

# **Land Laws and Land Use in Kenya: Implications for Agricultural Development**

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## **Abstract**

*Land is both a 'social' and economic asset. As an economic asset, land works either as a financial tool or production tool. Land as a production tool is essential in production of agricultural goods. At the same time, land can be held as a hedge against inflation and for speculation. In so far as land is a factor of production and a store of value, it also has great social and political significance. Access, ownership and use of land in society depends on the legal structures governing land access and use. In Kenya, there is an elaborate system of formal and informal rules that govern access and use of land. They range from unwritten taboos, customs and traditions to various legislation, and the constitution. This paper attempts to analyse the various regulations that impact on land use and therefore agricultural development in Kenya. The paper reviews the various land laws, examines the relationship between the various laws, and provides a pointer to the effects of such law on agricultural land use. The research reveals that Kenya has a plethora of laws regulating land access and management of land and land-based resources. This multiplicity in laws has created gaps, conflicts and contradictions in the application of the laws, and these have implications on land use and agricultural development in Kenya. The overall legal framework and its resultant tenurial arrangements has inhibited the emergence of a vibrant land market, which is key for agricultural development. There is need to re-examine land laws in Kenya with a view to repealing, amending or revising them. More importantly, there is need to harmonise land laws in Kenya and work towards a comprehensive land use policy.*

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## 1. INTRODUCTION

Land as a resource is often the most important, if not the only means of livelihood, for many people in developing countries. All activities, be they economic or social, depend largely on land. Land is the foundation of shelter, food, work and indeed a sense of nationhood. As such, rights of land ownership and land use not only involve emotions but also provide important ways through which political influence is practised. The 'land question' or questions concerning issues of land ownership and usage have therefore continued to take centre stage.

Land in Kenya is both a 'social' and an economic asset. As an economic asset, land works either as a financial or production tool. Land is a factor of production and is essential for production of agricultural goods and for provision of urban housing services. At the same time, land is an important financial and speculative tool that can be used to hedge against inflation especially in countries where the financial market is not well developed. Financial institutions frequently prefer land as a collateral in advancing credit largely because land is immobile, its depreciation over time is small and its value is not eroded by inflation (Biswanger and Roserizweig, 1986).

The social asset value of land ranges from its role as a definer of community locations to individual-specific social concerns such as social standing. For this reason, land holding and control is of importance to the organisation of economics and politics in any social formation. Many scholars, politicians, policy makers and other development practitioners have therefore prioritised the land governance theme.

The arrangements that communities establish concerning ownership and use of land depend on, among other factors, the legal structures governing and regulating access and use of land. Kenya has an elaborate system of rules that govern the relationship between people and land and between citizens and the state with regard to land ownership and use. These rules comprise a complex system of both formal and informal constraints, legislations, and the constitution. Informal rules include fairly stable informal structures such as customs, laws, and trust that gives rise to an informal institutional framework in land use practices. Formal rules include political and judicial rules, economic rules and contracts. These facilitate economic and political

exchange and are arranged in a hierarchical order from the constitution, to state and common laws, to specific by-laws, and finally to individual contracts.

While it is generally recognised that land laws play a major role in shaping land use pattern in Kenya, knowledge on the nature and extent of this influence is insufficient. Although there have been some attempts to understand this relationship, evidence remains scattered and in most cases conjectural. With an economy heavily reliant on agriculture (as evidenced by its contribution to the GDP, exports and employment) and a significant proportion of the population engaged in land-based economic activities, it is important that this relationship between land laws and land use pattern is mainstreamed in national debate and policy. More precisely, an understanding of the impact of land laws on agricultural development is a necessary condition for policy analysis and formulation in Kenya. This paper attempts to examine the nature and extent of the relationship between land laws and land use and their implications on agricultural development in Kenya. The paper reviews various land laws in order to provide a pointer to the effects of such laws on agricultural land use and agricultural development.

The paper traces the evolution of land laws in Kenya since independence and examines existing laws and regulations governing ownership and access to land. The land law-land use nexus is examined and implications on agricultural development in Kenya highlighted.

## **2. EVOLUTION OF LAND LAWS IN KENYA**

The evolution of land laws (both formal and informal) in Kenya can be traced back to three important phases in the history of Kenya: the pre-colonial, the colonial and the post-colonial periods. The three phases are characterized by major events that shaped the legal regime that governed land. This section reviews some of these events and their impact on land law evolution in Kenya.

### **2.1 Property laws in the pre-independence period**

Available records in Kenya indicate that before colonialism, communities governed land through community (informal) rules, or what is today commonly known as customary laws. Under this system, no individual owned the land. Instead, land belonged to the whole community with

individuals having the right to use it in a manner acceptable to the community. The land tenure system, defined simply as the manner in which individuals or groups in society hold or have access to land, varied greatly from one community to the other depending on cultural values, geography, climatic and socio-economic conditions. Individual property rights and land use rights existed as sub-regimes of joint community rights. Land access rights were open to every member of a social group and land was equitably distributed on the basis of individual needs to members of the social organisation in control of a particular territory (Kanyinga, 1998). Community leaders acted as 'judges' and had the powers to control land use.

The establishment of the Protectorate in the early 1890's and subsequently the colonial economy at the beginning of the century brought in major changes on the generally stable flexible structure of access to land in pre-colonial Kenya. This occurred mainly through acquisition and ownership of land considered 'suitable' for European settlement and the subsequent need for a continuous supply of cheap and dependable labour for plantation agriculture. To predicate their actions on law, the colonialists imposed foreign law, and specifically the Crown Lands Ordinance of 1915, which brought into control virtually all the territory under the Commissioner of the East African Protectorate (Kenya) and later the Governor.

Having acquired land for settlement, the colonialists needed law to govern the manner in which land was owned and used (especially for agricultural purposes). They introduced the English Property Law which immediately replaced customary law in the areas that they occupied. The imposition of the English Property Law had two immediate implications on land ownership and use in the Protectorate. First, it marked the beginning of individualisation of land ownership in Kenya (Wanjala, 2000). Community governance was from then on subjugated and lacked legal mandate. The notion that land belonged to society, with its customary embeddedness, became subservient to individual ownership. Second, this was the beginning of settler incursion and settler agriculture in the Protectorate. A less discussed effect was the emancipation of the role of community in planning and defining expansion and resettlement.

To consolidate the settlers' grip on the acquired land, the colonial government institutionalised the Transfer of Property Act of India (ITPA), a law that governed property with regard to transfers, leases, mortgages, covenants, etc. Besides, to ensure security of tenure of the settling proprietors, the Registration of Titles Ordinance (now Cap 281 of Kenya laws) was enacted in 1920. The effect of registration under this Ordinance was to declare the title of the registered proprietor of land conclusive and indefeasible. These colonisation institutions are still in place today.

The political processes and the mechanisms used to acquire land from the natives by the settlers are beyond the objectives of this paper. Suffice to say that an important result of all this was the establishment of "African reserves" and the setting aside of prime agricultural land (otherwise known as the "white highlands") for exclusive by the white settlers. Africans were consequently moved *en masse* and settled in reserves far removed from the European settlements. Indigenous people occupying the Central Rift Valley—located in Kenya's high potential areas—were consequently moved to some 14 land units called "Native Reserves" administered by the Native Land Trust Board. The result of this balkanization policy was, according to Okoth-Ogendo (1976), widespread landlessness, deterioration of the quality of land due to fragmentation, overstocking and soil erosion, and the disintegration of social and cultural institutions in the reserves.

## **2.2 Land laws and land reform in the 'reserves'**

The English law, introduced to govern ownership and access to land, initially operated in areas controlled by the settlers while customary law prevailed in the "Native Reserves". This, however, changed with the Swynnerton Plan of 1953. Mounting land pressure, caused by relocation, overstocking and heavy soil erosion in the reserves, led to massive poverty and discontent. Out of the belief that the deterioration of life in the reserves was due to overpopulation, bad land use and a defective tenure arrangement, the authorities saw need in reforming the whole tenure arrangement. The Swynnerton Plan was instituted to guide intensified agricultural development in the reserves by encouraging individualisation of tenure and to provide security of tenure through an indefeasible title. The authorities assumed that native farmers would be encouraged to invest their labour and profits in the development of

their farms and enable them to offer it as security for credit to develop their farms (Swynnerton, 1953).

The land reform programme in the reserves had three main stages: adjudication, consolidation and registration. Adjudication involved ascertaining individual or group rights amounting to “ownership” over land within a given area. The second step of consolidation involved the merging of fragments into single economic units while registration entailed the entry of established rights into the land register and the issuing of a title deed.

Each of the stages of the programme had implicit reform compliant objectives. Adjudication sought to make customary land law, a law associated with chronic litigation, obsolete. It ascertained individual or group rights, therefore fragmenting land ownership and the existing governance structure. Consolidation aimed to solve the problem of excessive fragmentation, and reduce travel time, therefore facilitating planning (read control) and extension work. Registration would convert African land into a marketable commodity over which title would be obtained and be easily transferable or chargeable as security for development credit (Okoth-Ogendo, 1976). Registration was obviously a permanent seal on un-arbitrated land disputes in both intra-African conflict and inter-race conflicts.

Analysis of the effects of the reform process by Okoth-Ogendo (1976 and 1984), Heyer and Waweru (1976), and Kibwana (2000) indicate that whereas the reform process brought with it some individualism in land ownership (believed to be crucial in providing incentives for development) it failed to change the farmers’ perceptions of the nature of land rights and the power derived from it. This is particularly evidenced in the farmers’ perception of the powers of disposition implied by individual title. Although the new tenure laws defined the rights of an individual proprietor, traditional rights of access and inheritance continued to determine the farmers’ ‘freedom’ of disposition. According to the authors, titles did not improve farmers’ access to credit and inputs as anticipated. Public and private credit agencies were reluctant to extend credit to small farmers except under the most exhaustive scrutiny.

Initial indications of the reform process suggested that in most cases it significantly altered the pattern of land distribution in the peasant sector

to the detriment of the bottom quartile of the rural society. Because of the general unwillingness to exchange or release land in the process of reform, most poor people were forced to sell land to their well-to-do neighbours. This accelerated landlessness and led to accumulation of land by a few members of the rural society.

Although the colonial government argued that land-related laws and policies were aimed at the economic development of the Protectorate, a closer scrutiny reveals that these laws and policies were meant to achieve political as well as imperialist goals. The colonialists were more interested in achieving 'political control', and securing sources of raw material and guaranteed markets for investment of surplus capital (Mweseli, 2000).

### **2.3 Post-independence land laws and policies**

Although the struggle for independence in Kenya revolved around issues of land, it is interesting to note that even after attaining independence, the incoming government retained and continued with most of the colonial land laws and policies. The new constitution inherited by the independent government had specific clauses aimed particularly at safeguarding the interests of the settlers who opted to remain in Kenya. This marked not only the beginning of the retention of colonial laws and policies but also their entrenchment to this day.

At independence in 1963, the government enacted the Registered Land Act (Cap 300), which was to govern land formerly under the customary law. This law, which was an embodiment of the English law, was to encourage individualisation of tenure in line with the agronomic arguments mooted in the Swynnerton Plan. After five years of independence, the Land Adjudication Act (Cap 284) was amended to cater for group rights particularly in pastoral and nomadic areas where individualisation had little success. The group rights were to be registered under the Land (Group Representatives) Act (Cap 287). The intention behind this Act was to maintain the status quo in the semi-arid areas where the way of life was pastoral and nomadic (Wanjala, 2000).

The other significant post-independence legislation was the Magistrates Jurisdiction Amendment Act of 1981 which vested in councils of elders the powers to hear and determine cases revolving around beneficial ownership of land, the division and determination of boundaries to land,

claims to occupy or work on land, and trespass cases. In effect, this legislation divested the Magistrate Courts in Kenya of the jurisdiction to hear and determine certain land disputes. This, it would appear, was a direct response of the government to the perceived inability of courts to handle disputes between registered proprietors and other unregistered claimants.

A significant development in the post-independence land policy in Kenya was the establishment of settlement schemes to resettle the landless. With the assistance of the British government, the independent Kenyan government purchased land and settled Africans who had been displaced either during the colonial incursion or in the reform process. Some of the most elaborate of such schemes were the 'million acre settlement schemes' located in the Eastern, Central, Rift Valley, Nyanza and Western Provinces of Kenya. Through these schemes, over a million people were settled in holdings ranging from 10-40 acres. These holdings were divided into three categories: the high density-low income holdings of 25 acres, the low density-low income holdings of 40 acres, and the 'squatter settlement schemes' of 10 acres. Most of these schemes were established between 1962 and 1965. In the 1970s, the government settled squatters in the *shirika* schemes located in specified areas and managed by farm managers employed by the Settlement Fund Trust.

Apart from the establishment of settlement schemes, the government employed other means to address the issue of landlessness. Immediately after independence, the government encouraged people to pool resources together and purchase land collectively. This saw the mushrooming of land buying companies and farming co-operatives with interests in land. Theoretically, the land buying companies and co-operatives were meant to assist poor peasants to easily access land. As experience would show, however, the settlement schemes and the other land acquisition methods largely failed to meet their original objective of settling the landless. In fact, they served to defeat this very objective. The policy in the settlement schemes was that land was bought or vested in the Settlement Fund Trust who then sold it to the settlers at a price. No freehold title would be granted until the settled complied with the conditions of the purchase, the most important being the payment of a compulsory land loan. As it turned out, the truly landless were unable to meet these conditions with the result that those settled

were the well-to-do middle class farmers, politicians and businessmen (Okoth-Ogendo, 1976).

Land buying companies and co-operatives failed to deliver to the poor mainly because politicians and other members of society used them for their own benefits and at the expense of the landless poor. It is partly due to the abuse of these systems that these organisations have increasingly fallen out of favour with the government. The general public is also increasingly weary of these organisations because the numerous incidents of land-related fraud and disputes.

### **3. CURRENT LAND LAWS AND POLICIES IN KENYA**

Every legal document from the national constitution to contract law details some aspect of land governance in Kenya. However, since the focus here is on agriculture, the review will be limited to the essential issues that govern land in agriculture. The formal governance of land can be categorised into three facets. These are direct effect governance systems, indirect governance laws, and enforcement organisations.

The direct effect governance system comprises diverse sectoral laws governing exploitation and conservation of the natural resources incident on land. These laws are in operation in many sectors including agriculture, wildlife, livestock, forestry, water, wetlands and environment.

Indirect effect laws are those laws that define property rights in land ownership. They deal with issues of land ownership and involve processes such as enacting of laws, revisions, land adjudication, consolidation, and registration. Enforcement refers to both the organisations emanating from the various legal institutions and the laws governing enforcement. This section provides an overview of these three categories of laws and organisations as stipulated in various land law documents in Kenya. The section however begins by examining the Kenyan constitution on matters relating to land.

#### **3.1 The Constitutional foundation of land law**

The Kenya constitution provides legal protection of ownership rights and deprivation of property. These constitutional provisions are specified in Section 75, which guarantees protection from deprivation of property, and Section 84 which guarantees enforcement of the above protection, among others. Therefore, as relates to property including land, the

constitution embodies a fundamental ideal; it bans the violation of private property and guarantees ownership rights.

In Kenya, compulsory acquisition of land for public interest is embodied in Section 75, 117 and 118 of the constitution. This however can only be done under certain qualifications:

- (i) The acquisition must be shown to be of public interest and will promote public interests.
- (ii) The benefits of the acquisition must be shown to exceed the hardships or inconveniences that may be occasioned to the owner(s).
- (iii) There must be prompt and complete compensation to the owner(s)

The constitutional provision that explicitly pertains to land relates to trust land only. This is perhaps because of the controversies surrounding trust land. The provisions are specified in Chapter IX, Sections 114 to 120. Besides defining trusts land in Kenya, the provisions outline general principles on management and use of trust land. The principles vest all trust land on county councils. The principles also allow county councils to convert trust land into private land by applying for registration of individual titles to trust land under the Land Consolidation Act and the Land Adjudication Act.

A glaring gap in the constitution of Kenya as far as land is concerned is the absence of guiding principles on land not classified under trust land. Issues of land tenure, land management, environmental concerns, and the role of agriculture are therefore regulated by ordinary laws without a guiding constitutional philosophy. It therefore became necessary to enact a large number of laws to address the various issues on land. These laws have generated a multiplicity of normative, institutional and policy conflicts (Wanjala, 2001) and have hindered the emergence of a clear land policy in Kenya.

### **3.2 Laws on land ownership**

Land ownership in Kenya currently falls under three property regimes. These are:

- (i) The Indian Transfer Property Act (1882)

- (ii) The Registered Land Act (Cap 300)
- (iii) The customary law system

### **3.2.1 The Indian Transfer of Property Act**

The Indian Transfer of Property Act (ITPA) is an embodiment of English law extended to Kenya from India as early as 1887. The colonialists used this Act to govern land in the 'white highlands'. The law defined the various interests that exist and can be held over land and the manner in which these interests may be created and transferred. The Act embodies the freehold estate. Despite its old common law content, this law still governs large tracts of land in Kenya today, and significantly in the agriculturally high potential areas of Kenya. The Act applies particularly to those lands whose title can be traced to the Crown Land Ordinances of 1902 and 1915; the Lands Title Ordinance of 1908 (currently Cap 208) and the Conversion of Leases Regulations and Rules of 1960.

### **3.2.2 The Registered Land Act**

The Registered Land Act (Cap 300), also a derivative of the English Law, applies mainly to land that was formerly the 'native reserves'. The law, whose present version was enacted in 1963, was the culmination of the reform programme started by the colonial government and aimed at replacing the customary law system of communal ownership of land with the English system. The Act derives from the neo-classical reasoning that places the individual at the centre of growth. The reasoning is that conferring individuals with private property rights on land would contribute to and enhance proper resource management because individual actions are informed by enlightened self interest. In line with this thinking, the Act confers on individuals ownership rights in a manner that is meant to be rational, efficient and productive in managing resources.

### **3.2.3 Customary Law System**

The third legal property regime governing land use in Kenya is the informal law or customary law. This regime is multifaceted and diverse. It varies by region, ethnicity, and even by clan. It is based on the socio-cultural values and institutions of local communities utilising the land resource. Informal rules, culture, and the communities' interpretation of

the land property rights define governance systems across generations. Informal law, like formal law, has direct and indirect effects on land use and agricultural production. Some of these informal laws hinge directly on land use and provide guidelines on land use patterns. They constitute unwritten internalised laws that dictate land use patterns, either by seasons and/or cultural event. They can be either general or specific, with detailed referencing. Indirect informal laws define property rights of community, family or individual. Today, there is increased recognition of this governance form in defining land property rights and in environmental management in developing countries. The institutionalisation of informal law in written (formal) land law in Kenya is increasingly in debate.

A secondary definition of land property rights exists in the Agriculture Act (Cap 318) and the Land Planning Act (Cap 303). These secondary land rights refer to all those definitions of ownership and rights that exist beyond the primary character of ownership discussed above. One such example is the separation of owner from occupier and assisted owner of land. These property rights determine the rights to use land and clearly differentiate between owner and user of land holdings. In the case of agricultural land, the Minister for agriculture determines any conflict emanating from any misunderstanding of what agricultural land is. In the event that ministerial determination is deemed unsatisfactory by complainants, the agricultural land tribunal gives the final verdict on such conflict.

A scrutiny of primary laws relating to land use reveals a hierarchy in the formulation of formal rule. The hierarchy classifications, however, do not form distinct discrete sets. There are several overlaps in the character of land ownership and in the definition of land under the specified holdings. Despite these overlaps, such classification is useful in consolidating the various laws that constitute and define land property rights in Kenya. A clarification of Government versus private holding is enshrined in the Government Lands Act (Cap 280). Private property rights are defined in the Land Titles Act (Cap 282) and the Registered Land Act (Cap 300).

Although all the land ownership systems discussed above exist in Kenya today, the Registered Land Act (Cap 300) is the dominating legal instrument that governs land. Land previously held under the ITPA and

the customary law system is being converted to registered land. Virtually all post-independence policy documents and plans have underlined the government's commitment to getting all land registered under the Registered Land Act. The Acts of parliament that deal with registration of deeds in Kenya are Registration of Documents Act<sup>1</sup> (Cap 285), the Land Titles Act<sup>2</sup> (Cap 282) and the Government Lands Act<sup>3</sup> (Cap 280). These laws pre-date independence and have given way to the Registration of Titles Act (Cap 281) and the Registered Land Act (Cap 300). In the arid and semi-arid lands, where people's lives remain largely nomadic, registration has been embodied in the Land (Group Representative) Act. This Act does not in any way form a new tenure arrangement. It provides an innovative legislative framework within which certain ethnic groups can relate to land without fundamental alteration in their customary land arrangements.

It is important to note here that many of the laws governing land ownership in Kenya are outdated and need to be amended, revised or repealed altogether. The Registration of Titles Act, for instance, has a number of problems that make its administration difficult. The Act is not full proof and registration has occasionally been done outside the provisions of the Act. Additionally, the requirement that a *gazette* notice be issued whenever a provisional certificate of registration of title is issued defeats the purpose of *gazzettement*. Furthermore, it does not provide for objection by an aggrieved party. A major weakness with the Registered Land Act is that it does not make fixed surveys mandatory. This has resulted in numerous boundary disputes. There is clear need to review these two important laws in order to streamline land registration and issuing of titles in Kenya.

Once land is registered under any of the three legislations dealing with land registration, it becomes subject to the English law. Such land is

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<sup>1</sup> This Act, which came into force in 1902, was intended to provide for registration of documents and deeds.

<sup>2</sup> This Act was enacted in 1908 to enable the colonial authorities determine the land 'owned privately' and in the process identify 'free' land that could be alienated to the settlers at the coast. Verification of land ownership at the coast became necessary because the Sultanate of Zanzibar owned the ten-mile coastal strip.

<sup>3</sup> This Act was enacted purposely to serve the interest of the colonial settlers. The main objective was to enable the colonial administration to set aside land for the European settlers by issuing grants of 999 years for agricultural purposes and 99 year leases for commercial development.

then entered into a register as stipulated in laws governing land registration and is from then henceforth referred to as registered land. Table 1 below shows the extent of land registration in Kenya by province (excluding Nairobi) as of December 1990, the latest year for which data is available. The data gives an indication of the extent of land registration in Kenya. It should however be interpreted with caution because it excludes the former scheduled areas<sup>4</sup>. This partly explains the relatively low ratios in Central and Rift Valley provinces that were part of the scheduled areas. The high ratios of total registered land are in the former non-scheduled areas including districts in Western Province (except Busia), Kericho, Uasin Gishu, Embu, Meru and Kisii. Registration is lowest in the arid and semi-arid regions where the predominant tenure system is customary.

**Table 1: Land registration by province, 1990\***

Province	Total Registered Land ('000ha)	Total Land Area* ('000ha)	Registered Land (% of total)
Nyanza	844.6	1,252.6	67
Western	712.3	822.3	87
Rift Valley	4,108	17,110	24
Central	416.4	1,317.0	32
Coast	398.4	8,304	5
Eastern	601.0	15,576	4
North Eastern	0	12,690	0
Total	7,081	571,416	1.2

Source: Statistical Abstract, 1999

\*This excludes land in the former scheduled areas

### **3.3 Laws governing land use**

Kenya has a plethora of laws regulating the use of land resources. Laws regulating the use of resources incident on land, that is water, wildlife, agriculture, forests, the environment, etc., have been enacted to regulate

<sup>4</sup> This was land set aside by the colonial government for exclusive use by the white settlers.

the powers conferred on landowners. Currently, there are about 68 pieces of legislation governing land use in Kenya. The targets for these laws are:

- (i) Land exploitation
- (ii) Land control
- (iii) Land planning
- (iv) Land conservation

The substantive and regulatory laws that are used in realizing these targets include the Agriculture Act (Cap 318), the Land Control Act (Cap 302), the Physical Planning Act (No 6 of 1996), the Environmental Management and Co-ordination Act (No. 8 of 1999), the Chiefs Authority Act (Cap 128) and the Local Government Act (Cap 265). There are many other laws that directly or indirectly affect the manner in which land is used. These include laws that govern water, use of forest resources, succession, land acquisition, surveying, stamp duty, etc. The brief overview that follows focuses only on laws that are substantive as far as agricultural land use is concerned.

### **3.3.1 The Agriculture Act**

The main objective of the Agriculture Act (Cap 318) was to promote and maintain stable agriculture, stimulate the development of agricultural land, and to conserve soil. Fundamentally, the Act defines ministerial statutory powers on how these tasks should be undertaken. The Act identifies a number of agencies to assist the Minister undertake these tasks. These agencies include the District, Provincial and the Central Agricultural Committees. To achieve its objectives, the Act gives the minister the authority to determine ownership of agricultural lands (section 3.1.2). The Act gives the Minister, and the various sub-organs of the ministry, authority and powers to undertake the following tasks on land use:

- (i) Ensure production of food crops by declaring essential food crops or “scheduled crops” and special crops, and enforcing the production of such crops.
- (ii) Enable new settlements and provide rules that govern such settlement, including outlining the crops to be grown, the number

and type of livestock to be kept, and the agricultural production procedure.

- (iii) Limit activities that exploit land and damage the environment. Under this prerogative, the Ministry, through and in consultation with its various offices, can demarcate land for preservation with a land preservation order.
- (iv) Order land development and alter land development procedures in consultation with other boards.
- (v) Make rules for preservation, utilisation and development of agricultural land including the control of erection of buildings.
- (vi) Limit the size of land available to farm workers for utilisation, and empower local authorities to make by-laws for the same purposes.
- (vii) Dispossess owners of land if they violate land preservation orders, crop delivery specifications and land development orders.

The Agriculture Act is one of the most authoritative land use legal documents, and this is perhaps its greatest weakness. The Act, for example, makes provision for regulation planting of cash crops such as coffee and tea. These crops can neither be planted nor taken out without a permit. The framework of the Act is built around commands and controls and this can be a major disincentive for agricultural production and efficient land use.

### **3.3.2 The Land Control Act**

The Land Control Act (Cap 302), enacted in 1963, basically aims to control transactions in agricultural land. Section 5 of the Act makes provisions for establishment of Land Control Boards with the responsibility of controlling all land transactions in Kenya. These boards have wide powers to either permit a transfer of agricultural land to take place or refuse a transaction in agricultural land. Section 6 of the Act lists the following transactions as null and void without the boards' consent:

- (i) The sale, transfer, lease, mortgage, exchange, partition or other disposal of a dealing with agricultural land, which is situated within the land control area;
- (ii) The division of any such agricultural land into two or more parcels to be held under separate titles;
- (iii) The issue, sale, transfer, mortgage or any other disposal of a dealing with any share in private company or co-operative society which for the time being owns agricultural land situated within a land control area.

The board's decision on whether to grant or refuse consent to proposed transactions in agricultural land are governed by certain considerations including the impact of the transfer to the economy of the control area, the intended use of the transferred land and the nationality of the person receiving the land. These considerations are, from the governments perspective, important in realising the government's stated objective of increasing productivity by ensuring economical use of land and also in conservation of land for future production. From a slightly different perspective, however, the Land Control Act is concerned with regulation of the agricultural land market in Kenya. It is a form of government intervention in the agricultural land market. This has implications on the use of agricultural land both as a productive and financial asset. Some of these implications are discussed later in this paper.

### **3.3.3 The Physical Planning Act**

The Physical Planning Act (No. 6 of 1996) came into effect in October 1998. The Act was enacted to provide for preparation and implementation of a physical development plan and for related purposes. This Act repealed the Land Planning Act<sup>5</sup> (Cap 303) of 1968 and the Town Planning Act<sup>6</sup> (Cap 134 of 1931). The Act is mainly concerned with the physical planning of land. It regulates land use through the policing powers of the state and by making specific provisions for the use and development of land. The Act establishes interim planning authorities

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<sup>5</sup> This Act was to make provisions for planning the use and development of land. The Act limited its application to within a 5 mile radius (8 Km) of the boundary of gazetted townships and municipalities and within 400 (122 meters) from the center line of scheduled roads or any other areas that the President may specify by Gazette Notice.

<sup>6</sup> This Act was applicable to Municipalities and gazetted townships. The Act provided for the preparation of town planning schemes and development control within towns.

to which land development plans must be submitted for approval before specific developments are done.

Although the Physical Planning Act exists for the purpose of land use planning in Kenya, it is mainly concerned with planning of urban centres and the development of such facilities as roads, buildings and factories. Despite the existence of this important legislation, no area plans have been formulated for various ecological regions in Kenya. Land use and development has therefore been haphazard and land use decisions largely *ad hoc* (Ogolla and Mugabe, 1996). This has had some negative implications on agricultural production as some vast areas of agricultural land have been encroached by urban growth.

### **3.3.4 The Environmental Management and Co-ordination Act**

The Environmental Management and Co-ordination Act (No. 8 of 1999) provides for the establishment of an appropriate legal and institutional framework for the management of the environment. It received Presidential assent on 6 January 2000 and became operational on 14 January 2000. The Act covers virtually all diverse environmental issues which require a holistic and coordinated approach towards its protection and preservation. The Act provides for the legal regime to regulate, manage, protect and conserve biological diversity resources and access to genetic resources, wetlands, forests, marine and fresh water resources and the ozone layer, to name a few.

To manage the environment in a holistic manner, the Act establishes two administrative bodies: the National Environment Council (NEC) and the National Environment Management Authority (NEMA). While NEC has the responsibility of formulating policies, setting national goals, and promoting cooperation among stakeholders, NEMA's role is to supervise and coordinate overall matters relating to the environment. It is instructive to note that the Act creates NEMA (Section 7) as the body charged with implementing the provisions of the Act. NEMA has however not operated more than two years since the Act came into force. This poses a serious legal conundrum and has also left the efficacy of the Act untested.

If fully implemented, the Environmental Management and Co-ordination Act is likely to have both long term and short-term effects on agricultural development in Kenya. In the short run, the Act will impact on production especially in the marginal and forested areas as it will seek to conserve

them. In the long run, however, the Act will provide a basis for sustainable agricultural development on account of its resource conservation measures.

### **3.3.5 The Chief's Authority Act and the Local Government Act**

The Chief's Authority Act (Cap 128) and the Local Government Act (Cap 265) are two pieces of legislation with extensive policing powers. The Chief's Authority Act confers on administrative officials the power to issue orders regulating and prohibiting land use.

The current Chief's Authority Act gives extremely wide-ranging powers to Chiefs. The Act for example allows Chiefs to require persons to plant any specified crops for the support of themselves and their families if the area concerned is suffering from or is threatened with a shortage of foodstuff. The Act also allows a Chief to prohibit grazing in areas that are being rehabilitated or have been planted with fodder crops.

The Local Government Act also confers on local authorities far reaching powers to regulate land use in the trust-land under their jurisdiction. Through this Act, local authorities have the power to manage forest reserves and regulate land use in already settled areas. The Act also confers on the authorities powers to alter boundaries, and acquire land. County Council by-laws made under section 201 empower County Councils to prohibit or regulate the performance of certain activities on land. These by-laws are regulatory in nature but some recognise the residual rights of the local communities. In Narok County Council, for example, 'indigenous' residents are allowed to graze their cattle on specified forest reserves.

Like the Agriculture Act, the two legislations are authoritarian and do not allow free public participation in use of land resource. The laws also do not provide incentives for proper land use. It is notable also that in certain areas, the Local Government Act is in conflict with the Physical Planning Act making it difficult to implement any one of them.

### **3.4 Enforcement of Laws**

Enforcement of laws relating to land is just as important a governance tool as are land laws. In fact, there are those who believe that the problem in Kenya is one of lack of enforcement of existing laws rather than the existence of good land laws. For land law to be effective, enforcement

must be credible and repetitively consistent. For complex contracting, such as land-based contracts, enforcement is the sufficient condition for land governance. Enforcement deters breaking of contracts and encourages re-dress. The causes for inefficiencies in enforcing land law are beyond the scope of this paper. An overview of enforcement organisations emanating from the various legal land management articles and their implications on agricultural development will suffice here.

Given the multiplicity of land use rule regime in Kenya, enforcement forms also vary by rule and hierarchy of rule. The key enforcement agents are; (a) the office of the executive, including ministers and the President; (b) various land boards created by the various land-management Acts; and (c) the judiciary and to a lesser extent councils of elders as specified by various Acts.

#### **3.4.1 The Executive**

The powers of the executive in defining land law are substantial. The key executive officers with such powers are the President and Ministers of agriculture and lands, as the cabinet definition of such offices dictates. The President has at his discretion powers to nullify, exempt from statutory payments, and to order land transactions. The Minister for land and the Minister for agriculture have clear enforcement powers as stipulated in the Agriculture Act (Cap 318) and the Land Control Act (Cap 302). In both Acts, the Minister for agriculture has an open hand in determining spatial jurisdiction and therefore the right of land law application to any one area. From the various land laws, the executive has powers, of determining ownership and ratifying land transactions. When agricultural land ownership is in dispute, the Minister has powers in determining ownership. The Minister also has the right to apply the Land Control Act to any area he considers expedient to apply the Act to. The same Act gives the Minister the right to control transactions.

#### **3.4.2 Boards and Tribunals**

Boards and tribunals govern and also enforce land law. The key institution here is the Agricultural Appeals Tribunal established under the Agriculture Act. This tribunal acts as the final arbitrator of land disputes of all forms. The Agricultural Appeals Tribunal arbitrates land ownership conflicts after the determination by the Minister for agriculture.

The tribunal also arbitrates conflict as regards ministerial directives on land preservation and land development order. Other institutions with subservient arbitration powers are the District Land Control Boards, the Provincial Land Control Appeals Board and the Central Land Control Appeals Board.

The powers of Land Control Boards supersede those of the judiciary in ratification of transactions. The powers of control of transaction are hierarchical, starting at the lower end with the Minister for agriculture and at the top with the Central Land Board. The district Land Board, then the Provincial Land Board and finally the Central Land Board hear refusals to transaction ratification by the Minister if not determined satisfactorily in any one echelon. The other board-type categories are the various regional agricultural boards. These include the District Agricultural Committee, Provincial Agricultural Committee, and the Central Agricultural Board Authority. Their role in land use emanates from their statutory and advisory role to the Minister for agriculture, the Land Board, and the agricultural land tribunal. In general, these boards act as second tier enforcement institutions after arbitration or control by the executive has failed.

Other relevant organisations in enforcement of agricultural law, and not necessarily within the auspices of boards or tribunal, are the Agricultural Finance Corporation (AFC) and the Director of Agriculture. The latter has a wide mandate that goes beyond advice to implementation of laws.

### **3.4.3 The Judiciary and the Elders Courts**

The judicial system in Kenya plays an important role in enforcement of land laws. Prior to 1981 when the government enacted the Magistrates' Jurisdiction (Amendment) Act, all disputes concerning land ownership were presided over by ordinary courts of law. This Act established 'elders' courts or panels and vested in them the power to hear and determine some land cases. These cases, as earlier indicated, included those cases revolving around the beneficial ownership of land, the division or determination of boundaries to land, a claim to occupy or work on land, and cases involving trespass to land.

The Elders' court, which is chaired by district officers and comprising of two or four other elders, are required to reach decisions on land disputes and file the decisions with the Resident Magistrates' Courts. The

Resident Magistrates' Court has powers to accept the decisions of the elders without any alteration and enter judgement in favour of the person who is judged by the record to have won the case. The court also has power to instruct the elders court to reconsider a case or modify or correct a record filed by the panel of elders. The court may also set aside the record of a panel of elders and order the matter to be re-heard before a new panel. In effect, therefore, the Resident Magistrates' Court still maintains immense powers for the determination of land-related disputes.

In the event that an aggrieved is not satisfied with the ruling of the Resident Magistrate, then one would expect the existence of the possibility for an appeal to a higher court. However, the Magistrates Jurisdiction (Amendment) Act stipulates that once a decision is accepted by the Resident Magistrates Court and a decree has been issued, no appeal can be made except in so far as the decree is in excess of, or not in accordance with the decision of the panel of elders. This requirement is clearly quite restrictive and could easily lead to miscarriage of justice. Where the ruling made is conceived to be beyond the mandate of the elders' court, then an appeal can be made in the High Court.

It was hoped that the establishment of the elders' court would solve many of the problems and disputes concerning land in Kenya, but this has not been the case. There are still numerous land-related litigations despite an elaborate and innovative system of settling land disputes through elders' courts. The courts are ineffective in disposing justice. Wanjala (1990) identifies a number of reasons for this. Elders' courts have no powers to listen to any dispute concerning land that is already registered. Lack of clarity on the provisions of the law governing elders' courts, corruption, and lack of knowledge of the role and function of the courts render the system ineffective. Further, the court system in Kenya is very slow in dispensing justice. Lengthy litigations have therefore left huge tracks of agricultural land to lie idle pending resolution of disputes. These litigations also deter long-term investment in agricultural land and therefore have profound implications on land use and agricultural development.

Although most people in Kenya would therefore wish to take advantage of the legal system to enforce land rights, access to the legal system

through the courts is also difficult. To access the legal system, one needs to be knowledgeable of the legal rights and have the resources to pursue these rights through appropriate legal channels. Most people, however, lack this capacity and this limits access to the legal system.

### **3.5 Land Laws and Land Policy in Kenya**

Although Kenya has numerous legislation governing land use and management, there is no concise national policy framework from which holistic and integrated land use strategies and directions can be generated. Land laws and policies in Kenya are sectoral in approach and are consequently neither functionally integrated nor administratively well co-ordinated. Consequently, it is difficult to moderate the different demands on land resource and to generate strategies for its wise usage. Degradation of land is currently a serious threat to agricultural production but can be mitigated if a proper land use policy was in place. Legislation is also important to enforce the policy. The need to harmonise policy and legislation in matters of land ownership, rights of use, control of land use, exercise of state powers, etc. is also crucial. A good starting point would be to provide sound guiding principles of such a policy in the constitution.

## **4. LAND LAWS AND LAND USE IN KENYA**

The effects of land law on land use fall into two broad categories. First is the effect of such land law status on the generality of land management ethos, and second is the effect of land law on land use and agricultural productivity. This section focuses on the effects of land law on land use and management. The section however begins with an overview of the current tenure system in Kenya.

### **4.1 Land Tenure Systems in Kenya**

Land policies and legislation in Kenya have over the years given rise to three types of land tenure systems. These are private, customary and public tenure system.

#### **4.1.1 Private Tenure**

The private tenure system is largely a consequence of the imposition of the colonial regime of English notions of land ownership. This tenure system confers on the individual or corporate entity an indefeasible and exclusive title to a specified estate in land. This includes all land held

on freehold or leasehold by individuals, companies, co-operative societies, religious organizations, public bodies, and legal bodies. Private land may be as a result of alienation under the Governments Land Act, the Trust Land Act or adjudication of trust land (under the Land Adjudication Act), determination of claims under the Land Titles Act, or by sale off by the Settlement Fund Trustees. Holders of such land are 'free' to utilize their pieces of land in a manner they deem fit subject to land use laws. The law applicable to this land is embodied in the Registered Land Act (Cap 300). Most smallholder schemes fall within this tenure system.

#### **4.1.2 Customary Tenure**

This is the tenure system mainly found in areas that have not yet been transformed though adjudication, consolidation and registration. Under customary tenure, land belongs to a clan, ethnic group or a community as a whole. Each person in the community has a right of access depending on the needs of the individual and the political authority in a given community. Individuals or groups, by virtue of their membership in some social unit of production or political community, have guaranteed access to land and other natural resources. Rights of control are vested in the political authority of the unit or community (chiefs, heads of clans, or heads of family, etc). Areas under customary tenure system are designated as trust land<sup>7</sup>.

#### **4.1.3 Public Tenure**

Public tenure establishes control over forests, national parks, open water, townships and other urban centres as well as alienated and un-alienated government land<sup>8</sup>. In effect, this tenure arrangement designates the government as a private landowner. This land is supposed to be reserved by the government for public purpose, unless and until it has been privatised to an individual or corporate entity through a presidential grant of freehold or leasehold. The constitution confers two types of residual power in the state relating to public interest. The first is the *eminent*

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<sup>7</sup> This includes all land (urban and agricultural) within the special areas, special reserves, Temporary special Reserves, Special Leasehold Areas, and Special Settlement Areas as described under section 114(1) of the Constitution of Kenya.

<sup>8</sup> This is land vested in the government by virtues of section 204 and 205 of the Constitution of Kenya and section 21, 22, 25, and 26 of the Constitution of Kenya.

*domain* that gives the state, sometimes through county councils, the right to compulsorily acquire land for public purposes. This is subject to the state being able to demonstrate public interest, and that benefits outweigh costs and compensation. The second are the *police powers* that relate to regulation of property rights in land. This category of land is administered under the Government Lands Act (Cap 280).

Table 2 below summarises the land tenure in Kenya for the periods 1980 and 1995. It is evident that the most extensive tenure system is trust land which takes up about 78.4 percent of the total land surface. Most of this land is available for smallholder registration. Government land takes about 20 percent while freehold land is only 1.5 percent.

About 5.7 percent of government land has already been alienated and forms part of the freehold land. It is instructive to note that all these tenure systems co-exist and in many cases overlap especially where

**Table 2: Land tenure in Kenya (1980 and 1995)**

Type of Tenure	1980 (sq. km)	1995 (sq. km)	1995 (%)
Government land	117,878	116,088	19.9
Forest land	9,125	9,116	1.6
Other government reserves	1,245	1,970	0.3
Townships	1,911	2,831	0.5
Alienated land	37,013	38,546	6.6
Unalienated land	34,858	28,598	4.9
National parks	22,653	24,067	4.1
Open water	11,073	10,960	1.9
Freehold Land	7,135	8,731	1.5
Smallholder schemes	5,016	6,615	1.1
Other government reserves	2,119	2,116	0.4
Trust Land (not for registration)	34,965	59,625	10.2
Forests	7,092	7,084	1.2
Government reserves	443	492	0.1
Townships	1,398	1,812	0.3
Alienated land	13,915	33,397	5.7
Game reserves	9,285	13,691	2.4
National parks	2,832	3,149	0.5
Trust land (for smallholder registration)	425,341	397,366	68.2
Already registered	27,217	27,279	4.7
Not registered	398,124	370	63.5
<b>Total water</b>	<b>11,230</b>	<b>11,230</b>	<b>1.9</b>
<b>Total Area</b>	<b>582,646</b>	<b>582,646</b>	<b>100</b>

Source: Republic of Kenya, Statistical Abstract, 1993 and 2000

the conversion from customary tenure to the modern tenure systems is incomplete.

The co-existence of various tenure regimes in Kenya is better depicted by examining the distribution of the different land categories by provinces. Table 3 below shows such a distribution for the eight provinces for the year 1995, the latest period for which data is available. The predominance of trust land in Kenya is clear as most provinces have relatively larger proportions of trust land. In North Eastern Province, all the land is under the customary land tenure system. Other provinces with substantial proportions of trust land are Eastern, the Rift Valley and Western Provinces. Nairobi Province has no trust land while the proportions of trust land are relatively lower in Central and the Rift Valley. In these two regions, the proportion of government land is higher.

**Table 3: Land categories by province (1995)**

Province	Total land	Government land		Freehold land		Trust land	
	(sq kms)	(sq kms)	%	(sq kms)	%	(sq kms)	%
Western	8,360	758	9	853	10	6,749	81
Nyanza	16,162	3,796	23	551	3	11,815	73
Rift Valley	173,868	27,375	16	2,044	1	144,449	83
Central	13,176	5,288	40	3,365	26	4,523	34
Eastern	159,679	25,365	16	605	0	133,709	84
North Eastern	126,902	0	0	0	0	126,902	100
Coast	83,603	53,123	64	1,178	1	29,302	35
Nairobi	684	549	80	135	20	0	0
Total	582,434	116,254	20	8,731	1	457,449	79

Source: Republic of Kenya, Statistical Abstract, 2000

## **4.2 Land tenure and land use systems**

The diversity of tenure regimes in Kenya has had major implications on agricultural development. The tenure regimes have led to various forms of farming including large scale intensive farming or ranching, plantation agriculture, family farms, communal farming, contract farming, etc. Each type of farming system affects land use, conservation, and management

in different ways. There have been attempts in Kenya to assess the impact of land tenure on land use and the management of environmental resources (Ogolla, 1996; Ondiege, 1996; Eriksen et al., 1996; Okowa-Benuth, 1996; Torori et al., 1996; and Barrow, 1996). The overarching finding of these analyses is that tenure regimes influence land use.

Lenaola et al. (1996) provide some very useful insights into the land tenure–land use nexus in the arid and semi-arid regions of Kenya where most land falls under the customary tenure system. They note that the pastoral system in Kenya is governed by a system of intricate organization. The rights to different categories of resources, such as different types of water points, various arable field sites, transhumance routes, trees, and riverine pastures are held by different ownership units. Households, for example, may control arable field sites while riverine grazing is controlled by a small group of co-residents. The regime is however communal since ownership groups are not territorially distinct, and mobility is therefore possible. Taking into account the seasonal variation in the dry lands and the need to move around, they conclude that pastoralism is the best land use system in pastoral rangelands. Therefore, the government's attempt over the years to replace the customary tenure system is therefore counter-intuitive.

### **4.3 Land tenure, property rights and land use**

The perception of farmers on their entitlements to land has a bearing on how they develop and invest on it to make it more productive. This perception is closely linked to the security of tenure they enjoy. Secure property rights are critical in establishing a structure of economic incentives for investment in land-based activities. A bundle of characteristics define property rights over land: exclusivity, inheritability, transferability and enforcement mechanisms (Alchian and Demsetz, 1973). **Any** land holding system defines the legitimate exclusive uses of land and identifies those entitled to those rights. Land rights may also include stipulations of the circumstances and conditions for transfer or inheritance. The value of these rights will however depend on the formal mechanisms for defining and enforcing those rights.

The tenure regimes outlined above imply different property rights. In the case of customary regime, property rights are assigned to a specific community. Members of the community are able to exclude outsiders

from using the land and are able to control and regulate its use by members. Although exclusion of non-members is possible in customary tenure systems, there are incentive problems related to the unwillingness of individual members to undertake fertility-enhancing investments in land. Usually, the larger the community the greater the unwillingness of individuals to invest in customary land.

Public ownership implies that the state (or state agents such as local authorities and municipalities) possess property rights. These rights are however temporarily transferable to individuals or communities in cases of leases. To ensure its rights over land, it is important that the state asserts its authority otherwise its rights may become *de facto* private property if individual or communities establish their rights by physical possession. The squatter problem in Kenya is partly due to lack of assertiveness by the state.

Under the private tenure system, property rights are assigned to specific individuals or corporate entities. The individual or corporate body is free to do what it wishes with the land. Ideally, this system guarantees incentives for land improvement and conservation. However, certain formal or informal restrictions on rights weaken the inherent investment incentives. Restrictions on rights can come from formal legal and non-legal inhibitions, customary conventions or inadequate enforcement (Salazar et al., 1995). Certain restrictions to the time horizon over which property may be held, for example the duration of leasehold, or other limitations on use may weaken the investment incentives. There are also restrictions on transferability of property rights, for example restrictions on the sale of agricultural land. The more these rights are restricted, the weaker the investment incentives and the lower the productivity of land.

#### **4.4 Effects of the Legal System**

The evolution of legal instruments outlined in the previous sections and their application over the years has had a number of outcomes with implications on land use and ownership and on agricultural development in Kenya. The legal system has precipitated into:

- (i) The existence of a dual land tenure system comprising of customary rights to land and individual title;

- (ii) A system of law that is inclined towards individualisation or privatisation of land ownership;
- (iii) Multiplicity of formal land laws and therefore duplication of agenda among varied institutions;
- (iv) Excessive powers in the hands of the executive in land management and land governance; and
- (v) Multiplicity of land enforcement organisations, raising the costs of arbitration and conflict resolution.

#### **4.4.1 Dual tenure system**

As already mentioned, land in Kenya is governed by a complex mixture of English law and traditional customary law. The colonial powers introduced the English system to facilitate the appropriation of prime agricultural land, the 'white highlands'. Parallel to this were policies that restricted the access to and control by Africans to designated reserves under customary tenure system. While there are obvious strategies to recognise formal law today, the character of the legal system encourages dismantling of the customary tenure system and its replacement with English law. Nevertheless, the customary land system still prevails even in areas where land adjudication has been done. This has created a dual tenure system with the following implications on agricultural development:

- (i) Persistent conflicts

The post-colonisation period in Kenya has been characterised by persistent conflicts between customary rights to land and individual title acquired following land registration under the Registered Land Act (Cap 300). This has generated many land disputes that consume work time and material resources that can be used to enhance agricultural production through sound utilisation of agricultural land (IEA, 2000). At the same time, litigation has held huge chunks of land in abeyance pending legal resolution. Although it is difficult to measure the economic cost of non-utilisation of such land, it is reasonable to believe that the cost is high given the large number of land-related disputes in courts. An issue that keeps coming up is whether registration of individual land under the Registered Land Act extinguishes the customs rights of access and use that other people may be having with regard to a piece of land.

The land clashes in parts of the Rift Valley Province in 1997, though indicative of the politicisation of land ownership in Kenya, are also pointer to uncertainty in land holding. These clashes shook the very concept of security of tenure and had a negative impact on agriculture and other economic activities such as tourism.

(ii) Exclusion of access to prime agricultural land

The dual system of land tenure excluded indigenous Africans from access to land during the colonial period leading to serious landlessness in Kenya. In recent times, this phenomenon has manifested itself in marginalisation of the poor by the rich and the politically well-connected. The result is that agricultural land has ended up in the hands of people who do not necessarily 'need' it and are therefore not inclined to use it efficiently or conserve it. This has led to neglect of land and 'absent landlordism', and is associated with low agricultural output, soil erosion and land degradation.

(iii) Uncertainty in the land market

Dual tenure systems have also created uncertainty in the land market, slowed down land mobility, and impacted on the growth and intensification of agricultural land use. In areas where customary law is recognised, individuals are increasingly relying on formal registration as the surest tool for claim to land. This change is however not reflected in land use and intra-community land rights that have remained informal. The informal-formal law duality has tended to become more complex and entrenched and this has impacted on the land market and transactions and therefore on land activity.

#### **4.4.2 Individualisation of land tenure**

Kenya's land laws have been inclined towards individual tenure. At independence, the government retained this system of tenure from the colonial period and in addition restated its resolve to accelerate adjudication, consolidation and registration of land. This policy and the laws it generated were premised on the Swynnerton Plan which emphasised the link between agricultural development and individual tenure. It stated:

“Sound agricultural development is dependent upon the system of land tenure which will make available to the African farmer a unit of

land and system of farming whose production will support the family...He must be provided with such a security of tenure through an indefeasible title as will encourage him to invest his labour and profits into the development of his farm as will enable him to offer it as security against such financial credits as he may wish to secure from such sources as may be open to him" (Sywnnerton , 1953).

The impact of land reforms and in particular land registration on agricultural development in Kenya has attracted the attention of many analysts including Okoth-Ogendo, 1976; Herberson, 1973; Hinga and Heyer, 1976; Heyer and Waweru, 1976; and Kanyinga, 1998. These authors agree that individual tenure in Kenya has not significantly increased agricultural production. The explanation for this failure has focused on the inability of individual tenure to provide free land mobility and the inability to develop a land market that could, among other objectives, enable solicitation of agricultural credit in open markets. They note that despite adjudication, land registration only served to marginalize areas that were not in the former 'white highlands'. According to these protagonists, pre-colonial adjudication, farm size, the nature of land use, and the existence of agro-finance infrastructure were a stronger determinant of agricultural credit availability than registration. Whereas a considerable number of farmers, especially small-scale farmers, hold title over their land, securing credit using title has not been easy. The reality is that most public and private credit agencies are reluctant to extend credit to small farmers except under very exhaustive scrutiny.

The second explanation emanates from recognition that subsequent attendant laws emerged that were inimical to the very objectives they were set to promote. As early as 1967, the government introduced the Land Control Act to enable the government keep an eye on land transactions. This legislation established the Land Control Boards to give consent to any transactions affecting 'agricultural land'. The Land Control Act had two important objectives. One was to ensure that land owners do not sub-divide their land into small uneconomical units as this would defeat the objective of promoting agriculture by ensuring that farmers maintained economical pieces of land. Secondly, the law also intended to enable the government prevent landowners from selling their land and in the process becoming landless.

The land control legislation on agricultural land is an anomaly in a free enterprise environment where the principle of 'willing seller- willing buyer' operates. Moreover, the requirement that individuals wishing to sell their land must get approval from land boards masks the relationship between land tenure and agricultural productivity. Government intervention in the land market has made it extremely difficult for individuals to dispose off land when they wish to even when they are not using it economically. Land Control Boards prevent transactions on the overriding consideration of preventing landlessness. There is need to review this legislation in order to develop an effective land market in Kenya. Further, the Magistrates Jurisdiction Amendment Act that requires rural land disputes to be taken to elders tends to serve 'social' and not economic interests.

The use of agricultural land as collateral is also a victim of the Kenyan legal system following a judicial circular to all provincial heads preventing the sale of the so-called 'family land' by public auction. Consequently, banks and other lending institutions are discouraged from accepting land as a security against loans, bringing into question the need for individualised land tenure.

The third explanation focuses on a previously overlooked phenomenon of land speculation. Putting land under the possession of individuals bestows on the owner the right to make decisions on the proper use of the land. The assumption here is that individuals are rational and will exploit land gains to benefit the whole society. This is however not always the case. Some people acquire land not because they need it for agricultural purposes but because they want to hold it for speculation. The under-utilization of land held for speculation is an important factor that affects agricultural productivity. This problem was recognised by the government in its Sessional Paper No.1 of 1986, when it states that: "Two misuses of land must be prevented. The subdivision of small farms; and idle and under utilization of large holdings" (Republic of Kenya, 1986:89)

While the Land Control Act (Cap 302) and the Agriculture Act (Cap 318) have specific stipulations to prevent such conditions, these laws have not been effective in ensuring efficient land use in Kenya. Idle holding of land and other undesirable land practices have gone on unabated for the many years these laws have been in operation. Those vested

with powers to make rules aimed at ensuring sound utilisation and management of land have rarely exercised those powers effectively. There have been calls to establish a Land Use Commission and to introduce land taxes to discourage under-utilisation of land. Whatever the merits of each of these, there is certainly need to look for legislative or other means of ensuring efficient use of the scarce land resource.

It has also been argued that communal holding of land in the customary tenure system is inimical to agricultural production. In fact, this was the basis of land individualization in the Sywnnerton Plan. The primary defects in the customary land holding system has been related to the communal holding of land in which 'ownership' resides in the tribe or the clan and that individual farm households only have user rights. The system is therefore incapable of providing security for land development since, among other things, title cannot be marketed or otherwise negotiated. The system also leads to overuse of land and is prone to disputes.

However, Migot-Adholla *et al* (1994), based on empirical evidence from a number of African countries (Kenya, Ghana and Rwanda), argue that the communal rights land system does not constrain agricultural productivity. They note that "the effects of indigenous tenure institutions, through their effects on land rights, do not appear to constrain agricultural productivity. It is likely that farmers feel sufficiently secure in their ability to continuously cultivate their land, regardless of rights category" (Migot-Adhola *et al*: 137). The authors argue further that perpetuation of the communal system is indicative of the fact that the system is after all not necessarily bad.

#### **4.4.3 Land law multiplicity and land use efficiency**

The multiplicity of laws on land use has over the years led to the establishment of various agencies and institutions to oversee their implementation. These laws, which are in most cases sectoral in nature, are neither functionally integrated nor administratively well co-ordinated. This has caused gaps, conflicts, contradictions and over-laps in the current system with adverse effects on efficient utilisation of land in Kenya.

The numerous land laws emanate from the legal duality explained earlier and the lack of a national land policy and a land-policy review framework.

Land policy agenda has since pre-independence years been defined piece-meal, with subsequent legislation formulated to cater for emerging interests. The character of interests on land has changed considerably from independence to date. Documented interests include the alienation of Africans from traditional lands in the pre-independence period; the Africanisation of land holdings after independence; the encouragement of land settlements within and outside irrigation schemes; the promotion of agriculture; agricultural intensification; and more recently environmental preservation. Each of these interests has been characterised by legislation without adequate review of past policies. The land policy framework is therefore full of duplications, contradictions and has created a multi-mandate legal environment.

The specific consequence of this multiplicity in relation to agricultural land use is the inability to regulate competing demand on land. Currently, land use in Kenya is articulated through sectoral land use policies and laws. Because there is no comprehensive national policy on land use, it is difficult to regulate the competing demands. There are numerous cases of conflict between agricultural land use (which falls squarely under the Agriculture Act and the Land Act) and, for example, wildlife (which falls under the Wildlife Conservation and Management Act). The absence of a comprehensive land use policy also leads to haphazard land use that accelerates the destruction of natural resources and degradation of the environment.

#### **4.4.4 Executive powers in land alienation and distribution**

A major weakness of the legal environment relating to land in Kenya is the over-concentration of powers in certain institutions, especially the presidency and ministers. The Government Lands Act (Cap 280) empowers the President to make grants of freehold to individuals or corporate entities. During the 1970s and early 1980s, alienation of land took place for scientific research, agricultural and other productive use. The creation of the Agricultural Development Corporation (ADC) in the 1960s was designed to concentrate land into larger holdings. Through the ADC, the government, acting as a farmer, was able to facilitate the transition from subsistence to modern agriculture. Since the early 1980s, redistribution of state-owned land to private, individual ownership has aggravated land disputes. The absence of provisions stipulating the conditions under which such grants may be made have given the chief

executive the powers to alienate land sometimes on purely patronage lines. This has put land in hands of people who may not need the land for agricultural production. Unlimited executive powers in land appropriation and land management can discourage agricultural productivity by raising uncertainty, and discouraging the operations of the free market.

#### **4.4.5 Multiple enforcement agencies**

As earlier indicated, there are more land enforcement agencies than there are land laws. Enforcement agencies range from the Office of the President, the Ministers for lands, agriculture and physical planning, the judiciary, boards and tribunals, and other subsidiary bodies. There are far too many land law enforcement organisations and most are highly hierarchical and bureaucratic in arrangement. The minimum amount of time a land preservation order would take to be solved is 18-20 months given elaborate and extensive rules of the constitution of various boards, each with its own set of hierarchy from division to district to provincial to central boards. There are also other rules that stipulate the time within which an appeal is to be made and time within which responses would be made, apart from the period of resolution and subsequent appeals. The enforcement system clearly needs to be rationalised and simplified.

### **5. SUMMARY AND CONCLUSIONS**

This paper has attempted a review of Kenya's land laws and their impact on land use. The review reveals the existence of a multiplicity of laws regulating land ownership. The review also reveals that there is a strong inclination towards private ownership regime. Despite this trend, communal land ownership under the customary regime still remains in place in vast areas of Kenya. The co-existence of the two has been a major source of conflict in land use and management.

The theoretical argument for defining property rights and the use of law to govern land use depends on the costs and returns, both social and economic, the comparisons of the various property rights' regimes, and the law enforcement. It is evident that such definition is not optimal in Kenya. Such non-optimality is exemplified in various conflicts such as land clashes, refusal to oblige to set contractual obligations, land use conflicts, etc.

Despite the legislative activity that has gone on in Kenya after independence, land tenure arrangements have not led to the reform of the key institutions that govern the management and use of land. The land market is highly distorted and land transactions have mainly tended to be handled by administrative provisions rather than by clear policy or law. The consequence has been land alienation, land disputes and inefficient land use. Financial institutions that were expected to facilitate agricultural use of land by providing credit have been discouraged by legislation that makes selling of 'family land' difficult. The result is that the land tenure system in Kenya has not increased agricultural production despite its inclination towards individual ownership.

The challenges in land use in Kenya are enormous. They range from the multiplicity of laws to non-rationalisation of land and land use agenda. The duality in the tenure system has been a source of conflicts, lengthy litigation and exclusion of access by certain sections of society. This has had a negative impact on agricultural land development. The multiplicity of laws and institutions that govern land use and ownership has led to gaps, conflicts, contradictions and overlaps in land laws with negative implication on agricultural development. The absence of a comprehensive land use policy to govern land tenure and conservation also remains a big challenge.

Discussion to date has focused on pricing and incentive solutions with minimal focus on land use rules (formal and informal law). Emerging theoretical constructions such as institutionalism suggested by North (1990) have energised the need for legal land review as a tool for increased efficiency in land use. In Kenya this will require specific measures such as repeal, amendment, revision and harmonisation of land laws. The introduction of legally enforceable incentives to stimulate efficient use of land and conservation should perhaps be considered. Enforcement of negative incentives such as taxes would increase efficiency in the utilisation of land in Kenya.



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