act 1977 (Queensland Australia) (Reprint No.2)
58. The Ramsar Convention on Wetlands of International Importance 1971.
59. United Nations Convention on the Law of the Sea 1982

Government of Kenya Publications and Reports

1. Agricultural Land Policy – Proposals for Optimum Agricultural Land Use, 1996.
2. Aids in Kenya: Background Projections Impact Interventions Policy, Sixth Edition, Government Printer, 2001.
3. Economic Survey, 2002, Government Printer.
4. Handbook for the Guidance of Land Control Boards, 1969.
5. Handbook on Land Use Planning, Administration and Development Procedures, 1991.

6. Lawrance, J.C.D. (1966) The Report of the Mission on Land Consolidation and Registration in Kenya, London.
7. National Development Plan 1964-1970, Government Printer.
8. National Development Plan 1966-1970, Government Printer.
9. National Development Plan 1970-1974, Government Printer.
10. National Development Plan 1974-1978, Government Printer.
11. National Development Plan 1979-1983, Government Printer.
12. National Development Plan 1984-1988, Government Printer.
13. National Development Plan 1989-1993, Government Printer.
14. National Development Plan 1994-1996, Government Printer.
15. National Development Plan 1997-2001, Government Printer.
16. National Development Plan 2002-2008, Government Printer.
17. National Population Census, 1999, Government Printer, 2001.
18. Physical Planning Handbook, 1992.
19. Poverty Reduction Strategy Paper for the Period 2001-2004 Volume 1, June 2002.
20. Report of the Commission of Inquiry on Local Authorities in Kenya, Government Printer, 1995.
21. Report of the Kenya Demographic and Health Survey, 1999.
22. Sessional Paper No.1 of 1986 on Economic Management for Renewed Growth, Government Printer, 1986.
23. Sessional Paper No.10 of 1965 on African Socialism and its Application to Planning in Kenya, Government Printer.
24. Sessional Paper No.2 on Industrial Transformation to the Year 2020, Government Printer.
25. Sessional Paper No.6 of 1961, The Coastal Strip Report of the Commissioner (James W. Robertson).
26. Sessional Paper No.9 of 1961, Report of the Commission on the Kenya Coastal Strip, Government Printer.
27. Swynnerton, R. J. M., (1955) A Plan to Intensify the Development of African Agriculture in Kenya, Government Printer, Nairobi
28. The Kenya Land Commission Report, 1933.
29. The Kenya National Environment Action Plan Report (NEAP), 1994.
30. The Report of the Judicial Commission appointed to inquire into Tribal Clashes in Kenya, Government Printer, 1999.
31. The Report of the Select Committee on the Issue of Land Ownership along the Ten-Mile Coastal Strip of Kenya, Government Printer, 1978.

Publications by other Governments

1. A Report of the Presidential Commission of Inquiry into Land Matters Vol.I Land Policy and Land Tenure Structure, Ministry of Lands, Housing and Urban Development, United Republic of Tanzania, 1994.
2. Botswana National Policy and Land Tenure, Government Paper No. 1 of 1995.
3. Government of Swaziland, Draft National Land Policy.
4. Government of United Republic of Tanzania; National Land Policy, 1997.
5. Government of Malawi, National Land Policy 2001.

General Publications

1. Ghimire B. Krishna (Ed.) (2001), Land Reform and Peasant Livelihoods, I.T.D.G. Publishing, London, U.K.
2. Hoorweg Jan, Foeken Dick and Obudho R. A. (Eds.), Kenya Coast Handbook-Culture, Resources and Development in the East African Littoral, Transaction Publishers, New Brunswick U.S.A. and London, U.K.
3. Kenya Land Alliance; Land Use in Kenya: The Case for a National Land Use Policy Volume 3.
4. Kenya Land Alliance (May 2002); 1st National Civil Society Conference on Land Reform and Land Question.
5. Kenya Land Alliance, (2001) Land Mali Umma.
6. Larsson Gerhard, (1991) Land Registration and Cadastral Systems Tools for Land Information and Management, Longman Group, United Kingdom.
7. Miller, C. (1971) Lunatic Express, Westlands Sundries, Nairobi.
8. Ojwando C., (1970) White Highlands No More Vol. I. Pan African Researchers.
9. Okoth-Ogendo, H.W.O. (1998), Land Policy Development in East and Southern Africa: an analysis of drivers, processes and outcomes.
10. Okoth-Ogendo, H.W.O., (1991) Tenants of the Crown: Evolution of Agrarian Law and Institutions in Kenya, ACTS Press, Nairobi.
11. Okoth-Ogendo, H.W.O., (2000) The Tragic African Commons: A Century of Expropriation, Suppression and Subversion.

12. Okoth-Ogendo, H.W.O., African Land Tenure Reform Heyer, Maitha, J.J., and Senga, W., (1976) Agricultural Development in Kenya, An Economic Assessment, Oxford University Press, Nairobi.
13. Shivji Issa G., Not Yet Democracy: Reforming Land Tenure in Tanzania, IIED London, 1998.
14. Somevi Kwame Joseph, The Effectiveness of Institutions in Land Registration in Ghana, Oxford Brookes University, U.K.
15. Sorrensen, M.P.K., (1968) The Origins of European Settlement in Kenya, Oxford University Press, London.
16. Toulmin Camilla, Quan Julian (Eds.) (2000) Evolving Land Rights, Policy and Tenure in Africa, DFID/IIED/NRI, London.
17. United Nations, and Economic Commission For Europe (1996); Land Administration Guidelines: With Special Reference to Countries in Transition.
18. Van Zwanenberg, R. M. (1972) Agricultural History of Kenya to 1939, East African Publishing House.
19. Van Zwanenberg, R. M., (1975) Colonial Capitalism and Labour in Kenya, 1919-1939, East African Literature Bureau.
20. Wasserman, G. (1960-1962), The Independence Bargain: Kenyan Europeans and the Land Issue, 1960-1962, Journal of Commonwealth Political Studies, Volume II No.2.

Other Sources

Oral and written evidence from members of the Public, Government Ministries and Departments, Professional Societies and Special Interest Groups, among others.

APPENDIX

Republic of Kenya

Interim Report

of the

Commission of Inquiry

into the

Land Law System of Kenya

Chairman:

Charles M. Njonjo

Presented to

His Excellency
Hon. Daniel T. arap Moi, C.G.H., M.P.
President and Commander-in-Chief of the
Armed Forces of the Republic of Kenya

December, 2001

Interim Report

of the

Commission of Inquiry

into the

Land Law System of Kenya

TABLE OF CONTENTS

COMMISSION OF INQUIRY
INTO THE
LAND LAW SYSTEM OF KENYA

P.O. Box 45986, Nairobi, Kenya
Tel. 313744/313710/313728; Fax 313758
E-mail: Landcomm@africaonline.co.ke

10th December, 2001

HIS EXCELLENCY, HON. DANIEL T. ARAP MOI, C.G.H., M.P.,
PRESIDENT AND COMMANDER-IN-CHIEF OF THE
ARMED FORCES OF THE REPUBLIC OF KENYA,
STATE HOUSE,
P. O. BOX 40530,
NAIROBI.

YOUR EXCELLENCY,

RE: INTERIM REPORT OF THE COMMISSION OF INQUIRY INTO THE LAND LAW SYSTEM OF KENYA

By Gazette Notices Nos. 6593 appointing the Commission and 6594 setting out the Terms of Reference dated 17th and published on 26th November, 1999 as read with Gazette Notice No. 1797 dated 27th and published on 31st March, 2000; Gazette Notice No. 2972 dated 11th and published on 19th May, 2000; and Gazette No. 4445 dated 14th and published on 21st July, 2000, Your Excellency appointed us Commissioners to inquire into the Land Law System of Kenya and set out our Terms of Reference.

Following that commission, we have visited all provinces and districts of Kenya to gather views of Kenyans on the subject.

We have also received both oral and written submissions and complaints from Kenyans in different parts of the country on a variety of land issues. The submissions and complaints made to us have amply demonstrated the emotive and potentially explosive nature of the land issues facing Kenyans. Indeed, the recent outbreaks of violence in areas

such as Trans Mara, Trans Nzoia, Tana River and Narok Districts are a reflection of the seriousness of these issues.

While we shall be making a fuller exposition of the issues raised and propose remedies when we come to analyse all the evidence before us and write our Final Report, there are certain critical issues which, in our view, require urgent remedial action and cannot wait until we complete the Inquiry as it may then be too late to remedy the situations complained of.

Accordingly, we submit this Interim Report.

We remain,
Your Excellency's most obedient servants,

Charles M. NJONJO,
Chairman.

M. E. ARONSON,
Vice-Chairman.

P. N. NDUNGU,
Commissioner.

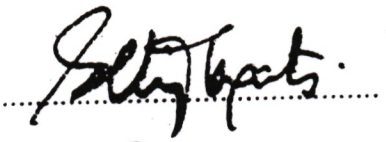
Ezekiel IDWASI,
Commissioner.

F. R. S. ONYANGO,
Commissioner.

Benjamin KUBO,
Commissioner.

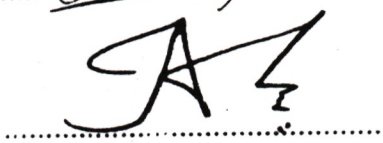
Keriako ole TOBIKO,
Commissioner.

Stephen KIPKENDA,
Commissioner.

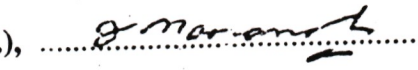


Omar BWANA,
Commissioner.

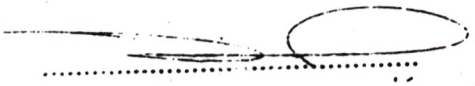
Juma Athman LUGOGO (Prof.),
Commissioner.



Jane Mwanje MANASSEH (MRS.),
Commissioner.

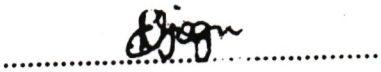


Joel Kipkemboi YEGO,
Commissioner.



V. M. W. KATTAMBO (MRS.),
Joint Secretary

Emma NJOGU (MISS),
Joint Secretary.



ACKNOWLEDGEMENTS

This Interim Report is the result of intensive consultations with Kenyans, when the Commission visited all of the country's provinces and districts. It is representative of the views collected to-date on the land issues affecting a vast majority of the citizens of this country.

We wish to express our appreciation to His Excellency The President and Commander-in-Chief of the Armed Forces of the Republic of Kenya for his foresight in establishing this Commission to inquire into the land issues which are fundamental to the development of this country.

We thank the Office of the President and the Provincial Administration for their efficiency in mobilising the people and organizing public meetings and ensuring the general safety of all those who attended the hearings.

The Commission wishes to extend its gratitude to the general public for turning out in large numbers to candidly air their views on the land issues that are so important to Kenya. Similarly, the participation of professional and religious organizations and some non-governmental organizations was very important in ensuring the views of many more people were heard.

We also thank all those who took time to give their views in writing.

The Commission also extends its profound gratitude collectively to all those who played a role in facilitating its work but have not been singled out for specific mention.

Last, but not least, we wish to thank the Joint Secretaries and the entire Commission staff for their admirable, tireless effort over the past two years.

All the contributions made were valuable and ensured that the work was carried out with a great degree of professionalism and dedication.

EXECUTIVE SUMMARY

This Report is an outline of pressing issues raised by members of the public to this Commission in various fora through oral evidence, correspondence and memoranda. The issues are urgent and require immediate Government intervention in order to stem some of the unnecessary social, political, economic and environmental pressures that have resulted from disregard and abuse of existing land laws, and from administrative and logistical inadequacies in land administration. Most of the issues require either administrative intervention or some amendments of existing laws in order to bring about the necessary change.

The Report covers the following:

- Specific laws and practices that have been disregarded or abused and the effects of such abuse and failure to apply these laws: *Chapter 2.*
- Duplication of titles: *Paragraphs 2.2 and 3.3.2.*
- The creation of suspect or void titles and the effects such titles have on the vast majority of good titles: *Chapters 2 and 3.*
- Certain specific critical countrywide issues such as excision and allocation in protected areas and other reserved land, management of land registries and application of the Physical Planning Act, among others: *Chapter 3.*
- Delay in registration and issuance of titles in areas undergoing adjudication: *Paragraph 3.3.*
- Critical issues peculiar to the Coast Province such as the impact of certain historical events, squatters, tenants-at-will, absentee landlords/idle land and the application of the Land Titles Act: *Chapter 4.*
- Recommendations as to how these problems should be addressed: *Appearing throughout the Report.*
- Proposed legislative amendments of various laws: *Chapter 6.*

CHAPTER 1

INTRODUCTION

1.1 Preamble

The Commission of Inquiry into the Land Law System of Kenya received both oral and written evidence over the last two years from a large number of members of the public throughout all the provinces and districts. Memoranda have also been received from a large number of organizations both public and private including Government ministries, professional institutions, universities, banks, non-governmental organizations and from individuals of all walks of life. Written complaints have similarly been received from members of the public touching on a myriad of land problems.

Some of the recommendations made and complaints received require legislative intervention while others require administrative action in order to check the abuses that have occurred and continue to be perpetrated in the administration of land law in the country. It clearly came out that the majority of the land problems have been brought about either by the disregard of existing law or abuse of the same. The immediate consequence has been a lack of faith by the general public in the administration of justice in so far as land matters are concerned and also considerable lack of faith in the various Government institutions charged with the responsibility of land administration especially the Ministry of Lands and Settlement, the Ministry of Environment and Natural Resources, the Ministry of Local Government, Local Authorities and the Provincial Administration. This was indeed confirmed when some members of the public who gave evidence to this Commission disclosed that they had been harassed by some members of the Police Force and the Provincial Administration, the very people who are supposed to protect them.

This widespread abuse has had serious negative socio-economic and environmental consequences.

The views, opinions and recommendations included in this Interim Report have been formulated without reference to the land policy framework paper which is still under consideration by this Commission. However, all the recommendations are based on sound general principles of law and practice of administration of land. The Report addresses itself to problems that require urgent administrative intervention and/or amendments to existing law to resolve. These are issues that cannot wait

for the Final Report. Issues that require substantive change of law to resolve will have to await the Final Report. However, in general terms, it is the view of the Commission that the existing laws and procedures relating to the administration of land, the issuance of letters of allotment, the extension of Government leasehold titles in urban areas, the adjudication of land ownership rights and the registration of titles to land when properly and honestly implemented and enforced are capable and adequate to protect the environment and the public and their rights to and over land until our Final Report is ready for submission. This will particularly be the case if the recommendations of the Commission contained in this Interim Report are adopted and implemented promptly.

1.2 Appointment and Terms of Reference

As noted earlier, this Commission of Inquiry into the Land Law System of Kenya was appointed by His Excellency the President pursuant to section 3 of the Commissions of Inquiry Act, Cap. 102 of the Laws of Kenya ("the Act") *vide* Gazette Notice Nos. 6593 and 6594 published on 26th November, 1999 as read with Gazette Notice No. 1797 published on 31st March, 2000; Gazette Notice No. 2972 published on 19th May, 2000; and Gazette Notice No. 4445 published on 21st July, 2000. These Gazette Notices appear as Appendices A.1 – A.5, respectively.

The Commission was directed to hold an inquiry under the following terms of reference—

(a) to undertake a broad review of land issues in Kenya and to recommend the main principles of a land policy framework which would foster an economically efficient, socially equitable and environmentally sustainable land tenure and land use system;

(b) to undertake an analysis of the legal and institutional framework of land tenure and land use in Kenya and to recommend a programme or programmes of legislation that would give effect to such policies;

(c) to recommend guidelines for a basic land law and complementary legislation and associated subsidiary legislation which would address, *inter alia*, the following issues—

(i) the systems of land tenure appropriate for the country;

(ii) the system of land ownership and control;

(iii) the system of acquisition and disposition of land rights whether by inheritance or otherwise;

(iv) the structural framework for the administration of all categories of land whether State, communal or private including the consolidation, up-dating and improvement of all procedural legislation relating to the registration of titles to and of all other instruments concerning dealings with land and of interests and rights therein, thereto or thereover;

(v) the structural framework and principles for the administration and management of protected areas including wildlife sanctuaries, coastal and marine zones, wetlands, catchment areas, forests and nature reserves;

(vi) the system of land use planning, management and development;

(vii) the process of land delivery including survey, registration and the preparation of official records relevant to such survey and registration;

(viii) the structural framework for the processing and settlement of land disputes;

(ix) the replacement of the foreign applied laws;

(x) the repeal and/or replacement of all laws now deemed to be obsolete;

(d) to take into account all customary laws relating to land and so far as is practicable, to incorporate such of those laws with such modifications, if any, as may be considered to be desirable for the purposes of making them consonant with present-day conditions;

(e) to incorporate in such new legislation, if thought desirable in the interests of people of Kenya, with or without modifications, the provisions of any laws of other States relating to the tenure of or dealings with land and of any rights of interests thereto or therein;

(f) to prepare a draft or drafts of such new or amending legislation as may be necessary to implement the recommendations of the Commission to be developed as indicated above; and

(g) to make such further recommendations as the Commission may deem necessary.

In accordance with section 5 of the Act, we made and subscribed an oath in the prescribed form.

1.3 Procedure of Inquiry

As at 26th November, 1999 when the Commission was gazetted, there were no regulations made under the provisions of section 19 of the Commissions of Inquiry Act. So, under the powers conferred by section 9 of the Act, the Commission made Rules and Procedure for the conduct and management of the Inquiry proceedings. The Rules and Procedure appear as Appendix B.

The Rules and Procedure provide, among other things, that the Commission may summon any person to attend at such time and place as set forth in the summons to give evidence or produce books, plans and documents that the Commission may require; that the Commission may take evidence on oath; and that evidence may also be given by way of affidavit. So far, it has not been necessary for the Commission to summon anybody for any purpose, neither has the Commission received any evidence by way of affidavit.

This Commission was formally launched and opened its offices at Kencom House, Nairobi, on 25th January, 2000. The Commission then called a Press conference to inform members of the public that it had commenced its work and invited them to make their presentations on the subject matter of the Inquiry orally or in writing or both.

Soon after the formal launching, the Commission published its Terms of Reference in the print media and invited members of the public to make presentations on the matters under inquiry. Special invitations were made to, *inter alia*, bankers, professional societies, Government ministries and departments and some non-governmental organizations.

The Commission also planned visits to the provinces and to every district to receive oral and written evidence from the Provincial Administration, local leaders, civil servants and members of the general public.

To address issues unique to the Coast Province, a temporary secretariat was set up in Mombasa to receive written and oral presentations from the public. The secretariat was manned by 3 Commissioners who, as and when necessary, made special visits to areas with critical land problems.

Complaints lodged with the Commission requiring action or explanation by public bodies have been and continue to be referred to relevant Ministries for necessary action with requests for the Commission to be informed of action taken.

1.4 Hearing of Evidence

To-date the Commission has visited every district in all the provinces in Kenya. The provincial visits were publicised in both the print and electronic media so as to reach as many people as possible. This was usually done at least two weeks prior to the visits. The Provincial Administration was also asked to publicise the meetings of the Commission which were being held in district headquarters or other convenient venues easily accessible to members of the public.

During these visits oral and written presentations were received in meetings from the public including members of the Provincial Administration from the Provincial Commissioners downwards, local Members of Parliament, heads of Government departments, mayors, chairmen of urban and county councils, councillors, chief officers of local authorities, and representatives of companies. As provided for by the Commissions of Inquiry Act, every person was invited to make their views known without fear. Random selection of speakers in every public forum was adopted to give a chance to as many people as possible from all walks of life to make their presentations. The public meetings were well-attended and participants spoke their minds on a variety of topics relating to the subject matter of the Inquiry. The meetings continued uninterrupted until no new views, opinions or complaints were forthcoming.

Oral evidence was recorded by hand and also tape-recorded for later analysis by the Commission.

1.5 Complaints and Memoranda from Members of the Public

Soon after the Commission was formally launched many members of the public sent in or brought with them memoranda covering many land issues and complaints against various Government Ministries, local authorities and other public and private institutions. In response, the Commission noted that item *(c) (viii)* of the Commission's Terms of Reference enjoined it to make recommendations which would address "the structural framework for the processing and settlement of land disputes". Therefore the Commission felt that the complaints received should be dealt with because they provided an insight into the weaknesses of the current dispute settlement mechanisms including the courts where delays adversely affect the rights of interested parties. The complaints would also provide evidence of a breakdown in the administration of land laws as a whole and abuse of office by public officials dealing with land matters.

The Commission, therefore, arranged meetings at different times with the Permanent Secretaries concerned—in the Office of the President in charge of Provincial Administration and Internal Security, and Ministries of Lands and Settlement and of Local Government, and discussed with

each of them separately the modalities of handling complaints affecting their respective Ministries. It was agreed during the discussions that all complaints against a particular Ministry would be referred to that Ministry for investigations and would be attended to by a liaison officer nominated by the Permanent Secretary for that purpose. So far, over 1,400 such complaints have been received. A majority of them have been forwarded to the above Ministries for investigation, action and feedback.

The purpose of forwarding the complaints to the Ministries concerned was three-fold—

(i) to request the Ministries to take action on the complaints;

(ii) to assist the Commission to assess, using the feedback, the efficiency and effectiveness of the dispute resolution mechanisms as contained in the current land administration and legal structures; and

(iii) to enable the Commission to recommend appropriate improvements on the legal and administrative structures for the processing and settlement of land disputes.

1.6 Harassment of Witnesses

Some of the public disclosures made to the Commission of malpractices in the management of land affairs did not go down well with certain elements of the Kenyan society. Consequently, incidents of harassment of witnesses followed such disclosures, no doubt with a view to discouraging or intimidating witnesses against giving evidence of the said malpractices. The Commissions of Inquiry Act under which the Commission was appointed makes it a criminal offence for any person to hinder or prevent another from giving evidence to the Commission. Accordingly, upon receipt of the first reports of harassment of witnesses, the Commission did, on 22nd September, 2000, issue a Press Release (Appendix C) warning against harassment of witnesses, otherwise the perpetrators would face legal sanctions.

The Commission has received reports of 16 cases of harassment all of which were referred to the Office of the President for appropriate action. At the time of the preparation of this Report, the Commission has received feedback on only one of these 16 cases as having received attention and even in this one instance the perpetrators of the harassment were not disciplined. Instead all that was done was to have the harassed witness released from Police custody. The Commission feels that until action is taken against those who harass witnesses, be they Government officers or members of the public, there will be a danger of the Commission not being

given full evidence of wrong-doing in the administration of laws relating to land.

1.7 Analysis of the Evidence

As a result of the provincial and district visits, and receipt of written memoranda and complaints in the Commission offices. a large volume of evidence has been gathered.

Not all the evidence has been analysed. However some critical issues were repeated in every forum. Analysis of some of the complaints received has also shed some instructive light on these matters. It is these issues that will be addressed in this Interim Report.

The need to address some of these issues now as outlined earlier has been necessitated by their urgency and the simple mechanism required to resolve them. Some or all of these issues will be dealt with more comprehensively in the Final Report of the Commission once all the information has been analysed. The recommendations of the Final Report will deal with short-term as well as long-term solutions to the problems raised.

1.8 Definition of Terms

Certain words and phrases may have a formal legal meaning whether they have been legally defined or not. The same words and phrases may also have a local interpretation that may vary from one part of Kenya to another. The Commission lists some of these words and phrases hereunder and gives their current acceptable legal meanings and also the various local interpretations. When used in this Report, the local interpretation and usage is generally intended.

"Absentee Landlord"

This phrase, at the Coast, refers to persons who, seldom if ever, use land of which they are the registered owners and such land, if it is managed at all, is managed by "agents" who may or may not have been validly appointed by the registered owner. Many such agents are thought to be self-appointed with no legal authority over the land.

"Grabbing" and "Grabber"

"Grabbing" of land is the process whereby an individual or body corporate (the "Grabber") obtains a title to public land especially public utility land otherwise than in strict accordance with the law. The "Grabber" may be either the first or a subsequent registered owner of

the land. The whole process enables speculation in land to flourish and creates titles to land that are of dubious validity.

"Idle Land"

Idle land refers to land with a registered title that is lying idle without being used (as opposed to lying fallow) and has lain without being used for a considerable period of time.

"Kaya"

This is a forested sacred shrine where the Mijikenda traditionally conduct their prayers.

The Mijikenda comprise nine closely related coastal peoples (i.e. the Chonyi, Digo, Duruma, Giriama, Jibana, Kambe, Kauma, Rabai and Ribe) who share a common linguistic and cultural heritage.

"Squatter"

Legally, a squatter is a person who occupies land or a building that legally belongs to another person or institution without the owner's consent.

At the Coast of Kenya, a squatter would include a person occupying Government land or private land. For historical reasons the word "squatter" in this context is regarded by indigenous coast people as a term of abuse or misnomer.

In the former white highlands a squatter would include a person and his family occupying part of a large farm with the permission of the farm owner. The squatter would provide labour to the farm-owner on a casual basis.

Similarly, a forest squatter would occupy land in a gazetted forest with the authority of the Forest Department in exchange for providing casual labour from time to time.

"Tenant-At-Will"

A tenant-at-will is a person in possession of immovable property legally owned by another person, the landlord, whose occupation can be terminated without notice. At the Coast, the tenant pays "goodwill" and "rent" to the landlord. While the tenant may plant and harvest crops and even build a house on the landlord's property, he remains a tenant and has no legal ownership rights over the land although the crops and even the house remain the property of the tenant.

Frederick Cooper's book *From Slaves to Squatters* records another dimension of the phenomenon whereby even after the 1907 Ordinance outlawing slavery, some slaves being landless and fatherless and not knowing where or how to start the new life as free people ".... remained loyally in their masters'" service so that the masters would delay as long as possible before putting in claims for compensation following the freeing of those slaves. The freed slaves stayed on as plantation workers to tend their former enslavers' tree crops in exchange for space to grow seasonal subsistence crops. In the latter event it is the freed slaves who were deemed to have opted to remain as tenants-at-will.

"Wananchi"

Wananchi is a Kiswahili word for citizens and can include, in general terms, "the public". *Wananchi* also has the connotation that it refers to the ordinary people.

CHAPTER 2

DISREGARD AND ABUSE OF CERTAIN LAWS AND PRACTICES RELATING TO LAND AND THEIR EFFECTS

It has been noted by the Commission in its deliberations that most of the problems relating to land arise mainly from the failure of the authorities concerned to enforce and comply with the law as it exists. Alternatively these same authorities create new procedures which are inappropriate or inconsistent with existing laws. In both cases the results are confusion and creation of titles that are either suspect or wholly void. By and large, the laws which are being disregarded and abused are basic to the creation of valid titles and also to subsequent dealings with those titles. The sum total effect of the stated disregard and abuse of the land laws and practices is an array of injustices and disinheritance.

Examples of such disregard and abuse are many and the Commission gives some illustrations below, under specific laws and practices:—

2.1 The Government Lands Act (Cap. 280)

This is the Act that governs the allocation and administration of all Government land, both urban and agricultural.

The Act in Parts III and IV contains elaborate procedures which the Commissioner of Lands is required to observe in allocating land. For example, sections 12 and 20 stipulate that all urban and agricultural land available for allocation shall be advertised and sold by auction. For many years, this mandatory requirement has not been followed. Indeed, the Commission has been told that no land has been sold by auction since the 1950s. Instead, the Commissioner of Lands has allocated and continues to allocate land using procedures not provided for in the Act.

This Commission has received representations to the effect that the requirement for urban and agricultural plots to be sold by auction discriminates against the poor. There is some merit in the complaint but it poses a dilemma as between giving the plots to those capable of developing them and giving such plots away for mere social reasons or sentimental satisfaction. The Commission will address the issue in its Final Report.

Section 18 provides that all dealings with leasehold urban plots such as sales, etc., must be consented to by the Commissioner of Lands. The section goes further to say that no such consent shall be given until the plot is developed. In contravention of this provision, the Commissioner routinely consents to sales of undeveloped plots. He also, illegally and

frequently, consents to the informal sale of Letters of Allotment. Both the Letter of Allotment and the Grant include time limits before the expiry of which the Allottee or the Grantee must perform certain acts. The Letter of Allotment, which is nothing more than a formal offer of land on certain terms, costs and conditions, lapses after a period of 30 days. The Grant incorporates Special Conditions which require the Grantee to submit plans for the development of the land within 6 months and to complete such development within 24 months of the registration of the Grant. Once the Letter of Allotment has lapsed, the offer ceases to be valid. Once the development period has expired and the development conditions have not been complied with, the Commissioner of Lands has the right to terminate the Grant by re-entering and repossessing the property.

One consequence of the practice of consenting to the sales of letters of allotment and undeveloped plots is that demand for prime urban plots for purely speculative purposes has grown far beyond supply and the so-called "grabbers" have turned to public utility plots such as cemeteries, schools, road reserves, riparian reserves, and forest reserves among others. In extreme cases the "grabbers" have also started forging title documents over private properties which find their way to the land registries. This is indeed a very serious development as it threatens the sanctity of title. The long-term negative effect of such a development on the use of title as a tool for economic advancement of the country is frightening.

The unlawful allocation to "developers" of public utility plots and other publicly owned plots was the most widely reported complaint from members of the public and from Central Government and Local Government officials in every single provincial and district headquarters the Commission visited and in each of the 8 divisions in Nairobi. As the Commission has now visited all districts in Kenya and all divisions in Nairobi, in the view of the Commission, this is the most pressing problem facing the Government and the problem most urgently in need of rectification.

A very similar action, closely related to grabbing takes place in many areas of Kenya and this is the planned but unlawful invasion of land by persons who are subsequently called "squatters". In many parts of Nairobi, especially in Embakasi and also in some areas at the Coast and elsewhere in Kenya including settlement schemes, people are encouraged to invade and settle on land owned either by the Government, or by a local authority or a parastatal or, in some cases, by private individuals.

The titles issued in respect of available Government land in contravention of Parts III and IV of the Act are of doubtful validity, while titles issued in respect of public utility plots are illegal and void. Duplicated titles issued in respect of privately owned land are an absolute

nullity, and the act of issuing such titles may be criminal. Some of these titles have been charged/mortgaged to banks to secure huge loans and, here again, the legal validity of such charges/mortgages is doubtful. In a few instances where the public has gone to court to challenge the allocation of public utility plots, the courts have taken the view that land reserved for public purposes is held by the Commissioner of Lands in trust, with no power to allocate such land for different purposes. Many complaints reaching this Commission show clearly that a lot of public officers either have little understanding of the concept of trusteeship or they simply treat it as a subject of disdain.

The creation of void titles and the illegal dealings with them is, undoubtedly, very damaging to the country's economy. The practice has put in doubt the entire land law system. In particular, banks and other lending institutions have developed understandable reluctance to accept land title deeds as securities for loans.

There is confusion in the implementation of certain Government procedures and practices dealing with extensions and renewals of leases. This confusion arises to the detriment of the landowners when leasehold titles are due to expire at the end of the leasehold term. The Ministry of Lands and Settlement's *Handbook on Land Use Planning, Administration and Development Procedures* only gives guidelines to be followed by officers dealing with applications for **extensions of leases.** This is quite different from applications for **renewal** of leases that are about to expire. There are no guidelines for officers to deal with **renewal of leases** as this problem has only recently arisen. Instead, applications for renewal of leases are being treated as applications for extension of leases. In this Report only the renewal of urban leases and sub-leases are addressed. The renewal of agricultural leases will be dealt with in the Final Report.

Thousands of 99-year leasehold titles were granted at the beginning of the last century, which means the periods are due to expire in another 2 or 3 years' time. Complaints received from the public and practising Advocates indicate that many landowners are not getting their leases renewed. In rural markets and townships, a large number of leases that were originally granted for 33 years have expired, and plot owners fear that their plots will be allocated to other people.

Overall, the central theme of complaints regarding renewal of leases is that the Ministry of Lands and Settlement does not bother to notify lessees in good time or at all about the fate of their applications for renewals of leases, thereby leaving the lessees in the dark. Such omissions adversely affect development in that lessees cannot plan.

There are also hundreds, perhaps thousands, of leasehold titles in Nairobi and other towns that were created by way of sub-leases, with a

few days reversion being retained by sub-lessors. The sub-leases were granted under either the East African Land Regulations, 1897 or the Crown Lands Ordinance, 1902 neither of which required Government consent to develop or otherwise deal with land. The few days reversion is called reversionary interest. This category of titles is to be found in such areas of Nairobi as Kirinyaga Road, Ngara, Westlands, etc. Before considering renewals of this category of leases, the Ministry has up to now required the property owners to buy the reversionary interest from the sub-lessors. This requirement presents two major problems to the landowners. Firstly, some of the reversion owners are no longer in Kenya. Secondly, where the reversion owners are available, the cost of the reversionary interest is prohibitive.

The Commission recommends:

(i) ***That allocation of Government land should be strictly in accordance with the current provisions of the Act and the Ministry of Lands and Settlement's*** *Handbook on Land Use Planning, Administration and Development Procedures.*

(ii) ***That to stem speculation in Government land, the Commissioner of Lands should forthwith stop consenting to sales of Letters of Allotment and sales of undeveloped plots.***

(iii) ***That paragraph 2 (b) of the Government Lands (Consents) (Fees) (Amendment) Rules, 1994 published under Legal Notice No. 305 of 1994 (Appendix D) should be revoked, because the rule contradicts section 18 of the Act.***

(iv) ***That public utility land and plots reserved for public purposes must not be allocated as such land and plots are not "unalienated Government land" within the meaning of the Act.***

(v) ***That where leasehold titles are issued under the Government Lands Act (Cap. 280), the Government should enforce the provisions of the special conditions in order to spur development and curtail speculation. For the Government to enforce the special conditions it is necessary for it to provide the infrastructure to support development.***

(vi) ***That all Letters of Allotment which have lapsed should be cancelled forthwith.***

(vii) ***That as soon as possible, the Commissioner of Lands should formulate and publicise guidelines concerning the renewal of urban leasehold and sub-leasehold titles. Proposals for such guidelines are set out below:***

1. *RENEWAL OF URBAN LEASEHOLD TITLES*

(a) An application for the renewal of a lease by the leaseholder must be acknowledged in writing within one month of receipt.

(b) Unless the Government requires the land for a specified public purpose as defined under section 6 of the Land Acquisition Act (Cap. 295), any renewal of the lease will be made subject to the special conditions to be incorporated in a new grant.

(c) Unless the Government requires the land under (b) above, reference to the local authority or to other departments of Government for their comments on the application for a lease renewal should require an answer within 90 days failing which the lease will be renewed without further reference.

(d) Unless there is a site inspection by the Local Authority no inspection fee should be charged. Any inspection fees shall be paid once the renewal of the lease has been approved.

(e) The annual rent to be charged and the special conditions to be incorporated in the new lease shall take into account the use of the property and shall be based upon the current standard special conditions appropriate for such properties, suitably modified.

(f) Visits by Government officials to inspect the property shall be made by the Ministry of Lands and Settlement at its own expense.

2. *RENEWAL OF URBAN SUB-LEASEHOLD TITLES*

All the above provisions will apply where the property concerned is held on a registered sub-lease. An application by the present registered sub-leasehold owner shall be treated as if he were the direct tenant of the Government and a new lease shall be granted to him to commence on the day following the day on which the reversion comes to an end. No interference with the occupation of the sub-leaseholder by the reversion owner during the reversion period shall be tolerated.

There shall be no requirement that the sub-tenant purchases the reversion and an application for a new lease of the property by the reversion owner shall neither be acknowledged nor acted upon.

2.2 The Registered Land Act (Cap. 300)

This Act governs registration of title to land and regulation of dealings in lands so registered under it.

The Registered Land Act (R.L.A.) has been abused especially in regard to laxity by the registrars in issuing titles on the basis of the filed mutation forms without a corresponding correction of the registry index map as provided by section 19 of the Act. This laxity has resulted in production of duplicate titles or at times production of titles to non-existent land. This calls into question the reliability of R.L.A. titles especially in general boundaries areas. The result is that transactions in R.L.A. titles are dealt with by those concerned with a lot of caution.

The other problematic area is the disregard of enforcement of maintenance of boundary features as provided by section 23 of the Act and enforcement of section 24 of the Act in respect of interference with boundary features. The disregard of these sections of the Act has resulted in incessant boundary disputes being filed under section 21 of the Act.

Any person with a boundary dispute is required to pay to the Land Registrar a fee deposit of KSh.1250 per day for the Registrar to determine the dispute. Land Registrars have not been able to dispose of such disputes as speedily as possible due to various constraints experienced in the districts, like lack of transport/fuel, shortage of staff and delays in the disbursement of funds to the districts. As a result, the disputes remain unresolved for long periods.

The provisions of section 143 (1) of the Act which disallows the challenging of first registration of title in any court of law even if obtained by fraud has become a nightmare to everybody including the Government. Irreparable damage has been done to individuals, families and at times whole communities by the provisions of this section of the Act. A classic example that has attracted both national and international attention was the registration of the Iloodariak and Mosiro Adjudication Sections in Kajiado District. Even though the process was unashamedly abused by those concerned, nothing could be done as a result of the provisions of the said section.

Reasons for inclusion in the Registered Land Act of the words that prevented a first registration being challenged in the courts included the fact that in the early days of land consolidation and registration, fears were expressed that numerous challenges to first registration would render the whole programme unworkable. The colonial authorities were anxious that if first registrations were made challengeable the potential claims of very large numbers of detainees from the then Central Province in the mid- to late 1950s could cause serious setbacks to the land title registration

programme. A further reason was that adjudication of customary rights to land was basically a new process in Kenya and that staff were being trained on the job by officers who themselves had little or no practical experience in such matters. After a period of over forty years of adjudication and registration, it has become apparent that the protection offered by this subsection is being deliberately abused in a number of cases to prevent a challenge being mounted to the registration of persons who could not conceivably have any right to claim ownership of land in some areas.

It is also noted that section 143 (1) has been abused by some family members who are registered as proprietors of family land as trustees to disinherit other members of the same family. Adversely affected members have found it almost impossible to challenge a first registration where the registered trustee proprietor is a trustee under section 126 (1) of the Act which prohibits the entry of particulars of any trust in the register.

By allowing only the registration of the bare fact that the registered proprietor has been registered as a trustee and prohibiting the entering of particulars of any trust in the register, the Act has unwittingly aided and abetted fraud.

Adversely affected family members are thereby subjected to the rigours of having to establish through the judicial process that a trust relationship exists between the dishonest family member and themselves, to prove that the trust has been breached and that they have been defrauded. It is common knowledge that the cost of litigation is beyond the reach of the ordinary Kenyan, which means that lots of victims of such fraud have to suffer in silence.

It has become clear to the Commission that section 143 (1) of the Act has been variously misused to perpetrate injustices far worse than the mischief it was intended to prevent. It is imperative that the section be suitably amended without delay to prevent its further misuse.

It is also imperative that section 126 (1) of the Act be amended to make it mandatory for Registrars to describe the proprietor as trustee and remove the restriction against entering particulars of a trust in the register and that section 126 (3) be amended such that the registered trustee proprietor is not able to deal with trust property as if he or she were the sole beneficial owner.

As a consequence of the proposed amendment to section 143 (1) it will also be necessary to amend section 144 (1) (*b*).

The Courts should be empowered to consider evidence of fraud in the acquisition of titles to land and to rule accordingly when convinced that an abuse of the adjudication and registration process has occurred.

The Commission recommends:

(i) *That in the preparation of titles, Land Registrars should strictly comply with section 19 of the Act. No title should be produced on the basis of a mutation form without a corresponding amendment of the registry index map.*

(ii) *That the Land Registrars should enforce the provisions of sections 23 and 24 of the Act to reduce boundary disputes.*

(iii) *That money collected as boundary disputes fee deposits should be retained, spent and accounted for by the Land Registrar in each district for quicker resolution of boundary disputes.*

(iv) *That section 143 (1) of the Registered Land Act should be amended by deleting the subsection altogether and substituting it with a new subsection (1) reading thus:*

> *"Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration completed and registered prior to the commencement of this Act) has been obtained, made or omitted by fraud or mistake."*

(v) *That section 126 (1) be amended by deleting the subsection altogether and substituting it with a new subsection (1) reading thus:*

> *"A person acquiring land, a lease or a charge in a fiduciary capacity shall be described by that capacity in the instrument of acquisition and shall be registered with the addition of the words "as trustee" together with particulars of any trust."*

(vi) *That section 126 (3) be amended by deleting the words "but for the purpose of any registered dealings he shall be deemed to be the absolute proprietor thereof, and no person dealing with the land, a lease or a charge so registered shall be deemed to have notice of the trust nor shall any breach of the trust create any right to indemnity under this Act".*

(vii) *That section 144 (1) (b) should be amended by inserting the words "completed and registered prior to the commencement of this Act" immediately after the words "other than a mistake or omission in a first registration".*

2.3 The Land Control Act (Cap. 302)

This Act governs control of transactions in agricultural land. Any transaction whether sale, exchange, transfer, mortgage, lease, partition or other disposal or dealing with any agricultural land which is situated within a land control area, must receive the consent of the local Land Control Board.

Under this Act the District Commissioner of the district in which the control area or division is situated or a District Officer deputed by him in writing chairs Board meetings. In almost every district visited by the Commission very strong views were expressed against District Commissioners and District Officers chairing Land Board meetings. It was strongly recommended that Boards should be chaired by persons other than public officers.

Views received from members of the public indicate that the Act has been abused and disregarded, *inter alia*, through the convening of "special" Board meetings. In this context a "special" meeting includes a meeting of a Land Control Board without a quorum in accordance with section 15 (2) of the Act or a meeting called without proper notice or held in a place other than a public place.

A further complaint is the delay in the formal establishment by the Minister of some Land Control Boards and the appointment of their members. This sometimes leads to persons nominated for appointment actually attending meetings prior to their formal appointment. In addition, the long service by members has resulted in accumulation of unabated power and subsequent abuse of the same while the low remuneration paid to the members has encouraged the soliciting of illegal fees from members of the public. Furthermore the guidelines contained in section 9 of the Act are hardly considered by the Boards. Section 9 sets out the criteria to be taken into account by Boards when considering applications. The Boards hardly consult technical officers in their deliberations resulting in authorization of uneconomic, inaccessible and poorly planned land units.

Women, who form the bulk of those who work on the land, are either not represented or lack adequate representation on the Boards.

It is noted that the level of education of most Board members is so low that they can hardly comprehend the law governing the transactions before them. Certain instances were cited where sale of family land has been done by crafty members of the family rendering whole families landless. Such actions could be prevented if there is wider presence of family members at Board meetings.

The Commission recommends:

(i) *That the Minister responsible should ensure that Land Control Boards are gazetted and their members appointed promptly especially in new administrative districts and divisions.*

(ii) *That members of Land Control Boards should be people of high integrity with basic education up to at least Kenya Certificate of Secondary Education or its equivalent, and must be mature and knowledgeable in local issues affecting land.*

(iii) *The Ministry of Lands and Settlement should train members of the Land Control Boards on the operations of the Land Control Act subsequent to their appointment.*

(iv) *That in order to stem corruption and motivate Board members, remuneration should be improved to reasonable levels and should be reviewed from time to time.*

(v) *That "special" Land Control Board meetings should never be held as they are illegal and are usually avenues of dishonest and corrupt transactions.*

(vi) *That appointment of Board members should be done every 3 years with a Board member serving a maximum of 6 consecutive years.*

(vii) *That Boards should consult relevant technical officers in all their transactions and that the public officers sitting in the boards should be those responsible for agricultural, physical planning and land survey matters.*

(viii) *That the Minister should urgently consult with the Minister for Agriculture so as to issue countrywide guidelines on minimum agricultural holdings appropriate to the various ecological zones in each district in the country.*

(ix) *That the Act should be amended to provide for:*

  (a) *At least one-third of the Board members to be women from the land control area.*

  (b) *Board members to elect their chairman.*

(x) *That amendments be made to the Act requiring, inter alia, the Board to seek the approval of the applicant's spouse, adult children, beneficiaries (where the applicant is a trustee or administrator) in respect of a controlled transaction as set out in Chapter 6, Paragraphs 6.1.1 and 6.1.2 of this Report.*

(xi) That the Minister, pursuant to section 25 of the Act, makes amending regulations with regard to the Board members as set out in Chapter 6, Paragraph 6.1.3 of this Report.

2.4 The Land (Group Representatives) Act (Cap. 287)

This Act was enacted to make provision for the incorporation of representatives of groups who have been recorded as owners of land under the Land Adjudication Act (Cap. 284).

The abuse and disregard of the principles and the procedures established under the Land (Group Representatives) Act for its proper administration have been and are still some of the leading causes of disputes and subsequent delays in the issuance of individual titles over areas where this Act is operational. It has also resulted in illegal sale of "shares", bringing bloodshed in areas such as Trans Mara and Narok Districts; the tampering with the register through registration of non-members, resulting in conflicts and law suits; and dispossession of other members of the group of land through illegal allocation of "shares". In Trans Mara District, the Commission was told of a single committee member who managed to allocate to himself ten square kilometers of prime land!

Some of the abuses mentioned above arise from the officials of these groups failing to call annual general meetings over long periods of time. Some groups do not maintain basic records as required by the Act, for example the group constitution, register of members and books of account. In other cases, the Registrar consents to the Group Representatives being dissolved before the liabilities of the group are settled and the assets of the group are shared among the members resulting in very serious complications. In more extreme cases, some of the group officials mortgage the group owned land without the approval of the group members. Lack of adequate and trained staff at the district level to supervise the proper administration of the Act and advise the group members contributes to most of the above problems.

It has been represented to the Commission that subdivision of group ranches in arid and semi-arid areas has led to environmental degradation, reduction of livestock and the creation of poverty. A group owned and managed ranch is more viable in these areas than a number of individually owned plots. Thus until a land use policy has been adopted for such areas further subdivisions should be suspended.

The Commission recommends:

(i) That the Minister should appoint qualified Assistant Registrars of Group Representatives to each district where this Act applies

to ensure that the provisions of the Act are understood and complied with by group officials and by the members.

(ii) That the Assistant Registrars should publicize the fact that sales of undivided shares by group members are unlawful and they should also emphasize that such sales are null and void.

(iii) That the Registrar of Group Representatives should ensure that Group Representatives hold meetings and file returns in accordance with the provisions of the Act and the regulations.

(iv) That the Registrar of Group Representatives should regularly inspect the registers of groups and ensure that any new member has been accepted by members of a group in a validly convened general meeting in accordance with the provisions of the Act.

(v) That subdivision of group ranches in arid and semi arid areas should be suspended until a land use policy has been adopted for such areas.

(vi) That for high potential areas the Registrar of Group Representatives should not consent to the dissolution of a registered group before all the liabilities have been settled and all the assets shared among the individual members of the group. Thus section 13 of the Act should be amended to reflect the foregoing as set out in Chapter 6, Paragraph 6.2 of this Report.

2.5 The Trust Land Act (Cap. 288)

The Trust Land Act makes provision for the administration of Trust land.

The Act, however, does not define "Trust land" or "Trustee". Indeed a survey of our major statutes on trusts reveals that they have carefully avoided defining the term. The Commission refers to: the Trustee (Perpetual Succession) Act (Cap. 164); the Trustee Act (Cap. 167); the Public Trustee Act (Cap. 168); the Trust Land Act (Cap. 288); the Trusts of Land Act (Cap. 290); and the Unit Trusts Act (Cap. 521). Even the Interpretation and General Provisions Act (Cap. 2) makes no attempt to define a trust but defines "Trust land" to mean land which is for the time being Trust land for the purpose of the Constitution. There is no definition of "trust" in the Constitution but only broad descriptions of certain categories of land deemed to be Trust lands.

The hesitancy of legal writers to get involved in defining the legal concept of a trust is understandable. The concept is very complex. In his textbook, "*The Law of Trusts*" (8th Ed.), George Keeton correctly notes

that the exact definition of a trust has always offered special difficulties to legal writers.

Evidence before this Commission provides a catalogue of cases of rampant disregard or blatant violation of the principles of trusteeship by many officials placed in charge of public property. It may be of public interest to say something, albeit in general terms, about the nature of a trust.

Basically, "trust" is the relationship which arises whenever a person called the trustee is compelled to hold property for the benefit of some other person called beneficiary or for some object permitted by law in such a way that the real benefit accrues not to the trustee but to the beneficiary or the object of the trust.

The Trust Land Act governs the administration of land as described in section 114 of the Constitution. All Trust lands are vested in county councils which hold the said land for the benefit of the persons ordinarily resident on that land.

The abuse and disregard of the provisions of the Constitution and this Act has occurred mainly in two forms, namely:

The Commissioner of Lands has alienated Trust land in some instances against the provisions of sections 117 and 118 of the Constitution and section 53 of the Act.

Section 117 of the Constitution is to the effect that an Act of Parliament may empower a county council to set apart an area of Trust land vested in it for public use and occupation—

"*(a)* by a public body or authority for public purposes; or

(b) for the purposes of prospecting for or the extraction of minerals or mineral oils; or

(c) by any person or persons for a purpose which in the opinion of that county council is likely to benefit the persons ordinarily resident in that area or any other area of Trust land vested in that county council, either by reason of the use to which the area so set apart is to be put or by reason of the revenue to be derived from rent in respect thereof."

Section 118 of the Constitution is basically about setting apart of Trust land for purposes of the Government; body corporate established for public purposes; company in which shares are held by or on behalf of the Government; or for the extraction of minerals or mineral oils.

Section 53 of the Trust Land Act mandates the Commissioner of Lands to administer Trust land of each council as agent for the council.

Complaints lodged with this Commission catalogue various instances of violation of the constitutional and statutory provisions relating to the setting apart of Trust land; overstepping by the Commissioner of Lands of his agency mandate under the Trust Land Act; and abuse by civic leaders and council officials of their positions by causing alienation of Trust land contrary to the provisions of the Constitution and the Trust Land Act.

The consequence of the above activities is the allocation of land to speculators from areas far removed from their districts of ordinary residence thus causing bitterness and discontent among the general public in the affected areas. In some instances, councillors in collusion with the Office of the Commissioner of Lands have allocated public utility plots contrary to the provisions of the Act. This Commission was told of situations where chiefs' camps, cemeteries, public parks, bus parks, dams, holding grounds, water springs, forests, road reserves and game reserves had been allocated to individuals in blatant disregard of public interest and in violation of the provisions of the Act and the Constitution. These actions have created a lot of bitterness, anguish and loss of confidence by the public in the Ministry of Local Government, Ministry of Lands and Settlement and local authorities themselves.

The Commission recommends a total ban on all alienation of Trust land until proper procedures are put in place that check against violation of sections 114, 117 and 118 of the Constitution and section 53 of the Trust Land Act, provided that such a ban shall not affect setting apart of Trust land for public purposes as envisaged in section 118 of the Constitution.

From a broader perspective, on 28th July, 1999, the *Daily Nation* ***reported that on 26th July, 1999, the President had suspended all allocations of State and local authority land "with immediate effect and until further notice". Information received by the Commission is that the ban has been largely ignored. In view of the rampant land "grabbing" mania being reported countrywide, the Commission recommends that the Government finds ways of enforcing the ban pending completion of this Inquiry.***

2.6 The Local Government Act (Cap. 265)

This Act provides for the establishment of authorities of local government, defines their functions and provides for matters connected therewith and incidental thereto. Planning for and provision of basic social amenities and services, e.g. education, health, roads, sanitation, housing, markets, open spaces, parks, etc. constitute the central pillar for the existence of local authorities.

Section 166 of the Act empowers a local authority, subject to any other written law relating thereto, to:

> "... prohibit and control the development and use of land and buildings in the interest of the proper and orderly development of its area."

Section 144 (1) provides that a local authority may, for the purpose of any of its functions under the Act or any other written law, acquire any land notwithstanding that the land is not immediately required for that purpose; and that where land is so acquired notwithstanding that it is not immediately required for the purpose for which it was acquired, the local authority may use such land for the purpose of any other functions of the local authority until the land is required for the original purpose. Subsection 8 adds, instructively, that nothing in this section shall authorize the disposal of land by a local authority in breach of trust.

Under section 145 (*f*) a local authority may, subject to section 144, let or otherwise dispose of any of its movable or immovable property. Under section 145 (*g*), again subject to section 144 or any other written law relating thereto, a local authority may subdivide any land belonging to it for industrial or commercial purposes.

The central role of local authorities in physical planning is acknowledged by the Physical Planning Act, No. 6 of 1996 (section 29).

The Local Government Act, supplemented by other statutes, like the Physical Planning Act, 1996, has noble intentions for the citizenry and has entrusted the responsibility for translating those intentions into programmes beneficial to the general populace living within the jurisdiction of local authorities.

Evidence before this Commission, however, is to the effect that the above noble intentions are violated by local authorities through non-delivery of services despite payments being made for such services; allocation of public utilities or amenities such as road reserves, public toilets or public cemeteries to individuals; and double allocations of plots among others. It is a case of lamentably poor stewardship of public resources by the very persons entrusted with their management, a circus of wardens turning into poachers and of public morality cast overboard, all this happening under the very nose of the Ministry of Local Government whose duty it is to exercise supervision or superintendence over the activities of local authorities. A glaring example of failure by the Ministry in its supervisory or guiding role is the allocation of Nairobi City Council houses at Woodley Estate to influential people.

The provisions of the Local Government Act as regards acquisition of and dealings in land by local authorities are normally applied without any

publicity. Oftentimes the public becomes aware of the dealings when structures start coming up over road reserves thereby obstructing them; when fences are erected by individual allotees around communal water bodies thereby denying neighbouring communities access to such common heritage; etc. The restrictions imposed by section 144 (8) are seldom enforced. The mushrooming of kiosks in road reserves is a breach of the Government Lands Act section 85 but some kiosks appear to be licensed by the local authority contrary to the law.

This Commission will have more to say in the Final Report about the role of local authorities in land administration and management. In the meantime the Commission notes that there are enabling provisions in the Local Government Act for local authorities to control obstructions and other forms of nuisance. These provisions are not being invoked either at all or adequately by local authorities to promote proper and orderly development. There is hardly any valid excuse for such omissions or laxity.

The Commission recommends a total ban on allocation of local authority land while it works out legal and administrative procedures to govern the disposal and administration of such land.

2.7 The Land Disputes Tribunals Act (No. 18 of 1990)

This Act was enacted to limit the jurisdiction of Magistrates' Courts in certain cases relating to land. The Government saw the need to establish "*Land Disputes Tribunals*" to deal with certain categories of land cases.

Section 3 of the Act empowers Tribunals to hear all cases of a civil nature involving a dispute as to—

- the division of, or the determination of boundaries to land, including land held in common;
- a claim to occupy or work land; or
- trespass to land.

Under this Act members of Tribunals are elders who are persons in the community and who, by virtue of age and experience, are deemed to be competent to resolve issues between parties. The appointment of these elders is the responsibility of the Minister responsible for land matters through a gazette notice. The decision of the Tribunal is filed in a Magistrate's Court which enters judgment in accordance with that decision. If any party is aggrieved by the decision of the Tribunal he may appeal to the Appeals Committee constituted for the province within 30 days of the decision. Parties not satisfied with the decision of the Appeals Committee can appeal to the High Court only on points of law.

The exercise of jurisdiction as set out in section 3 of the Act has been hardly observed by the Tribunals. The Commission heard many complaints where the Tribunals have entertained matters or issues which are outside the jurisdiction set out in section 3 of the Act. This section limits the jurisdiction of the Tribunals to the three matters set out therein. However, because of ignorance or through blatant disregard of the provisions of the Act, the Tribunals often entertain disputes involving beneficial ownership to land, declaration of title to land, rectification of the land register, contracts for sale of agricultural land and even matters where other statute law provides a clear dispute resolution mechanism. As a result of this practice, the Tribunals end up making awards which are a nullity and invite costly appeals.

Many decisions of the High Court on this Act express the view that this Act has been used as an avenue of backdoor appeals by those defeated in the due process of the law. Consequently, many awards of the Tribunals have been quashed by the High Court either because of excess jurisdiction or lack of it or because the proceedings are tainted by bias or procedural irregularities.

Some of the instances of abuse under this Act cited by members of the public were soliciting of illegal fees, making of illegal awards due to low level of education of the members and non-gazettement of members by the Minister as required by law. Another glaring example of abuse of this Act are instances when the Tribunals decide to hear already decided disputes without regard to the process established by the Act. This has caused confusion, hardship and great expense to the ordinary *wananchi* in the countryside. The Act compels the Magistrates' Courts to enter judgment in accordance with the award made by the Tribunal without giving the courts discretion even to correct errors on the face of the award or inquire into the procedure adopted by the Tribunal. The end result is judgments which are null and void either because of excess jurisdiction or procedural irregularities.

During the inquiry it was evident that the Magistrates' Courts took too long to enter judgment while the Appeals Committee took too long in hearing the appeal cases. This exercise is slow and costly as the public sometimes have to make several trips to attend Appeals Committee hearings before a decision is made. The intention of the Act was to make litigation and dispute resolution of land cases cheaper and faster but the converse is the case as the appeal process coupled with the disregard of the procedures adopted by the Act has done little to assist the public.

Members of the public complained that this Act has made boundary dispute resolution confused as in some cases one litigant would go to the Land Registrar as set out in section 21 of the Registered Land Act while

the other party would go to the Tribunal. This makes resolution of boundary disputes protracted and expensive as the two Acts have not been harmonized.

Many complaints were made to the Commission that the remuneration payable to members is too low and also that even the low remuneration is not always paid promptly. In addition, members of the public complained that some elders had overstayed in office and therefore proposed that their term be limited to three years. The Commission observed that proceedings of Tribunals were not properly recorded and kept.

There was a general observation by members of the public that most of the members of the Tribunals are men. They proposed that at least one-third of the members should be women. In other instances the Land Disputes Tribunals have not been established in the newly-created Districts. This was cited in Mt. Elgon, Vihiga, Suba Districts and others.

The Commission heard proposals that the chairman of the Tribunal should be a person knowledgeable in land laws and should be elected. There were strong feelings that the other members of the Tribunal should be elected by the *wanamchi* as well.

The Commission will re-visit the issue of dispute resolution in the Final Report. In the interim, however, ***the Commission recommends:***

(i) That the Land Disputes Tribunals should be properly constituted and promptly gazetted by the Minister concerned.

(ii) That members of the Tribunals should be people of high integrity with basic education up to at least Kenya Certificate of Secondary Education or its equivalent and have reasonable knowledge of the land issues of the community concerned.

(iii) That at least one-third of the members should be women.

(iv) That remuneration of the members should be improved, paid promptly and reviewed from time to time.

(v) That Land Disputes Tribunals should be established in all districts.

(vi) That Land Disputes Tribunals should be chaired by persons knowledgeable in law or have a legal advisor attached to them during their sittings to guide them in matters of law.

(vii) That section 3 (10) be amended to make it mandatory for the Land Registrars to assist the Tribunals in the resolution of boundary disputes by substituting the word "may" with the word "shall".

(viii) ***That the elders should comply strictly with the Act especially on the question of jurisdiction.***

(ix) ***That the Minister, pursuant to section 10 of the Act, makes regulations prescribing the composition, qualification and terms of service for membership of the Tribunals and the Land Disputes Appeals Committees as set out in Chapter 6, Paragraph 6.3 of this Report.***

CHAPTER 3

OTHER CRITICAL LAND ISSUES

There are some other specific land problems that require urgent administrative intervention. Some of these problems have been simmering for a long time and are threatening to explode in some areas unless urgent action is taken. These are:

3.1 Excisions and Allocations of Protected Areas and Other Reserved Land

It has come to the notice of this Commission that certain areas of land that are protected from alienation have, in fact, been alienated improperly and titles granted by the Commissioner of Lands on behalf of the Government or on behalf of a local authority. There are other areas of land that already have titles and are used by State corporations or other institutions such as research or agricultural improvement organizations. The issuance of titles or the subdivision and sale of such land not only negates and defeats the original intentions but it also adversely affects agricultural research, disease control and farmers training. The negative effects of such allocations cannot be over-emphasized especially in view of the need for national food security. The disposal of such land in many cases amounts to an apparent breach of trust. Often such actions by the Commissioner of Lands and local authorities have deprived the public of the right to the use and benefit of such land. In addition, the resultant titles to such land may well be of dubious or of suspect validity.

Such protected areas include:

(a) forests, water catchment areas, riparian land, *kayas*, and any area gazetted under any Act for a particular or public purpose;

(b) road reserves which are protected by section 85 of the Government Lands Act (Cap. 280);

(c) public access to beaches at the Coast;

(d) fish landing sites at the Coast and lake shores;

(e) public access to water in arid and semi-arid areas;

(f) the foreshore being the area of land between a surveyed boundary and the high water mark as defined in regulation 110 of the Survey Regulations made under the Survey Act (Cap. 299) and section 82 of the Government Lands Act (Cap. 280);

(g) holding grounds, outspans, livestock or wildlife corridors, schools, playing fields, open spaces, places of worship, cemeteries, public

toilets and any other area of land deliberately acquired and retained by the Government or local authority for future public use;

(h) the land owned and occupied by Kenya Agricultural Research Institute (KARI), Kenya Plant Health Inspectorate Service (KEPHIS), Agricultural Development Corporation (A.D.C.) farms, Artificial Insemination Service (AIS), and many other similar public institutions;

(i) wildlife reserves and sanctuaries, marine parks; and

(j) historical sites and monuments.

The encroachment of forests, riparian reserves, marine parks, springs and water catchment areas has had a very negative impact on both the environment, rainfall patterns and water supply. Similarly, encroachment into wildlife sanctuaries has had a negative impact on conservation of flora and fauna thus affecting the tourism potential and the invaluable heritage of the country. Examples of such encroachment have occurred in Trans Mara, Narok, Mt. Elgon, Kajiado, Marakwet, Malindi and other areas.

The Commission recommends:

(i) ***That the Commissioner of Lands should be directed to stop alienation of protected and reserved land immediately.***

(ii) ***That in order to prevent encroachment on or acquisition of title over protected areas and other reserved land, the Government should prepare titles for such areas at public expense.***

(iii) ***That where it is not possible to prepare titles, the Government should prepare general perimeter boundary plans with identifiable reference numbers to all such land. Once such plans are prepared, they should be published and a register of plots opened and retained by the Director of Surveys.***

(iv) ***That in order to check encroachment of riparian reserves, foreshores and other protected areas, the Government should enforce the following provisions:***

- ***Regulations 110 to 114 of the Survey Act (Cap. 299) on Coast foreshore reservations, tidal river reservations, lake reservations, reservation boundaries and swamp boundaries.***
- ***Section 48 of the Agriculture Act (Cap. 318) which grants the Minister powers to make rules for land preservation.***

- ***Sections 81, 82 and 85 of the Government Lands Act (Cap. 280) on reservation of water and foreshore as well as saving of public roads existing on any land.***
- ***Section 14 of the Water Act (Cap. 372) which grants the Minister power to establish protected catchment areas.***
- ***Part V of the Environmental Management and Co-ordination Act No. 8 of 1999 dealing with protection and conservation of the environment.***

3.2 Management of Land Registries

The management of land registries is appalling to say the least. The security of documents and records is in serious jeopardy and the day to day operations of the registries has exposed the sanctity of title to serious questions. Most of the land registries are ill-equipped, and record keeping is haphazard. In the Inland Registry at Nairobi and the Coast Registry at Mombasa, the system of record keeping is manual and records are either retrieved from deed files or old volumes. Some of them are torn, tattered and/or illegible due to overuse, age and poor storage conditions. This is the same with the district land registries where the old kalamazoo binders are torn, insufficient or unavailable to cater for registration of new titles. Oftentimes seals are left unsecured, green cards are freely floating around the registry and strongrooms are not locked exposing vital documents to risk. This mess in the management of records in registries, coupled with corrupt practices, has resulted in increased numbers of duplicated titles, loss and forgery of registry records thereby compromising the position of the holders of valid title documents.

It was found that most registries are understaffed and in some districts like Teso, Mt. Elgon, Suba, Malindi and Tana River, among others, there are no district land registries in existence and the titles are still issued from neighbouring districts. In the whole of North-Eastern Province there is not a single land registry. This causes a lot of delay and expense in obtaining title and many residents of these districts are denied a right to obtain title speedily. It was also found that the training and standard of education of the registry staff including the District Registrars is most wanting and requires serious re-consideration. In many cases District Land Registrars are clerical level staff whereas their counterparts in other Government departments are university graduates. The Commission received complaints that, with low education, these officers are easily manipulated by crafty members of the public and some people in authority. As mentioned above, all these factors combined seriously compromise the security of title.

It was also noted that there is a very large number of uncollected titles in district land registries as a result of demand of unofficial fees by registry staff, distance of registries from most members of the public and lack of adequate notification whenever titles are ready for collection.

The Commission recommends:

(i) That the Government should establish adequately equipped and staffed land registries in areas where the volume of land transactions justify such establishment.

(ii) That in North-Eastern Province and other areas where the volume of transactions is low the Government should establish adequately equipped mobile registries.

(iii) That university graduates be appointed to head land registries. There should be a bias towards graduates with land-related training.

(iv) That experienced personnel, such as registry inspectors, be appointed to check against abuse and negligence found in the land registries, as has been the case in the past.

(v) That improvement of record keeping be undertaken urgently in all registries. Towards that end, archivists should be appointed to manage registry records. As an urgent measure, the Government should reconstruct Government Lands Act (G.L.A.) volumes and commence computerization of land registries.

(vi) That the fees charged for all transactions at the Registries as authorized by statute should be prominently displayed at the entrance to all land registries to check against exploitation of ignorant members of the public.

(vii) That the collection centres of titles should be decentralized and adequate notification given whenever titles are ready. The centres need not be permanent since mobile centres would be adequate.

3.3 Delay in Registration and Issuance of Titles

Complaints of inordinate delay in registration and issuance of title were received by the Commission in various parts of the country. This is common in Trust lands where the Land Adjudication Act has been applied and in a few districts where the Land Consolidation Act applies. Examples were found in Homa Bay, Suba, Migori, Kuria and Meru districts and also in some parts of Rift Valley Province and Coast Province. Delay is also common in Government land areas on which are created settlement schemes.

The negative impact of the delay is illustrated hereunder:

3.3.1 Land Adjudication

The Land Adjudication Act (Cap. 284) provides for the ascertainment and recording of rights and interests in Trust land.

From the evidence gathered so far, it is evident that the Act has been seriously abused, at times in inhumane proportions, by those charged with the responsibility of implementing its provisions. The customary rights of some of the people ordinarily resident in an adjudication section have been ignored thus creating landlessness and poverty.

One glaring example of such abuse is the case of Mosiro and Iloodariak Adjudication Sections, Kajiado District, where the provisions of the Act were blatantly abused resulting in the disinheritance of a substantial part of the community over its rights to land.

In some instances in Trans Mara and Narok Districts section 26 of the Act, which provides for a 60-day period for lodging objections after the publication of the adjudication register, is ignored by entertaining objections long after the mandatory period provided for by the Act has expired. These actions result in unnecessary disputes and subsequent delay in registration of adjudicated land.

Members of the public in virtually all districts visited complained bitterly about delays in the hearing of appeals by the Minister as provided for under section 29 of the Act. This section of the Act gives an aggrieved party the right to appeal to the Minister against the determination of an objection by the Land Adjudication Officer under section 26 of the Act. Due to the large number of cases the Minister, under section 29 (4) of the Act, has delegated his powers to hear appeals to district commissioners. The district commissioners in almost every district visited by the Commission complained that owing to their many responsibilities they are also not able to cope with the large number of appeals. The consequence is a serious backlog of appeals and subsequent delay of registration of titles for periods of up to 30 years in some areas. The results of such delay or failure to act promptly on appeals are grave indeed.

Lack of title to land has been cited in various places as one of the causes of poverty. When ownership to land is uncertain, an individual hardly has any incentive to develop land leading to large parcels of land being left fallow. Where the Land Adjudication Act is applied, there are many instances where issuance of titles is delayed by objections lodged under section 26 of the said Act. Some of these objections are over 20 years old and at present no titles, even where there are no objections, can be issued

before the Adjudication Register is finalized. Critical cases include Homa Bay, Suba and Meru Districts where adjudication has been going on for over 30 years.

The Commission recommends:

(i) ***That the Ministry should ensure that in all areas undergoing land adjudication the provisions of the Act are strictly adhered to.***

(ii) ***That section 29 (4) of the Act which allows the Minister to delegate his powers of hearing appeals only to "any public officer by name or to the person for the time being holding any public office", should be amended to allow such delegation also to "competent persons of integrity (preferably local) who have a working knowledge of both written and customary land law", so that such persons and any public officers of integrity other than District Commissioners can be appointed to clear the backlog of pending Minister's land appeals.***

(iii) ***That more land adjudication officers be appointed under section 4 (2) of the Land Adjudication Act to hear and determine the backlog of objections in areas undergoing land adjudication.***

(iv) ***That as a matter of priority the Government should budget and provide funds for the finalization of the on-going land adjudication programmes in the country.***

(v) ***That, in addition, section 27 of the Land Adjudication Act (Cap. 284) should be amended as set out in Chapter 6, Paragraph 6.4 of this Report to allow for parcels unaffected by objections in an adjudication section to be registered.***

3.3.2 Settlement Schemes

Settlement schemes were created by the Government to alleviate landlessness and to address the squatter problem. However, these schemes have been plagued by delay in issuance of titles to many bonafide allottees. The delay in forwarding a final list of allotees to the Director of Settlement and the unauthorised alteration and manipulation of the same by settlement officers have resulted in duplication of ownership documents and led to confusion in and dispute over the determination of rightful ownership. The Commission has received complaints that people with land elsewhere are allocated settlement scheme plots meant for genuine squatters and the landless. Public officers have also been given titles to these plots at the expense of genuine squatters and the landless. These problems have been cited in Kinale Forest Settlement Scheme, Ol

Bolossat in Nyandarua District, Shanzu in Mombasa, Mautuma Settlement Scheme in Lugari and Milimani Scheme in Trans Nzoia among others.

The Commission recommends:

(i) ***That the Director of Settlement should be directed to expedite the procedures leading to the issuance of titles in all settlement areas to avoid fraudulent manipulation of the register of allottees.***

(ii) ***That public officers and other persons who own or have been allocated land elsewhere in the country should not be allocated land in any new settlement schemes.***

(iii) ***That in selecting who will be settled in new schemes, a strict verification process should be put in place to ensure that only squatters, the landless and deserving cases are settled.***

3.3.3 Land Consolidation

In the districts of Meru North and Meru South, the Commission heard that although land consolidation began as early as 1957, most of the residents are yet to be issued with title deeds. The Land Consolidation Act (Cap. 283) was enacted to provide for the ascertainment of rights and interests and for the consolidation of land in the Special Areas (former native lands); for registration of title to; and of transactions and devolutions affecting such land and other land in the Special Areas. This Act revoked the Native Land Tenure Rules, 1956 which previously applied to such land.

The Land Adjudication Act (Cap. 284), was enacted in 1968 to provide for the ascertainment and recording of rights and interests in Trust land without the process of consolidation. Section 3 provides that it could be applied to those areas in respect of which no Record of Existing Rights had yet been completed and certified under the Land Consolidation Act. Consequently, the Land Adjudication Act was applied between 1970 and 1972 to 13 districts, which were then undergoing the process of land consolidation. These were: Bungoma, Busia, Kakamega, Baringo, Nandi, Kajiado, Kericho, Machakos, South Nyanza, Elgeyo Marakwet, Kisii, Siaya and Kisumu. It was not, however, applied to those areas of Meru District which were undergoing land consolidation. The Land Adjudication Act was applied in 1975 to all areas of Trust land situated within that district, being areas to which the Land Consolidation Act had not been applied.

Those who presented their views to the Commission complained that the relocation procedures in the Land Consolidation Act are unacceptable and this leads to delay in the issuance of titles.

The Commission recommends:

(i) ***That the Land Adjudication Act should be applied by the Minister for Lands and Settlement to those adjudication sections whose Records of Existing Rights have not been completed and certified under section 16 of the Land Consolidation Act, as was done to the 13 districts mentioned in the relevant subsidiary legislation under the Land Adjudication Act.***

(ii) ***That along with the above recommendation, section 27 of the Land Consolidation Act should be amended to allow for the registration of all those consolidated parcels which are not affected by objections to the adjudication register lodged under section 26 of the Act as set out in Chapter 6 paragraph 6.5 of this Report.***

3.4 Land Buying Companies, Co-operative Societies and Partnerships

Land buying companies, land buying co-operative societies and land buying partnerships are entities registered under the Companies Act (Cap. 486), the Co-operative Societies Act (Cap. 490) and the Registration of Business Names Act (Cap. 499), respectively. These entities were formed by *wananchi* soon after independence and thereafter with the principal aim of acquiring farms for investment and/or settlement.

After the acquisition of farms, major problems soon developed. Some of these were brought to the attention of the Commission and include—

- perpetual wrangles between directors and members;
- wrangles amongst the directors themselves;
- wrangles amongst members themselves;
- non-compliance with the statutory provisions of the laws governing their operations e.g. no accounts, no annual general meetings, no annual returns, etc;
- mismanagement by directors and management committees;
- failure to prepare members' registers and frequent and fraudulent alterations of registers to introduce bogus members; and
- protracted litigation.

The Commission received information that in the mid 1980's, in an endeavour to address the problems, the Government directed all these groups to subdivide their farms amongst their members and then liquidate themselves. Whereas a few of them completed the subdivision and settled their members, a large number of them in areas like Laikipia, Nakuru, Trans Nzoia, Nyeri, etc., have not yet subdivided their farms.

While this may appear the way forward in resolving this thorny issue, a number of problems come to mind:

(a) That the procedure adopted by some of these groups whereby they simply subdivided the farms and transferred the plots to members contravenes the provisions of the Companies Act and the Co-operative Societies Act. In law, a limited liability company can only distribute its assets amongst the shareholders by—

- outright sale to members pursuant to an extraordinary resolution;
- applying to court for reduction of its share capital and then distributing the capital so reduced to its members in cash or in assets e.g. land; or
- subject to various legal requirements, pass a winding-up resolution and appoint a liquidator who would then liquidate the company and distribute its net assets amongst the shareholders.

The last option is commonly chosen by a few groups that subdivide their farms and choose a liquidator for the purpose. The liquidator could be the Official Receiver, or he could be from the private sector. For reasons of high fees, most companies tend to appoint the Official Receiver as liquidator. For various reasons, the Official Receiver has proved to be unable to wind-up the large number of companies that require his services. Those groups that therefore correctly choose this route of winding-up their affairs and distributing assets among members get bogged down at this point and further complications develop.

(b) That subdivision of farms in semi-arid areas like Laikipia, Machakos, parts of Nyeri (Kyeni), Nakuru (e.g. Mai-Mahiu) has had the effect of creating communities who cannot sustain themselves and become dependent on the Government for food relief.

(c) That the subdivision of highly productive estates into small uneconomic units may not be the best policy for the country's food security and economy.

The Commission observed that for some unexplained reasons most land buying companies and co-operative societies do not seek Land Control Board's consent to subdivide and transfer their farms which is against the provisions of section 6 (1) of the Land Control Act (Cap. 302).

This Commission is still studying the problem and will be making further recommendations in its Final Report. In the interim, however, ***the Commission recommends:***

(i) *That subdivision of farms in arid and semi-arid areas should not be approved by the relevant Land Control Boards.*

(ii) *That the subdivision of all agricultural properties should not be undertaken before the consent of the relevant Land Control Board is obtained as required by the Land Control Act (Cap. 302).*

(iii) *That subdivision of farms in high potential areas into uneconomic units should not be approved by the relevant Land Control Boards.*

(iv) *That subdivision of estates with cash crops should not be consented to by the relevant Land Control Boards.*

(v) *That where subdivision can be justified, the provisions of the relevant laws (e.g. the Companies Act, the Co-operative Societies Act and the Physical Planning Act — in respect of change of use) must be strictly observed.*

3.5 Succession/Inheritance Problems

The views received from members of the public show that the process of inheritance under the Law of Succession Act (Cap. 160) is lengthy and cumbersome. The lengthy procedure makes succession costly. Where the deceased is a person of humble means and has died intestate and the only asset is a parcel of land, the cost of succession under the current rules could at times exceed the value of the land. Where the estate is an undivided share of the deceased in the family land, the lengthy procedures and the cost involved result in title to family land remaining in the names of deceased persons for generations causing family disputes and promoting fraudulent dealings.

Equally, the public complained of the inappropriateness of advertising applications for estates' representations in the *Kenya Gazette*, which is inaccessible to most people.

Similarly, the public recommended decentralization of the procedures so that succession matters are heard by the Resident Magistrates' Courts instead of the High Court to lessen cost and improve accessibility.

The Commission recommends:

(i) *That the Rules Committee under section 97 of the Law of Succession Act (Cap. 160) should publish simplified rules of procedure to be followed in obtaining letters of administration.*

(ii) *That the requirement that applications for grant of probate or letters of administration be published in the Kenya Gazette*

should be varied to include sufficiency of notice being published at Chiefs', District Officers' and District Commissioners' offices. This will reduce costs considerably.

(iii) ***That the Chief Justice should decentralize powers of the High Court to Magistrates' Courts to speed-up the process.***

3.6 The Physical Planning Act (No. 6 of 1996)

The Physical Planning Act, 1996 provides for the preparation and implementation of physical development plans and for connected purposes.

The Act was enacted in 1996 and brought into operation by a Ministerial notice on 29th October, 1998.

The Minister's notice was itself published as Legal Notice No. 40 of 23rd April, 1999, which means that the Act has now been in operation for about $2^1/_2$ years.

Although the Act has been in operation for a fairly short period, several problems have already been brought to this Commission's attention. Some of the problems are—

- the application of the Act to rural areas imposes a heavy financial burden on land owners;
- the Act has introduced a new bureaucratic and expensive bottleneck in all land dealings, rural and urban;
- there are major operational conflicts between the Departments of Lands and Physical Planning as well as conflicts between local authorities and the Department of Physical Planning; and
- local Physical Development Plans are not given adequate publicity to enable affected parties to object to the proposals contained in such plans.

Since the Act applies to the whole country, *wananchi* are now required to obtain the approval of the local authority and the Director of Physical Planning in respect of any development affecting their land. "Development" is defined to include subdivision, change of user, extension of lease, buildings, extensions to existing buildings, etc. The Act (section 41(2)) requires that applications for subdivision of land should be prepared by a registered physical planner and submitted to the local authority, which must refer every such application to the Director for his comments. Registered physical planners charge substantial fees, and they are only available in a few major towns. If one has to import a planner from Nairobi or Mombasa, the costs go up considerably. The Commission

heard at many district meetings that *wananchi* are opposed to this added financial burden. If, for example, a landowner is simply subdividing his land amongst his children, he does not understand why a physical planner, the local authority and the Director should be involved. With the privatisation of survey services by the Government the process of subdividing land is already too high, and should not be complicated and made more expensive by additional bureaucracy.

Urban landowners are concerned that the Act has introduced and empowered a new authority to deal with land matters, in addition to the existing Departments of Lands, Survey, Valuation and local authorities. Every conceivable transaction involving a piece of land such as change of user, extension of lease, subdivision, etc., has to be approved by the Director of Physical Planning and the local authority. This is in addition to the approvals that the landowner must obtain from the Commissioner of Lands under the terms of his title deed. If the land happens to be agricultural, one has to seek consent of the Land Control Board. Most dealings with land promote development, create employment and contribute to the overall growth of the economy. The law should facilitate and simplify dealings in land.

Detailed recommendations will be made in the Commission's Final Report. Meanwhile, ***the Commission recommends:***

(i) That bearing in mind that Kenya's economy is agro-based and taking cognisance of the reported financial burden the Act is imposing on dealings with agricultural land, the Minister should invoke section 2 of the Act to exempt application of the provisions of the Act to agricultural land as defined under the Land Control Act (Cap. 302).

(ii) That in view of the widespread public interest aroused by the sometimes improper allocation of public utility plots throughout Kenya, whenever a Local Physical Development Plan has been prepared, the Director should ensure that a billboard giving full details is erected on the property affected by the proposed development when giving notice to the public in accordance with section 26 of the Act. The Director should also ensure that the 30-day period for inspection provided by the above section does not commence before the erection of the billboard.

3.7 The Iloodariak/Mosiro Land Adjudication Sections

The Commission has received voluminous documentary evidence and also heard oral representations from representatives of disputing groups concerning the problems of the above-stated adjudication sections in Kajiado District.

It was alleged by one group that the whole adjudication process was flawed while the opposing group maintained that it was in order. A Government task force set up in 1991 confirmed irregularities in the Mosiro Adjudication Section. Subsequently, the Government recalled all the registers for the Mosiro Registration Section and placed restrictions against titles in the Iloodariak Registration Section. Further, the Government published the Land Adjudication (Amendment) Bill, 1999, to amend the Land Adjudication Act (Cap. 284) in order to, *inter alia*, cancel certain titles to land which were irregularly registered in the two adjudication sections. For reasons which are not apparent to the Commission the Bill was not enacted.

The complexity of the issues raised in the dispute demands that the Commission looks at the whole matter more closely.

In the meantime, this Commission recommends that the present status quo be maintained until the Commission finalizes its deliberations and makes appropriate recommendations in the Final Report.

CHAPTER 4

CRITICAL LAND ISSUES PECULIAR TO THE COAST PROVINCE

4.1 Preamble

Land in Kenya is, and has always been, a politically sensitive and emotive issue. However, in the ten-mile Coastal Strip of Kenya, owing to its peculiar historical and legal origins, the land question is potentially explosive. Indeed, to paraphrase one member of the public who testified before the Commission, the land issue in the Coastal Strip is "*a time bomb, which unless defused quickly, is going to explode.*" It was partly in recognition of this fact that, in 1972, a Special Committee, comprising 5 Cabinet Ministers and 2 Permanent Secretaries, was set up by the President to look into the land problems in the ten-mile Coastal Strip. Further, in 1976, a Select Committee of Parliament was formed by resolution in the following terms:

"That since land tenure system on the 10-mile strip along the Coast Province has created a lot of problems for the indigenous people in that they are regarded as squatters who have no right to own that land, this House resolves to set up a Select Committee—

(i) to probe the origin of these problems;

(ii) to investigate the right to own the available land since the transfer of the administration of the strip from the then Sultan of Zanzibar; and

(iii) to write recommendations to the House on how to resolve these problems permanently."

This Commission has had the advantage of reading the Report of the 1976 Parliamentary Select Committee. Although this Commission has not, despite numerous attempts, been able to access the Report of the 1972 Special Presidential Committee, nevertheless, reference is made to its recommendations in the Select Committee Report as follows:

"This Committee met several times in 1972 and made various recommendations which we have found of great assistance in our own investigations. But we were unable to find out what the fate of those recommendations were. Thus, up to the time this Committee was appointed, no systematic efforts had been made to solve the Coastal land problem."

This Commission has given serious consideration to the findings and recommendations of the Parliamentary Select Committee and agrees with

them. Regrettably, it appears, from the evidence gathered from the Coast Province by this Commission, that most of those recommendations have not been implemented to-date. Thus up to the time this Commission was appointed, still no serious systematic efforts appear to have been made by the Government to solve the coastal land problems. On the contrary, the abuse of land laws may have had a greater negative impact on coastal lands than elsewhere in Kenya. As a result, the coastal strip now has probably the largest single concentration of landless indigenous people in the whole country, most of whom live as "squatters", "licensees", "unprotected tenants" or "tenants-at-will" on their ancestral lands.

The apparent failure or inability by successive governments to find a lasting solution to the land problems of indigenous coastal people has engendered in them a sense of bitterness, hopelessness and despair about any prospects of their land rights ever being restored. This Commission, like the Parliamentary Select Committee, feels that the coastal land problems are volatile and of such importance and magnitude for the nation that they must be addressed promptly in order to put right the hurts, injustices and errors of the past.

For this reason, the Commission feels that these problems cannot wait until the Final Report is written and has therefore taken the decision to address them in this Interim Report, as hereunder.

4.2 The Land Problems of the Coastal Strip

The coastal land problems are well-known and include the following:

- "Squatters" on Government land.
- Landlessness.
- Mass evictions.
- Absentee landlords.
- Idle land.
- Tenants-at-will/Unprotected tenants.
- Access to the sea.

It is the view of this Commission, that the major cause of these problems is the Land Titles Act (Cap. 282) and that these problems can neither be fully appreciated nor meaningfully addressed without first understanding the history and operation of the Act itself.

4.3 The Land Titles Act (Cap. 282)

4.3.1 Analysis

The Land Titles Act, formerly the Land Titles Ordinance, was enacted by the colonial Government on the 30th November, 1908 and is one of the six registration statutes in Kenya. At the time of its enactment, there were uncertainties regarding how much land was "owned privately" so that the limits of "Crown" land could not be defined precisely and, therefore, there arose a need to determine them.

The colonial authorities borrowed the procedures for adjudicating private claims from an Act of Ceylon (Act No. 3 of 1907, Ceylon) and incorporated them in the Land Titles Ordinance. The purpose of this Ordinance was to "*make provision for the removal of doubts that have arisen in regard to titles to land and to establish a Land Registration Court.*"

Although the Land Titles Act could have been applied to any part of Kenya, nevertheless, it was only applied to the following areas of the Coast Province, namely:

(i) Malindi District, w.e.f 15/1/1909.

(ii) Mombasa Island, w.e.f 1/7/1911.

(iii) Part of Tana River District, w.e.f 15/11/1913.

(iv) The Lamu Archipelago and the Island of Lamu, 1913.

(v) The area lying between Mombasa and Kilifi, w.e.f. 1/7/1914.

(vi) The area lying between Mombasa and Umba River, w.e.f. 16/9/1914.

(vii) The Sultanate of Witu, 1915.

The objective of the colonial Government was to remove the thitherto existing uncertainties regarding titles to land in order to encourage the seemingly unwilling white settlers to exploit the resources in the rich Coastal belt for the benefit of the "Mother" country. The Coast was suitable for the production of cotton, rubber, coconut, and sisal fibre among others.

The Act required all persons "being or claiming to be proprietors of or having or claiming to have any interest whatsoever in immovable property" to lodge their claims within six months with a Land Registration Court presided over by a Recorder of Titles and provided that all land in respect of which no claims were made within the prescribed period was

deemed to be "Government land." Where the recorder was satisfied that a particular claim was valid he would then issue a certificate to that effect, which under section 21 of the Act is "*conclusive evidence against all persons (including the Government) of the several matters therein contained, and a certificate of ownership shall be conclusive proof that the person to whom such certificate is granted is the owner of the coconut trees, houses, and buildings on the land.*" This fundamentally and radically altered the concept of land ownership under African customary tenure governing the indigenous coastal communities whereby a clear distinction was always made between the ownership of the soil and the products thereof, the latter of which always belonged to the cultivator.

Further, there is evidence that the adjudication process under the Act was biased against indigenous communities. While the Arabs, Europeans and some Asians had lodged their claims, which were duly adjudicated, an overwhelming majority of the indigenous coastal people, for various reasons, did not lodge any claims. The reasons for such failure are ably articulated in the Parliamentary Select Committee Report as follows:

> **"The reasons why most indigenous coastal people made no claims as required by the Ordinance are not difficult to understand. First of all, the indigenous people of the strip had no knowledge of the existence of the Ordinance. Even if they did they never understood its provisions. Secondly, as we have said earlier the Ordinance had no relevance to indigenous conceptions of land tenure. That they should be asked to lay claims upon the soil was a startling proposition. Thirdly, the Ordinance was clearly biased against these people. For the colonial government and courts believed that no African whether as an individual or a community had any title in land. Hence for purposes of the 1908 and other colonial land Ordinances land occupied by Africans was always treated as ownerless. Fourthly, the actual investigation of claims was done mainly by Mudirs—usually Mazrui Arabs absorbed into colonial administration who were generally unsympathetic to the indigenous people. Some witnesses who appeared before the Committee even alleged that in the very few cases where claims by indigenous people were allowed, the size of such land was deliberately reduced and the whole often set wholly within land owned by Arabs. Such people were soon evicted simply by fencing them in! Fifthly, the time limit within which claims could be made was extremely short. And indeed after 1922 claims would no longer be received at all. Besides, when in 1926 three "native reserves" were established in Kwale and Kilifi any further doubts concerning the possibility of ever receiving claims from indigenous coastals were laid to rest. For with the exception of 13 pockets of land in Kwale, land comprised within**

these reserves were deliberately delineated *outside* the ten-mile strip. New legislations passed in 1938 extinguished any other rights that "natives" in Kenya as a whole might have had *outside* their respective reserves. Sixthly, because the Ordinance had introduced a basically British conception of land i.e. that whatever is attached to the land becomes part of that land, these people also lost whatever rights to the product of the soil, e.g. coconuts, etc., that they may have had under Muslim law and their own customary law. Although a few people were compensated for permanent improvements, the majority simply remained on the land in the belief that it was still theirs; a situation which was perpetuated by the fact that most of the new landowners were never resident on the land anyway."

By 1914 the Act had been applied not only to the whole of the ten-mile coastal strip, but also to Tana River District and most of the Coast Province. However, the adjudication process under the Act concentrated powers in one person, namely, the Recorder of Titles, who was required to hear and determine each claim. The process was slow, tedious and expensive. As a result, by 1922 when the exercise was suspended, only 5,300 out of the over 12,700 claims had been adjudicated and at a cost in excess of £110,000. The exercise was resumed in 1956 but strictly to process only those claims submitted before 1922. The adjudication process was ultimately completed in 1975 leaving behind a mass of landless indigenous people at the Coast of Kenya.

On 28/10/83 the then Minister for Lands and Settlement, by Gazette Notice No. 4056 (Appendix E of this Report) notified the public that the Government had "*decreed that all persons with an interest in claims which were left undecided or who have any valid claim in any part of the Coast Province to which the Land Titles Act is applicable is required to appear in person or to submit particulars of their interests in any claims to the Recorder of Titles on or before 30/4/84.*" As a result of this notice some 8,842 claims were lodged mainly in Lamu, Malindi and Tana River Districts. These claims remain unadjudicated to-date. This Commission has considered the validity of the said Notice *vis-a-vis* the provisions of section 53 of the Act upon which the Minister relied. It is the view of the Commission that neither section 53, nor any other provision of the Act, gives the Ministe powers to so "decree" and that, in view of the clear provisions of section 37 of the Act, the 8,842 claims made pursuant to that notice may very well be legally invalid.

As stated earlier, the enactment and application of the Land Titles Act was, and still is, the single-most important cause of the land problems of the ten-mile Coastal strip. In this regard, the Commission notes with

approval the conclusion reached by the Parliamentary Select Committee that:

> **"Adjudication of claims under the 1908 Ordinance is, in our view, the *primary* cause of landlessness by indigenous people in the ten-mile strip as we know it today. For it ruled out the possibility that these people and the sections of non-Mazrui Arab communities could ever acquire title or guaranteed access to land during the colonial period."**

The application of the Act has resulted in many adverse consequences, some of which are considered hereunder:

4.3.2 Consequences

(i) "Squatters" on Government Land

In the Coast Province the word "*squatter*" as commonly known is a *misnomer* as many of these "*squatters*" are actually residing on their ancestral land. The phenomenon of "*squatters*" on Government land emanates directly from section 17 of the Land Titles Act, by which all land concerning which no claim has been made is deemed to be Government land. The net effect of this provision is to legally deprive the indigenous people of the Coast Province of their customary land rights and transform them into "*squatters*" on their ancestral land.

For the various reasons outlined above, an overwhelming majority of the indigenous coastal people did not lodge claims under the Act within the prescribed period and, as a consequence, their ancestral land vested in the Government by *default* and their pre-existing customary land rights were extinguished without any compensation or due process whatsoever. This land became unalienated "Crown land" and was therefore available to the colonial authorities for disposal under the then Crown Lands Ordinance. Much of that land was then either indiscriminately sold or granted in leaseholds to non-indigenous coastal people especially Arabs, Europeans and some Asians.

At independence, the remaining unalienated "Crown land" became "Government land" and was treated by the post-independence Government in exactly the same way as had been done by the colonial government: freehold and leasehold titles were indiscriminately granted over that land mostly to non-indigenous coastal people. As the changes in the land ownership structure were taking place, the indigenous people continued to occupy the land and to effect permanent improvements and grow

perennial crops thereon in the belief that the land was still theirs. By and large, this sad state of affairs still obtains today.

(ii) Absentee Landlords/Idle Land

From the historical background to the Land Titles Act, it is clear that the effect of adjudication of claims under the said Act was to vest title to land in non-indigenous coastal people at the expense of the local community.

As earlier stated, many of those who obtained titles to this land, either through adjudication process under the Land Titles Act, or through grants from the colonial or independent Government, have never been resident on or utilized "their" land; some of these "land owners" have either left the country or died without heirs, while others merely collect "*ijara*" (rent) through "agents". It is this group of "land owners" who are commonly known as *absentee landlords.*

This category of land is invariably occupied or utilized by "squatters" or "tenants-at-will" who, in most cases, are the original owners of the land under their customary laws but who, unfortunately, have no measure of statutory protection and have therefore been victims of eviction, sometimes *en masse*, harassment and intimidation engineered by title holders or those purporting to act on their behalf.

Due to the fact that the original landowners have continued to use, occupy and assert claims over the land, even after titles had been granted to the new landowners for periods exceeding twelve years, it is probable that they have thereby acquired title over the same by adverse possession and that the titles of the new landowners have been extinguished. Section 38 of the Limitation of Actions Act (Cap. 22) would require the original landowners to apply to the High Court for orders that they be registered as proprietors of the land in question in place of the title holders. However, bearing in mind the prohibitive costs of land, and the delay involved in litigation, most of them cannot take advantage of the remedy provided under this section.

Another problem closely associated with that of absentee landlords and which, in the view of this Commission, is inimical to the development of this country, is that of *idle land*, a phenomenon that is common in registered areas of the Coast Province. The titles to this land are in many cases held by non-coastal people and for speculative purposes. These lands are not occupied, developed or meaningfully utilised.

(iii) Tenants-at-Will

As already noted, the effect of the Land Titles Act was to vest titles to most of the land along the ten-mile coastal strip in non-coastal people on either freehold or leasehold basis. In most of these cases, the land was and continues to be occupied by the original traditional owners with the full knowledge and consent of the new landowners; these traditional landowners have effected permanent improvements on the land, grown perennial crops and at times shared the fruits of their labour with the new landowners. Many of them paid goodwill ("*kilemba*") and continue to pay a monthly or annual rent ("*ijara*") to the landlords or their "agents". This has resulted in a peculiar relationship in the nature of a periodic tenancy between the original occupiers of this land and the new landowners, which at the Coast is commonly referred to as "*tenancy-at-will*".

By reason of the provisions of section 21 of the Land Titles Act, which introduced into the coastal strip, a basically British conception of land tenure and doctrine of fixtures i.e. that whatever is permanently attached to the land becomes part of the land, all the permanent improvements effected and perennial crops, e.g. coconuts, etc., grown on the land by the indigenous occupants became the absolute property of the new landowners. This has deprived the indigenous occupants of their ownership of such improvements and crops, which they had previously enjoyed under their own customary laws.

Moreover, this peculiar "tenancy" relationship has often created conflicts and tension between the "landlord" and the "*tenant-at-will*" which have been compounded by the fact that, presently, the "*tenant-at-will*" lacks any measure of statutory protection from arbitrary and capricious action by the landlord. There is therefore urgent need to provide statutory protection to these "*tenants-at-will*" in the same manner as tenants are protected under the Rent Restriction Act (Cap. 296) or the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap. 301).

(iv) Mass Evictions

This problem was graphically captured by the 1976 Parliamentary Select Committee in the following terms:

> **"Many landowners, particularly the new ones have taken advantage of this situation to carry out mass evictions from their land. We received many complaints ranging from**

evictions *via* actions in trespass to general harassment and intimidation of resident "squatters". For example, in Kilifi we were told that there were over 300 trespass cases pending in respect of farms that had recently changed hands. Apart from creating a lot of tension between landowners and the landless, mass evictions have raised anew the old question of the nature of the "squatter's" interest in permanent improvements made by him. The most important of these are cashew and coconut trees and, occasionally, houses."

In the view of this Commission the position described above has not changed for the better; if anything, it has worsened. A large number of indigenous coastal people complained bitterly before this Commission of having been forcibly evicted or threatened with such eviction from the lands which they have occupied for generations. Complaints of such evictions, or threats thereof, were made by the residents of Kaliapapo, to the West of Malindi Town, salt farms, to the North of Malindi Town, Wasini Island in Kwale District, among others. In these and similar cases, there is a conflict between customary land rights and those conferred by statute: while on the one hand the indigenous occupants assert their pre-existing customary rights of ownership, the title holders, on the other hand, invoke the "supremacy" of statutory title. This unhappy relationship between the traditional occupants and the title holders has, at times, led to violent clashes between them thereby impacting negatively on the economy (tourism) and the value of the land in addition to posing serious threats to public safety and security.

(v) Access to the Sea

Substantial numbers of the Coast people derive their livelihood from fishing and, to them, access to the sea and fish landing sites are indispensable. However, this Commission has noted with concern that the unchecked adjudication and allocation of the land adjoining the sea have left little or no access to the sea and expropriated traditional fish landing sites. For example, in the North Coast, virtually all the beach plots, with the exception of Kenyattta Public Beach, are privately owned.

In the South Coast, this problem has been compounded by the hotel and individual landowners who have not only blocked access to the sea, but also built concrete sea walls thereby preventing the breeding of various types of fish in the mangrove ecosystem.

The sea is a global common and a vital economic resource. Its beaches provide an important recreational resort. It is unfair for the sea, including its beaches, to be reduced to an exclusive reserve for a privileged few as doing so jeopardizes the well-being of a vast number of Kenyans, threatens food security and negates the Government's present policy of poverty eradication.

The Commission has already addressed this subject alongside that of lake shores in the context of fish landing sites and other public utilities in need of protection for the common good in Chapter 3, Paragraph 3.1 of this Report.

This Commission recommends:

A. Squatters on Government Land

EITHER

(i) That the Government should enact legislation to divest itself of ownership of all that land that became "Government land" by virtue of section 17 (1) of the Land Titles Act. Such legislation should include the following provisions—

(a) deem all land that became "Government land" by reason of the operation of section 17 (1) of the Land Titles Act to be "Trust land";

(b) vest all that land in the respective county councils within whose jurisdiction they are situated as TRUSTEES for the persons ordinarily resident on those lands;

(c) exempt all that land from the application of section 53 of the Trust Land Act which empowers the Commissioner of Lands to administer Trust land on behalf of county councils;

(d) apply the provisions of the Land Adjudication Act to those lands;

(e) require that within a prescribed period of time after the commencement of the proposed legislation, special land adjudication officers be appointed by the Minister for the respective districts within which the lands are situated and that once so appointed the special land adjudication officers shall, within a prescribed period of time, declare the areas within their respective districts that are deemed to be Trust lands as adjudication sections for purposes of ascertainment and recording of rights and interests in

accordance with the provisions of the Land Adjudication Act.

OR

(ii) That since that land is deemed to be Government land under section 17 (1) of the Land Titles Act, and has not been wholly adjudicated, the Government should, under the Government Lands Act, promptly grant freehold titles to all such land to the indigenous occupants without having to go through the process of adjudication of claims. For purposes of transparency of the process, before any steps are taken in this regard, there should be widespread publicity and public discussion of the intended programme by the people ordinarily resident in the areas concerned.

Further, the Government should announce on a location by location basis that all persons having claims to the land they occupy in the location should submit their written claims in respect thereof by a certain date. In order to exclude fraudulent claims, all such claims should be verified by a committee of elders appointed by the local residents.

B. Absentee Landlords/Idle Land

EITHER

(i) That as regards idle land that is unoccupied, abandoned, mismanaged or undeveloped the Government should repossess, through an appropriate constitutional amendment, all such land for redistribution to the indigenous occupants.

OR

The Government should, through the Settlement Fund Trustees (S.F.T.), initiate a land purchase scheme in the ten-mile coastal strip for the purposes of settling the landless indigenous people of the Coast, as happened in the "million-acre" scheme in the former white highlands at independence.

OR

That the Minister for the time being responsible for Agriculture should invoke the provisions of sections 51, 64 and 187 of the Agriculture Act (Cap. 318) and make preservation, development and/or management orders over idle and under-utilised land.

(ii) That in respect of agricultural land, the Government should, where applicable, enforce the provisions of section 33 of the Government Lands Act (Cap. 280) relating to development covenants and, where there is breach of such covenants, invoke the forfeiture provisions of section 77 of the Act.

C. Tenants-at-Will

That the "tenants-at-will" whether on rural or urban land be afforded statutory protection in the same manner as tenants are protected under the Rent Restriction Act (Cap. 296) and the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap. 301).

D. Access to the Sea

That there should be established throughout the coastline convenient public utility plots to serve not only as fish landing sites but also as public recreational centres. Such public utilities should be registered and titles issued to the Government to hold and manage them in trust for all those engaged in the fishing industry and the general public.

E. General

That the Government should without any further delay implement the recommendations of the 1976 Parliamentary Select Committee on the issue of land ownership along the ten-mile coastal strip of Kenya to the extent that those recommendations have not been implemented and are not in conflict with the recommendations of this Commission.

CHAPTER 5

CONCLUSION

This Interim Report is a result of preliminary analysis of the evidence received and observations by the Commissioners and is by no means exhaustive or conclusive. Its purpose is mainly to recommend urgent administrative and some legislative interventions to tackle perennial land problems that have brought about unnecessary land disputes, misery and, at times, tension in various parts of the country. Exhaustive and more conclusive recommendations, both short-term and long-term, in tackling the land question and reforming the land law system will be made in the Final Report.

The Commission must report, even at this interim stage, that a substantial proportion of the problems facing Kenyans today regarding land are, as a result of historical circumstances, malpractices apparently rooted in corruption and non-observance of the principles of trusteeship, and lack of integrity, honesty, patriotism, competency and professionalism. The Commission is of the view that unless there is a general resolve by the people of Kenya to revamp the virtues of honesty, integrity, patriotism, hardwork, competence and professionalism, there is unlikely to be any cure for land problems afflicting the Kenyan society.

The Report has been formulated without any reference to the land policy framework paper which is still under consideration by the Commission.

CHAPTER 6

PROPOSED LEGISLATIVE AMENDMENTS

6.1 PROPOSED AMENDMENTS TO THE LAND CONTROL ACT (CAP. 302)

6.1.1 Proposed Amendments on Controlled Transactions

(i) **The interpretation part of the Act, section 2 should be amended to include the following definition:**

> **"'Family land' includes land where a person lives with his spouse together with his dependants and they derive part or the whole of their livelihood from that land."**

(ii) **Insert the following new subsection (3) of section 9:**

> **"(3) No person other than the Board whose membership is prescribed in Paragraph 1 of the Schedule shall give consent to transactions affecting agricultural land and any person giving or purporting to give such consent shall be guilty of an offence and liable to a fine not exceeding two hundred thousand shillings or to imprisonment for a term not exceeding three years or to both such fine and imprisonment."**

(iii) **Section 9 (1) (*b*) of the Act should be amended to include a new clause (v) to read thus—**

> **"(*a*) in the case of family land, the sale may dispossess and make landless members of the family or dependants who have generally depended on that land;**
>
> **(*b*) where the applicant is married, if he is not accompanied by the spouse(s) and adult children."**

(iv) **A new subsection (1) (*d*) be added to section 9 to read thus:**

> **"refuse consent in any case in which the applicant is registered as a trustee or administrator of the land and the approval of all beneficiaries has not been obtained."**

(v) **Amend the Application For Consent of Land Control Board Form 1 in the Schedule by inserting paragraph 1(*d*) thus:**

> **"Indicate whether as a Sole Proprietor, Trustee/Administrator"**

(vi) **Amend paragraph 1 of Form 1 in the Schedule by inserting new sub paragraphs (*d*) and (*e*) thus:**

> **"(*d*) if married, whether the spouse(s) and adult children are present and have approved of the controlled transaction;**
>
> **(*e*) if trustee/administrator, whether the beneficiaries have approved of the controlled transaction."**

6.1.2 Proposed Amendments on Board Membership

(i) **Delete paragraph 1 of the Schedule to the Act and insert the following new paragraphs 1 and 2:**

"1. A Land Control Board shall consist of—

> **(*a*) not less than six and not more than nine persons resident within the area of jurisdiction of the Board who shall be owners or occupiers of agricultural land within the area of jurisdiction of the Board and at least one-third of whom shall be women;**
>
> **(*b*) two persons nominated by the county council having jurisdiction within the area of jurisdiction of the Board;**
>
> **(*c*) not more than three public officers responsible for agriculture, survey and physical planning matters in the District; and**
>
> **(*d*) the District Land Registrar who shall be the secretary of the Board;**
>
> **all appointed by the Minister.**

2. At the first meeting of the Board, the Members shall elect a chairman from among the members comprised in section 1 (*a*) above."

(ii) **Renumber the subsequent paragraphs in the Schedule.**

6.1.3 Proposed Additional Regulations Under the Land Control Act

IN EXERCISE of the powers conferred by section 25 of the Land Control Act, the Minister for Lands and Settlement makes the following Regulations—

The Land Control (Amendment) Regulations, 2001

(1) These Regulations may be cited as the Land Control (Amendment) Regulations, 2001 and shall come into force on .....

(2) Every member of the Board shall hold office for a term of three years from the date of appointment to the Board but shall be eligible for re-appointment for a further term of three years subject to satisfactory performance during the first term, provided that no member shall hold office for more than two consecutive terms of three years each.

(3) A person shall not qualify to be appointed to the Board unless he is a holder of at least a certificate in the Kenya Certificate of Secondary Education or its equivalent and has a working knowledge of either written land law or customary law of the community of the area.

(4) Vacancies arising in the membership of a Board by reason of death, conviction for a crime involving fraud or dishonesty, incapacity to perform the functions of office or otherwise shall be filled immediately they occur.

(5) The secretary of the Board shall be responsible for the maintenance of proper minutes of all meetings of the Board.

6.2 PROPOSED AMENDMENTS TO SECTION 13 OF THE LAND (GROUP REPRESENTATIVES) ACT (CAP. 287)

Insert the following proviso in section 13 (1) (*b*):

> **"Provided that in the case of consent to dissolve the incorporated Group Representatives, the Registrar shall specify that such consent shall not take effect unless and until firstly all the liabilities of the Group have been discharged; and secondly all the assets of the Group including the Group land are divided and distributed equitably among the registered members of the Group."**

6.3 PROPOSED ADDITIONAL REGULATIONS UNDER THE LAND DISPUTES TRIBUNALS ACT, 1990

IN EXERCISE of the powers conferred by section 10 of the Land Disputes Tribunals Act, the Minister for Lands and Settlement makes the following Regulations—

The Land Disputes Tribunals Regulations, 2001

1. **These Regulations may be cited as the Land Disputes Tribunals Regulations 2001 and shall come into force on .....**

2. **Every member of the Tribunal shall hold office for a term of three years from the date of appointment to the Tribunal but shall be eligible for re-appointment for a further term of three years subject to satisfactory performance during the first term, provided that no member shall hold office for more than two consecutive terms of three years each.**

3. **A person shall not qualify to be appointed to the Tribunal unless he is a holder of at least a certificate in the Kenya Certificate of Secondary Education or its equivalent and has a working knowledge of either written land law or customary land law of the community of the area.**

6.4 PROPOSED AMENDMENTS TO SECTION 27 OF THE LAND ADJUDICATION ACT (CAP. 284)

(1) Insert the following new subsections (3) and (3A) to section 27 as follows:

"(3) When the time for objection under section 26 of this Act has expired the adjudication officer shall prepare a No Objection Register (NOR) in respect of parcels not affected by any objections and send it to the Director of Land Adjudication and the Director shall—

(*a*) certify on the NOR and on the duplicate register that the adjudication of the parcels contained in the NOR has become final.

(*b*) forward the NOR together with a certified copy of the duplicate adjudication register to the Chief Land Registrar for registration to be effected in accordance with section 28 of this Act.

(3A) Notwithstanding the provisions of the Interpretation and General Provisions Act the provisions of this section shall apply to all adjudication registers that have not become final under the existing provisions."

(2) Renumber the present subsection 3 as 3B.

6.5 PROPOSED AMENDMENTS TO THE LAND CONSOLIDATION ACT (CAP. 283)

Delete section 27 and insert the following new section 27, subsections (1), (2) and (3):

"(1) After the expiration of sixty days from the date of the certificate mentioned in section 25 of this Act, the adjudication officer shall prepare a No Objections Register (NOR) in respect of the parcels not affected by any objections and deliver it together with a certified copy of the Adjudication Register to the Land Registrar or Assistant Land Registrar for registration to be effected in accordance with section 11 (2) of the Registered Land Act.

(2) The Adjudication Register shall become final either when a NOR has been prepared in accordance with subsection (1) hereof in respect of the parcels contained therein or on the determination of all objections in accordance with section 26 of this Act.

(3) Notwithstanding the provisions of the Interpretation and General Provisions Act the provisions of this section shall apply to all adjudication registers that have not become final under the existing provisions."

LIST OF REFERENCES

1. The Constitution of Kenya.
2. The Interpretation and General Provisions Act (Cap. 2).
3. The Limitation of Actions Act (Cap. 22).
4. The Commissions of Inquiry Act (Cap. 102).
5. The Law of Succession Act (Cap. 160).
6. The Trustee (Perpetual Succession) Act (Cap. 164).
7. The Trustee Act (Cap. 167).
8. The Public Trustee Act (Cap. 168).
9. The Antiquities and Monuments Act (Cap. 215).
10. The Local Government Act (Cap. 265).
11. The Government Lands Act (Cap. 280).
12. The Registration of Titles Act (Cap. 281).
13. The Land Titles Act (Cap. 282).
14. The Land Consolidation Act (Cap. 283).
15. The Land Adjudication Act (Cap. 284).
16. The Land (Group Representatives) Act (Cap. 287).
17. The Trust Land Act (Cap. 288).
18. The Trusts of Land Act (Cap. 290).
19. The Land Acquisition Act (Cap. 295).
20. The Rent Restriction Act (Cap. 296).
21. The Survey Act (Cap. 299).
22. The Registered Land Act (Cap. 300).
23. The Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap. 301).
24. The Land Control Act (Cap. 302).
25. The Agriculture Act (Cap. 318).

26. The Water Act (Cap. 372).
27. The Wildlife (Conservation and Management) Act (Cap. 376).
28. The Forests Act (Cap. 385).
29. The Companies Act (Cap. 486).
30. The Co-operative Societies Act (Cap. 490).
31. The Registration of Business Names Act (Cap. 499).
32. The Unit Trusts Act (Cap. 521).
33. The Land Disputes Tribunals Act, No. 18 of 1990.
34. The Physical Planning Act, No. 6 of 1996.
35. The Environmental Management and Co-ordination Act, No. 8 of 1999.
36. Act No. 3 of 1907, Ceylon.
37. Memoranda from various institutions and individuals.
38. Oral evidence received from members of the public.
39. Letters of complaint and recommendations from the public.
40. Frederick Cooper: *From Slaves to Squatters*.
41. George Keeton: *The Law of Trusts* (8th Edition).
42. Report of the Select Committee on the Issue of Land Ownership along the Ten-Mile Coastal Strip of Kenya.

APPENDICES

APPENDICES