Land Tenure and their effect on Urban Planning and Development in Kenya

Research Report

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DECLARATION A

"This Thesis is my original work and has not been presented for a Degree or any other academic award in any University or Institution of learning"

O. S. M

ONESMAS S. MANGARO

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Date

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"I confirm that the work reported in this Thesis was carried out by the candidate under my supervision"

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12/06/2025

Date

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CHAPTER ONE

THE PROBLEM AND ITS SCOPE

1.1 BACKGROUND

Land is a fundamental resource for human existence. Without land, without territory, there can be no state.[1]Housing, agriculture, natural resource use, and national security concerns are all based upon land management and use.[2]

Land tenure systems are a product of historical and cultural factors and they reflect the relationships between people, society and land. Land tenure comprises the customary and/or legal/statutory rights that individuals or groups have to land and related resources, and the resulting social relationships between the members of society

Each country has developed specific land tenure concepts that are based on historical and current values and norms. The concepts determine the present tenure systems and they have often been shaped by an evolutionary process. In many cases, endogenous forces act as drivers that sharpen and change tenure systems, for example population growth, industrialization and urbanization, or accelerating natural resource exploitation. In addition, there may have been external influences, such as the imposition of a colonial power's legal system in the past or more recently through internationally harmonized statutory law and global treaties such as those on indigenous peoples, the environment or gender equity. In some cases, tenure systems have been determined by revolutionary processes and the resulting turnover of existing land tenure systems through redistributive land reform or forced land collectivization. Even in countries where gradual changes in land tenure systems were initiated, policy makers may have strengthened the role of the (central) state in allocating and even managing land. Often in these cases, this vision materialized with the nationalization of non-registered lands

[1] R. Jennings and A. Watts, eds., *Oppenheim's International Law* (London, 1992) (hereafter, "Oppenheim"), at 121.

[2]Stephen Hodgson, Cormac Cullinan and Karen Campbell.,LAND OWNERSHIP AND FOREIGNERS: A COMPARATIVE ANALYSIS OF REGULATORY APPROACHES TO THE ACQUISITION AND USE OF LAND BY FOREIGNERS, International *FAO Legal Papers OnlineDecember 1999*

held under customary tenure and of forest or pasture resources, and the influence of government organizations that directly interfered in land use and management.

However, because these state-led tenure reforms had disappointing results with regard to economic development, efficiency and even equity and local participation, most of the policies and experiments have been criticised and partly revised since the 1990s, paving the way for far-reaching, market-driven tenure reforms and a redefined role for the state. These initiatives initially concentrated on reforming the complex statutory legal framework; later they tried to identify ways to better integrate customary rules and regulations into modern tenure systems. Together with decentralization and de-concentration of decision-making powers, many countries attempted to bring land administration closer to its clients in urban and, particularly, rural areas. This was done to support systematic titling of land, to enhance the efficiency of land administration, to address the poisoning impact of corruption at all levels and to settle different kinds of land-based conflicts. All these efforts aimed to significantly increase tenure security. In a few cases, they explicitly focused on the poor and marginalized groups in society; in other countries, reforms aimed to unleash the potential of working land tenure systems for economic growth, sectoral and structural change, and for domestic and foreign investment.

Further, governments were reacting to the strong demands from an increasing (mainly urban) middle class that invests in property in order to ensure their financial future and to finance the education of their children due to insecure or no alternative investment opportunities within the countries (e.g. bonds, bank savings).

Common trends in tenure systems can be observed for most of the countries despite remarkable differences in geographic location, historical development or economic performance. This is partly a result of shared historical background, new international regulations and influences on basic human rights initiatives (e.g. gender focus, indigenous peoples, landless). It is also a result of a painful learning process on the power of economic (dis-)incentives emerging from different property rights systems and

tenure-related rules and recognition of the power of the private sector in a liberalized and globalized world and an acknowledgement of state failure in the past. What is more, in all countries people have clearly expressed their on-going strong emotional and physical attachment to land, thus confirming that land tenure systems are indeed an integral part of any nation's or society's culture and history. This may contrast with the actual situation in Western post-industrial societies where this emotional-spiritual connection has been limited to agriculture and rural areas, and where anonymous land sale and tenure markets dominate urban development.

Current tenure system

Land tenure is a critical issue for future Kenyan development because it still plays a key role in social, economic and political progress. The country has several major tenure systems. The first, freehold, is the most secure form of rights to land and through which rights and restrictions are well defined. Rights are only restricted through compulsory state acquisition in the public interest and based on fair compensation, for example as a result of planning and environmental requirements. The second tenure system is that of leasehold arrangements, which are common. The leasehold period varies between 30 and 99 years- the current Constitution does not allow for any lease longer than 99 years. Due to such long periods, leasehold is close to freehold; most cases in Kenya were renewed at the beginning of the millennium.

The third system, customary tenure, exists in regions where individual rights have not been ascertained under statutory law. This system is currently governed by the Land Act from 2012. Customary tenure features in about 70 per cent of Kenya's landed area and is characterized by multiple practices as result of different cultural backgrounds. A large part of customary land is gradually being converted into freehold. As in other African countries, non-formal tenure systems exist in urban areas on a large scale (informal settlements) that are not yet recognized in law. In addition to private parties, state lands existwhere ownership and transfer rights are owned by jurisdictions at

different levels. A partial interest in land, such as easement, is the fourth tenure system.

Status of land tenure security

Despite some improvements in tenure systems, tenure insecurity is still high in Kenya. It has different forms and is driven by colonial injustices (the concept of tenants of the crown, dispossessions) that were not properly addressed after independence and include land settlement programmes that continued after independence, special regulations for the coastal strip (ten mile strip), urban sprawl as well as competition between wildlife and human settlement needs.

For leasehold land, tenure insecurity is due to land grabbing, double land allocations and fraud, which result in conflicts and violent clashes. These conflicts are aggravated by the individualization of tenure of formerly customary lands; this is a new legal framework that does not sufficiently consider holistic indigenous tenure concepts. Corruption is also a major cause of insecurities.

Urban Areas in Kenya

The Act classifies urban areas as city counties, cities, municipalities and towns. These urban areas are differentiated largely in terms of population and minimally in terms of capacity.

Kenya has had some form of Local Government since 1902 (Mboga H, 2009) though these have evolved over time. The management of Urban Areas and Cities in Kenya has been through the 175 Local Authorities established by the Local Government Act Cap 265 of the Laws of Kenya. The Local Authorities are categorized as city council, municipal councils, county councils and town councils. The Local Authorities work through committees of elected and nominated councilors who formulate policies and plan activities that help communities engage in socioeconomic and political responsibilities in their locality. Community participation is made possible through the Local Authority Service Delivery Action Plan (LASDAP) meetings.

The Urban Areas and Cities Act, 2011 gives effect to Article 184 of the Constitutionof Kenya (CoK) 2010. The Act provides for: the classification, governance and management of urban areas and cities; the criteria for establishing urban areas and; the principle of governance and participation of residents in the governance of urban areas and cities.

1.2 Statement of the Problem

Land is becoming an increasingly globalised commodity, fuelled by rising demand for food and agro fuels, for minerals, for tourism, and for ecosystem services including carbon sequestration

1.3 Purpose of the study

The purpose of this study was to establish gaps that exist in the existing literature and to test the theory of relationship between land tenure and urban development and planning in Kenya.

1.4 Research objectives

The aim of the study was to investigate **the relationship between land tenure** and their effect on urban development and planning in Kenya. The following specific objectives were addressed.

1) The study sought to establish the laws governing land access in Kenya.
2) To establish the laws governing land ownership/tenure in Kenya.
3) To establish the effect of land access and land ownership on urban planning and development in Kenya.

1.5 Research questions

The study was based on the following research questions.

(i) What are the laws governing land access in Kenya.

(ii) What are the laws governing land ownership in Kenya.

(iii) Is there a link between land access and land ownership and urban planning and development in Kenya.

1.6 Scope of the study

The research sought to review the legal framework for land access, ownership and the institutions put in place for land administration and how they impacted urban planning and development in Kenya. In particular, assessment was made of the policy and operational framework in terms of how to obtain access to land, which ownership rights accrue and what kind of protection is guaranteed to the rights acquired.

1.7 Significance of the Study

The expected benefit of the study included;

- Since it has been established that secure rights of access to land are a prerequisite for productive investment, the Research will help the government to come up with policy reforms which makes access to land easier. Easier access depends on effective, accessible land administration systems. Also required are proper regulation, transparency and an end to bureaucratic discretion and corruption[3].
- The study will help us understand the conceptions of ownership which is of fundamental importance in understanding the nature and direction of development in Uganda.
- Lastly, the study will contribute to the existing stock of knowledge on the link between land access, ownership and use and Foreign Direct Investment.

[3]Hanstad T, Nielsen R, Bown J 2004 *Lands and livelihoods: making land rights real for India's rural poor* FAO Livelihood Systems Programme Paper, RDI, Seattle / FAO Rome; and Srivastava RS 2004 *Land reforms and the poor in India: an overview of issuesand recent evidence* in Gazdar H and Quan J 2004 *Poverty and Access to Land in South Asia: a study for the Pakistan Rural SupportProgrammes Network* NRI Chatham

CHAPTER TWO

LITERATURE REVIEW

2.1 Land access

The concept of Land access

Land access has been defined as the ability to use land and other natural resources, to control the resources and to transfer the rights to the land and take advantage of other opportunities. It refers to the processes by which people, individually or collectively, gain rights and opportunities to occupy and use land (primarily for productive purposes but also other economic and social purposes), whether on a temporary or permanent basis. These processes include participation in both formal and informal markets, land access through kinship and social networks, including the transmission of land rights through inheritance and within families, and land allocation by the state and other authorities with control over land[4].

Importance of Land access

Access to land, and the conditions under which it happens, play a fundamental role in economic development. This is because how the modes of access to land and the rules and conditions of access are set, as policy instruments, has the potential of increasing agricultural output and aggregate income growth, helping reduce poverty and inequality, improving environmental sustainability, and providing the basis for effective governance and securing peace[5].

Land is not only a factor of production, and as such a source of agricultural output and income, it is also an asset, and hence a source of wealth, prestige, and power. Because it is a natural asset, its use affects environmental sustainability or degradation. For

[4]Cotula L., Toulmin C. &Quan J., 2006.BETTER LAND ACCESS FOR THE RURAL POOR. LESSONS FROM EXPERIENCE AND CHALLENGES AHEADIIED, FAO.

[5] A. Janvry and E. Sadoulet: Access to Land and Development1 University of California at Berkeley August 2005

these reasons, the link between access to land and development is quite multidimensional and complex, with many tradeoffs involved.

According to Waldron and Dias[6], the issue of access to land is critical to the avoidance of social conflict and therefore becomes transcendent as priority of governmental policy, rather than simply a juristic concern. Africa's state of underdevelopment and abject poverty necessarily propels the issue of land to the forefront of its development agenda because most Africans are directly or indirectly dependent upon the land for their survival and advancement[7].

Modes of access to land

Inheritance and inter-vivo transfers

Access to land via intra-family transfers is of fundamental importance. Indeed, it is the case that, where land frontiers are closed, large-scale redistributive land reform programmes have not been implemented, and land markets are yet poorly developed, most farmers have gained access to land through intra-family transfers. Even where land markets are well developed and land reform has been extensive, such as in the central region of Nicaragua, access to land through inheritance remains fundamental: in the province of Masaya, 40 per cent of the land has been acquired through inheritance, 35 per cent through the land reform, and 25 per cent through the land market.[8]

However, this mode of accessing land has its own shortfalls, for instance: there often exist external constraints to division. Such constraints can be imposed by landlords who prohibit peasants from transmitting the land to more than one descendant in order to make tax collection easier, the community may restrict transmission to more than one heir of the rights of access to common property resources to refrain over-extraction,

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[6] J. Austin, 'Lectures on Jurisprudence' quoted in R. W. M. Dias, *Jurisprudence*, Butterworth, p. 301, note 10.

[7] J. Pottier, *Land Tenure and Land Reform in sub-Saharan Africa: Towards a Land Reform Agenda* in African Centre for Technology Studies (ACTS): *Report of the Conference on Land Tenure and Conflict in Africa: Prevention, Mitigation and Reconstruction – 9th–10th Dec. 2004*, ACTS Press,Nairobi (2005),

[8] De Janvry and Sadoulet 2000.

The state may prohibit inheritance transfers to more than one heir to avoid atomization of the land and a return to explosive rural poverty. This is the case in the Mexican land reform sector, the '*ejido*', created as a response to the peasant-led revolution of 1910 and finally, there are situations of extreme population pressure on the land (e.g., in Uganda and Rwanda) where the farm has already reached the minimum size needed to sustain the household.

In Sub-Saharan Africa, as land markets tend to develop with the individualization of property rights, access to land via inheritance is also altered. Land that has been acquired by parents through the market, instead of having been inherited through lineage relationships, is not subjected to traditional inheritance rules. This new freedom is a source of discretion in transmitting land that can be used to exclude some and favour others. Fathers can transmit freely this land, including to daughters if they choose to do so, and sons who want to set up their own households cannot pressure parents to distribute land early (as they can with lineage land)[9].

Access to land via communities' membership

Access to land via membership in communities that have control over resources remains very important. In corporate communities, land is accessed through community membership and is allocated to individual households through thecommunity governance structure. In Mexico, 70 per cent of the landin the *ejido*sector is in common property, most particularly lands for grazing andforestry, and extraction from these resources follows community rules. If user rights are so incomplete that the community cannot exclude others from encroaching on the land, the open-access nature of the resource leads to the well-known tragedy of the commons, with under provision of services (e.g., for maintenance of irrigation canals or the repair of fences) and over-appropriation of resources (e.g., an excessive number of animals per hectare in herding and over-logging in forestry) leading to exhaustion of the resource.

[9] De Janvry and Sadoulet; Access to Land and Land Policy Reforms,Oxford University Press 2001

Access to land via land sales and land rental markets

Under increasing population pressure, a more mobile population, and growing market integration, access to land via family lineage and community membership tends to give way to individualization of property rights, and to access to land via land sales and land rental markets. This long-term regularity had been identified by Ester Boserup in her classical work on historical patterns of agricultural change[10]. Otsukaanalyse the details of this transformation in the forest frontier areas of Ghana and Sumatra. They find that, even when property rights remain informal, active land rental and land sales markets can exist with high endowments in social capital are observed to sustain active land markets without formal titling. By contrast, in communities of recent colonization and of more extensive population movements, social capital is insufficient to deter moral hazards in land transactions and informal land markets cannot\ operate. In this case, formal titling is necessary to provide the legal basis for the recognition of property rights and to sustain the emergence of land markets.[11]

As land markets become perfected through better established property rights and lower transactions costs, they will become the main mechanisms through which land is transferred across owners and between owners and users. If all markets worked perfectly, land sales and land rental markets would be equally effective in providing access to land to the rural poor since, as economic theory tells us, asset ownership is, under these conditions, unrelated to use of the assets in production.

However, in a context of market failures and missing institutions, land sales markets may not be effective for this purpose. And, even if access to land in ownership is achieved, the continued existence of market failures and missing institutions may jeopardize the competitiveness of beneficiaries, compromising their economic viability. Land rental markets, by contrast, may be friendlier[12].

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[10]BoserupEster: *Conditions of Agriculture Growht;economic of Agrarian change under population pressure. New York,Aldine publication.*

[11]Hayami,Yujiro and KeijIroOtsuka:The Economics of Contract Choice.Oxford. Clarelondon press.

[12]De Janvry and Sadoulet above.

2.2 Land Ownership

The Concept of Land Ownership

The concept of ownership is a complex one and ownership has a multiple of meanings. The Roman concept of ownership, for example, is absolute – 'the right to use, abuse and dispose of' property[13]. Similarly, John Austin expresses the idea in equally absolute terms: 'A right, indefinite in point of user, unrestricted in point of disposition, and unlimited in point of duration, over a determinate thing'[14]. The prevailing jural conceptions of ownership in most jurisdictions today are derivatives of this Roman idea but purged of its absolutist characterization. For example, Pollock articulates the concept with a limitation which, arguably, claims universal validity today: 'The entirety of the powers of use and disposal *allowedby law*'[15].

Importance of Land ownership

The conceptions of land ownership are of fundamental importance in understanding the nature and direction of development in any given society. For example, within the market economy, the conception of the ownership of property is essentially private, and provides the ideological support base for the contract device – the ultimate expression of relations of production within the market economy[16].Consequently, policymakers within a system based on the market philosophy need to promote a conception of property ownership which is essentially private. In this sense, the specific content of a given society's conception of property is crucial to the question of resource generation and allocation – matters that are critical to such society's stability and development.[17]

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[13] I. G. Shivji, *Class Struggles in Tanzania*, Tanzanian Publishing House (1975), p. 5.
[14] J. Austin, 'Lectures on Jurisprudence' quoted in R. W. M. Dias, *Jurisprudence*, Butterworth, p. 301, note 10.
[15] F. Pollock, *Jurisprudence & Legal Essays*, Selected and Introduced by A. L. Goodhart, Macmillan (1961), p. 97 (emphasis supplied).
[16] P. Richards, *Law of Contract*, Pearson Edu. Ltd (2002), pp. 3–11
[17] Supra note 45.

Systems of Land Ownership.

Various systems of land ownership have developed throughout the world under the influence of historical, cultural, and economic factors. These systems are exposed to a continual process of change and include the following;

State Ownership of Land

As a consequence of conquest, purchasing, gifts, and seizure, land belongs to the state in many countries in the same way as other areas belong to private people. In the USSR, the majority of the land has been turned into state property - in other socialist countries, only a part until now. This was done to prevent exploitation resulting form private ownership of the land as well as unearned income derived from ground rent. Otherwise, state ownership plays a large role if public interests cannot be satisfied by private ownership, or if the land is not of interest to private people from an economic standpoint (catchment areas, waste land, forest, frontiers, experimental farms, etc,). The state partially cultivates its own land (government farms, government forests) and also partially leases it out. In some countries, the church likewise has a great deal of landed property. The process by which the church gained possession of the land and its function is similar to that in the case of state land.

2.3 Land Grants

In Islamic countries, land is granted to schools, mosques, orphanages, and similar institutions. This type of grant is often called a "waqf." The beneficiary receives an irrevocable right of use that is carried out by government organizations, generally in the form of being leased out. The institution that is granted the right of use receives the profit. The lands are frequently in very bad condition as hardly any investments are made.

Land is sometimes established as a private 'waqf'. The irrevocability of the grant, which is established in court, prevents eventual changes in ownership and protects the family against property losses. The family receives the income derived from the yield. This

type of grant is also found in the south of Europe and existed in Eastern Germany until 1945 where it was called "Fideikommis."

Collective and Communal Ownership

In this type of ownership, the right of disposition is in the hands of kinship or political groups that are larger than a single family. In the forms of communal ownership found in Africa (a widespread phenomenon south of the Sahara), the land rights are generally controlled by the tribe, and the use of the land is regulated by the chieftain or priest serving the land and earth deities. Every member that is born into the group has a lifelong right to a piece of land for his own usage. The tribes regard themselves as custodians of the land for future generations rather than proprietors.

In Mexico, former 'latifundia' were transferred into a form of communal land called "ejido." The members of the community are granted land on a heritable basis for their usage, while pasture land and waste land are used commonly. In various countries such as Taiwan, India, and Jamaica, land belongs to minorities in the form of common land. The purpose behind this is to give protection against loss of the land.

In socialistic countries, land was collectivized in accordance with the political doctrine in order to prevent exploitation resulting from private ownership of land. At the same time, this measure simplifies controlling agricultural production and the process of adapting to the goals of rapid industrialization and overall development. Based on a different ideology, but with similar motives, various religious communities have also abolished private ownership of land and collectivized it. Physical and/or psychological coercion and pressure or a critical situation has always played a great role in collectivization.

Private Ownership of Land

In non-socialistic countries, the right of disposition is often in private hands – regarding agricultural land, less so in the case of forests. In face of the positive experience in

European history and its great ability to adapt to changing economic and technological systems, private ownership of land was introduced in many of the former colonies. In the process, however, it became obvious that the positive outgrowths of private ownership were dependent upon certain specific preconditions that were not always present. The decrease in the size of the farms resulting from population increase and the differences in the success achieved in the process of adaption to changing conditions - especially of an economic nature - led in part to property losses, whereas other people were able to gain control of large areas and, thus, economic and - consequently - political power. As a result of this process, today there are several widely differing forms of private ownership.

Small-scale agricultural property, or smallholdings, is a widespread form throughout the world and is the target of most of the non-socialistic agrarian reforms. Family farms have proved to be an expedient form of agricultural organization, both regarding agrarian production as well as the social conditions, as long as the farm size is large enough. The incentive ensuing from the farmer's freedom to make his own decisions and the knowledge that he will receive the fruits of all his labour and investments have always been a tremendous inducement, especially if the attitude towards work and investments was positive and the concomitant institutions (extension services, credit system) were advantageous. In order for family farms to guarantee the continuation of yields from their land, it is necessary for them to observe the preservation of the ecological balance. As seen as the precondition of sufficient farm size no longer exists, the situation becomes less favorable and the living standard of the farmers' families drops, the farms become indebted, property is lost, and the ecological balance is endangered.

Large holdings are in many cases not farmed by the owner himself. If there is a large demand for land, the owner is in a position to let others work for him and still receive a sufficient income. He, therefore, leases the land out, and, although he exercises his influence regarding farm management, this is more to control the farm rent payments than to foster agricultural production. The rent is usually not reinvested, but rather

used by the owner to cover his own living expenses as well as other purposes. Thus landed property becomes a source of rent while the agricultural economy remains static.

As soon as the owner becomes more interested in the cultivation of his land, he generally switches to centrally controlled farming as this makes it possible to control the cropping more closely and, thus, guarantee economic success. This form is not only found on plantations and commercial farms. In the course of the Green Revolution, many former lessors started cultivating the land themselves as this appeared to them to be more profitable under the new circumstances than the traditional forms of leasing the land to tenants.

2.4 Farm Tenancy

An increasing population, while at the same times the job opportunities outside the agriculture) sector develop only slowly, has forced a growing number of people to look for land that they can rent from someone for their usage for a period of time. In densely settled countries with private land ownership, in some cases more than half of the land is cropped today by tenants. One can differentiate between various forms of renting the land according to the type of payment that is demanded.

1. *Occupational tenancy*: in way of payment, the tenant works for a specific number of days on the landlord's farm in order to pay for the land he rents. In some cases, he uses his own draught animals and implements. This form, is particularly found in Latin America where it is called a colonate. Until a few years ago, it also existed in Westphalia, Germany, under the name Heuerling.
2. *Cash tenancy*: the tenant pays a fixed rent for the land he rents and, thus, bears the full cropping and marketing risk himself; however, he also receives all the proceeds growing out of his labors. This form demands the ability to face a risk and is, thus, found in the case of tenants who are economically sound.
3. *Rentin kind*: is a form of tenancy in which the tenant pays a fixed quantity of produce and, therefore, does not have to take the marketing risk himself. This

form is found especially among landowners who rent out small parcels of land and who consume the rent in their own household.

4. *Share tenancy* is a specific form of rent in kind. It is widely spread, particularly in the developing countries. In this case, the gross output is divided between the landlord and tenant. While the original size of the share was determined by the reciprocal obligations and the productivity of the land, the great demand for land has led increasingly to shares equaling 50/50. Under these conditions, each side receives only half of any proceeds resulting from additional inputs. There is little incentive, therefore, to increase productivity by means of working harder or making larger investments. Moreover, the contract is often drawn up for only one year. Even though it is often prolonged by tacit agreement, it leads to insecurity and a state of dependence. This has, along with the normally extremely small size of the plots under tenancy, resulted in many farmers being indebted and living in very poor economic and social conditions.

Although tenancy can fundamentally bring about flexibility in the structure of land ownership and allows making adoptions to changing economic and social (family) conditions, under the circumstances in the developing countries (with a one-sided advantageous position on the market for land available for tenancy in favour of the landlords), tenancy leads to stagnating agricultural production, dependence, and an economically poor situation for the tenants and their families.

2.5 Origins of land access and ownership

Much of the current day land use ideas and practices in the world take their inspiration from John Locke's theory of property. When advocates of private property rights defend their natural right to do as they choose with their own land, and argue that they should not have to take into account any one else's interests in making those choices, they base their arguments on concepts originally expressed by Locke. However, there is a great difference between the social context in which his argument was originally developed and the pervasive demands of consumer culture on ecological systems of the

present time. Furthermore, the mutation from his original theory to the concept of private property as it exists today is remarkable.[18]

Locke's theory of property begins with the concept of self-ownership. By being our own masters and exercisers of our capacities, in this sense we belong to ourselves by being...

Proprietor of his own Person ... [he] had in himself the great Foundation ofProperty; and that which made up the great part of what he applied to Supportof Comfort of his being was perfectly his own, and, did not belong in common toothers".[19]

Locke leads from this argument to the suggestion that labor produces not only a sense of entitlement but also an actual title of property, which grants possession. Possession of property entails two things. First is exclusion—within the limits of natural law, freedom from seizure or invasion of property. Second is control—to use and arrange holdings as the titleholder sees fit. These are applied not only to physical property, but also to oneself, the body and mind. The concept of self-ownership of one's labor, ability, and energy leads to the ownership of the improvements one effects on raw materials. These improvements then become one's property which excludes the common right of other people.[20]

For Locke, one's engagement with the land conferred ownership of that land, as well as the products of his or her labor. "Subduing or cultivating the Earth, and having Dominion ... are joined together. The one gave Title to the other. So that God, by commanding to subdue, gave Authority so far to appropriate. And the Condition of Humane Life which requires Labor and Materials to work on, necessarily introduces private Possessions."[21]

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[18] John Locke, Two Treatises of Government, ed. Peter Laslett (Cambridge: Cambridge University Press, 1967).

[19] ibid

[20] Elizabeth Michelle Grant, B.A., B.S; PRIVATE PROPERTY IN AMERICA: LAND USE AND THE ETHICS OF OWNING LAND. UNIVERSITY OF NORTH TEXAS ,December 2005

[21] John Locke above at, p. 119.

In Locke's view, appropriation of private possessions was naturally limited by the individual taking ownership of merely what could be used, and they would take no more than could be used because that would generate spoilage and be wasteful. Because of his emphasis on utility and production, and the moral obligation to not be wasteful, "the exclusionary right to use land [is] conditional upon, and entailed by, cultivation or other forms of making useful products."[22]

Locke carefully distinguished between "having Dominion, which a Shepherd may have, and having full Property as an Owner."[23] This distinction is taken to mean that a rights holder may have property in utilization of the land, but not full property as in ownership. Locke anticipates a division between full possession of and authority over what happens to an entity.

There is, according to Locke, another way in which an individual is said to have property without possessing an entity. If we consider this approach in the context of land use, claims of rights to use land in particularly defined ways are applicable here. A use right is similar to property abstracted from possession, since the user barely retains, but does not possess, the land he uses. But it also contains the attributes of possession and alienation appropriate to property in its proper meaning. The right holder possesses his right, but not the land over which it obtains.[24]

According to Eugene Hargrove, present-day private property owners who assert their right to do as they wish with their own property appeal to a history of rights that refer to early European traditions. Such a landowner is "appealing to the rights that he has informally inherited from his political ancestors, Saxon or German freemen—specifically, the right to do as he pleases without considering any interests except his own."[25] The freemen were the most commonly found people in early Teutonic society, and they usually followed no religious or political authority, but handled their own affairs

[22] Ibid., p. 123
[23]Locke, Two Treatises of Government, Treatise I, sec. 39.
[24]Tully, A Discourse on Property, p. 113.
[25] Eugene C. Hargrove, Foundations of Environmental Ethics (Denton, Tex.: Environmental Ethics Books, 1989), p. 55.

independently. In this tradition, Hargrove asserts that land was held rather than owned on freehold farmsteads. Possession of these lands would change hands regularly, as freemen moved about the land to establish new farmsteads and Germanic expansion across Europe continued.

Some have argued that Teutonic farmsteading was an early form of community ownership of land because the farmsteads were not boundaried and possessed in a conventional sense. Historian Denman Ross states, *It is often argued that because there were no fixed limits, no boundaries, to individual holdings, the land must have been owned collectively or communalistically. It is said that the statements of Caesar go to prove the existence of community of land; Feldgemeinschaft, the Germans call it. The argument is inconclusive. The absence of fixed limits and boundaries proves simply that the land was undivided property; it does not prove that it was common property.*[26]

[26] Denman W. Ross, The Early History of Land-Holding Among the Germans (Boston: Soule and Bugbee, 1883), p. 17.

CHAPTER THREE

METHODOLOGY

3.1 Research Design

This study adopted the descriptive survey design, specifically, the descriptive co-relational strategy. Descriptive studies are non experimental researches that describe the characteristics of a particular individual or group of individuals. It deals with the relationship between variables, and development of generalizations and use of theories that have universal validity. It also involves events that have already taken place and may be related to present conditions as to discover the casual relationship and differences to provide precise quantitative description.

3.2 Research Population

This research sought to analyze the land laws and land law administration institutions in Uganda from the perception of the law implementers and the foreign investors in Uganda.Therefore, the population for this study comprised of investors from the manufacturing industry and agribusiness and staff at UIA, Ministry of Lands. The Total population of study was estimated at 30.

3.3 Sample Size

The sample size for the study has been calculated according to the formula recommended by Slovene which is as below.

S=P/1+P (0.05) 2

Where P is the study population

S is the Sample size and

(0.05)2 is the margin of error

Therefore the sample size was; 30/1+30(0.05)2 which is equals to 28.The minimum sample size was therefore be 28 respondents.

3.4 Sampling Procedure

The research required the researcher to collect information from respondents in specific areas. Accordingly, the 28 respondents to be included in the sample was selected using purposive sampling method. This means the respondents were sampled out by virtue of their involvement either as staff at UIA, Ministry of Lands or as investors in agribusiness or manufacturing industry.

3.5 Research Instruments

The researcher used an interview Guide .

3.5.1 Validity and Reliability of the Instruments

The researcher sought to examine the Land laws and their impact on foreign direct investment, with a particular and justifiable concern on the law relating to access to and ownership of land by foreign investors. She restricted herself to the topic area despite the fact that there are other factors which have been identified to impact on a country's FDI climate.

3.6 Data Gathering Procedures

The researcher usedArchival analysis and interviews as the data collection method for this research.

3.7 Data Analysis

Data collected was analyzed qualitatively whereby the data was related to the objectives of the study.

3.8 Ethical Considerations

The researcher got an introductory letter from school of postgraduate studies introducing the researcher and explaining intended purpose of data collected. The researcher also committed to non-disclosure of availed information beyond what the information is meant for.

3.9 Limitations of the Study

The researcher encountered difficulty in questionnaire response since the respondents are very busy people. The researcher addressed the .problem of questionnaire response by making clear scheduled appointments with concerned respondents and being selective with the respondents and the themes of the study.

CHAPTER FOUR

THE LEGAL AND POLICY FRAMEWORK FOR LAND AND URBAN PLANNING AND DEVELOPMENT IN KENYA

4.0 Introduction

In Kenya, land tenure and urban development is governed by the Constitution of Kenya 2010 and various pieces of Legislation and Sessional Papers including; the Local Government Act Cap 265 which has been repealed by the Urban Areas and Cities Act 2011, Land Control Act Cap 302, the Physical Planning Act Cap 286, the Constitution of Kenya 2010, the Environment Management and Coordination Act 1999, the National Land Commission Act, the Land Act 2012, the Land Registration Act 2012 and the Sessional Paper No.3 of 2009 on the National Land Policy.

4.1 The Constitution of Kenya 2010.

The constitution provides for Devolution which is made effective under Article 184 which legalizes The Urban Areas and Cities Act, 2011. In addition, Pursuant to the Constitution of Kenya, three Acts of Parliament have been enacted in relation to land and came into force on 2nd May, 2012:

- Land Act, 2012
- Land Registration Act, 2012
- National Land Commission Act, 2012

Under the new laws, land has been classified into (a) Public Land; (b) Private Land; and (c) Community Land.

- **Public land** is defined pursuant to Article 62 of the Constitution and includes unalienated land, land occupied by a State organ, land transferred to the State, land to which no heir can be identified, minerals, forests, reserves, national parks, water

catchment areas, sea, lakes, rivers, land between high water mark and low water mark, any land not classified as private

- **Community land** is defined pursuant to Article 63 of the Constitution and includes land lawfully registered in the name of group representatives, land lawfully transferred to a specific community and any land declared to be community land by an Act of Parliament. Community land shall be managed in accordance with the law enacted pursuant to the Constitution. However, the law has not yet been enacted and the Constitution provides for a 5 year period within which legislation has to be enacted.
- **Private land** includes registered land held by any person under freehold tenure, land held by any person under leasehold tenure and any other land declared private land under any Act of Parliament.

Land can be converted from one category to another.

4.2 The Urban Areas and Cities Act, 2011

Urban Areas and Cities Act

The Urban Areas and Cities Act provides for the: classification, governance and management of urban areas and cities; and the criteria of establishing urban areas, to provide for the principle of governance and participation of residents and for connected purposes. The Act came into operation in April 2013 after the first elections held under the Constitution, except

59 Section 48, County Government Act (Number 17 of 2012). See also the Section, for the other proposed units for decentralization: urban areas and cities within the county; the sub-counties equivalent to the constituencies within the county; wards within the county; and such other or further units as a county government may determine.

part VIII of the Act which came into operation upon the repeal of the Local Government Act. The stated objects and purposes of the Act are to establish a legislative framework for the classification, governance, and residents" participation in governance, of urban areas and cities. The Act vests the management of cities and municipalities in the

county governments. It provides for the establishment of boards of cities or of municipalities whichever the case may be, as well as managers and other staff to manage the cities or municipalities on behalf of county governments. Of relevance to community land is that the boards so established are empowered to inter alia, take, purchase or otherwise acquire, hold, charge or dispose of movable and immovable property which may include community land.

The Act gives the city/municipality boards a raft of functions which may directly or indirectly impact on community land. Of biggest significance to community land is the role of controlling land use, land sub-division, land development and land zoning by public and private sectors for any purpose. The boards also develop and adopt policies, plans, strategies and programmes for their respective cities or municipalities, as well as formulate and implement integrated development plans. The other functions of the boards include overseeing the affairs of the city or municipality; implementing applicable national and county legislation; and collecting rates, taxes levies, duties, fees and surcharges on fees.

The Urban areas and Cities Act empowers the Cabinet Secretary for the time being responsible for cities and urban areas, to make regulations for the better carrying out of the provisions of the Act, or for prescribing anything which is required to be prescribed under the Act. Such regulations are subject to approval by the Senate, and shall only take effect after such approval. The cabinet secretary can thus employ such regulations to enhance the recognition and better utilization of community land rights.

The Urban areas and cities Act is very important in the discourse on community land. This is because land in urban areas has widely been overlooked yet urbanization has had far reaching effects on community land. For instance, the Nairobi Metropolitan Development Projectfailed partly because the planners never paid adequate attention to community land which constitutes bulk of the land in the proposed project area.

4.3 Land Registration Act 2012

The Land Registration Act gives provisions for revision, consolidation and rationalization of the registration of titles to land, in order to give effect to the principles and objects of devolved government in land registration, and for connected purposes. The Act applies to registration of interests in land under all the three land tenure regimes established by the constitution. The Act empowers the National land Commission, in consultation with national and county governments, to constitute land registration units at county level and at such other levels to ensure reasonable access to land administration and registration services. It details the procedure for division and systematic numbering of parcels of land in each registration unit.The Act requires a land registry to be maintained in each registration unit. The land registry shall contain all the land records which include: a land register; the cadastral map; parcel files; any plans which shall, after a date appointed by the Commission, be geo-referenced; the presentation book, in which shall be kept a record of all applications; an index of the names of the proprietors; and a register and a file of powers of attorney.

County Governments Act(Number 17 of 2012)

The County Governments Act is an act of parliament to give effect to chapter eleven of the Constitution. It provides for county governments" powers, functions and responsibilities to deliver services and for connected purposes. It came into operation upon the final announcement of the results of the first elections under the Constitution. The County governments, established under Article 176 of the Constitution consist of a county executive and a county assembly. The executive authority of the county is vested in, and exercised by the county executive committee which consists of the county governor and the deputy county governor; and members appointed by the county governor, with the approval of the assembly, from among persons who are not members of the assembly.

The County Governments Act lists functions of county executive committees which include implementing county legislation as well as relevant national legislation; managing and coordinating the functions of the county administration; preparing

proposed legislation; and providing the county assembly with full and regular reports on matters relating to the county. The County governments through the executive committees thus have a very important role in implementing laws. The county Governments Act, read together with Article 186 and Fourth Schedule of the Constitution, also assigns the county executive committees a number of roles. For instance, one of the key functions assigned to county governments is county planning and development which is county government function which directly affect community land. Under this role the county governments are to perform inter alia, land survey and mapping; boundaries and fencing; and housing.

CHAPTER FIVE

SUMMARY OF FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

5.1 SUMMARY OF FINDINGS

In Kenya development Control process is governed by various pieces of Legislation and Sessional Papers including; the Local Government Act Cap 265 which has been repealed by the Urban Areas and Cities Act 2011, Land Control Act Cap 302, the Physical Planning Act Cap 286, the Constitution of Kenya 2010, the Environment Management and Coordination Act 1999, the National Land Commission Act, the Land Act 2012, the Land Registration Act 2012 and the Sessional Paper No.3 of 2009 on the National Land Policy. The application process entails submission of a drawing or a design which is attached to various prescribed forms which were previously administered by thedefunct local Authorities of; the City Council, Town Council or the County Council. In Kenya Local Authorities collapsed after the 4th March 2013 General elections,and currently urban development control is under the armpit of the 47 County Governments in Kenya. Under the County Government, the Sub-County Admistrators receive the application forms from the applicants or proponents with sufficient copies for circulation to various institutions for comments.

The type of applications or drawings which are normally processed ranges from land subdivision or amalgamation, building plans, change of user, and extension of user and extension of leases or renewals. Development permission is granted by the County Government upon receipt of favorablecomments from the institutions to which the applications are circulated to. A decision by the County Government's Technical committee led by the Sub-County Administrator is made within a period of one month and that decisions can either fall within four categories notably:

a. Unconditional permission or approval
b. Conditional approval
c. Refusal of permission
d. Refusal to take a decision or deferrement

If planning permission is refused or the applicant is aggrieved by any conditions imposed or the County Government refuses to make a decision within one month, the applicant may appeal to the District/Municipal planning Liaison Committee, theNational Physical planning Liaison committee or theHigh Court. The Physical planning liaison committees are quasi-judicial bodies that meet and determine complaints lodged arising from planning decisions. An appeal must be lodged within two months of receipt local Sub-County Government's decision.

Reade (1987) argues within the context of positive planning at the local level or Municipal corporation that planning applications is evaluated in terms of their effects on the local economy on the labourmarket, on the rate yields and so on implying a situation in which the development control in practice would become increasingly discretionary, operated on the basis of informal negotiations between planners themselves and other functionaries and representatives of business interest , trade unions, the labour party and other local pressure groups.

While making informed decisions on the development applications in Kenya, development control institutions are persuaded by:

i. Existence of an approved urban/regional physical development plan
ii. Existing pieces of legislation and regulations
iii. Building code and By-laws
iv. Physical planning handbook
v. Physical planning liaison committee decisions
vi. History of the site and development trends
vii. Public interests and environmental considerations
viii. Other material considerations

Planning Act Cap 286 prohibits any form of development within an area of local Authority without a development permit having been granted. Contravening section 30 (1) of the Act constitute an offence liable to fine not exceeding Kenya shillings one hundred thousand or an imprisonment not exceeding five years or both, but this punishment has never been meted. One result of this poor enforcement of planning

regulations is that most low income urban residents continue to encroach and squat in un-upgraded areas.

Challenges of Urban Development control

Ndegwa (2001) quotes Raymond (1978. 4) as saying that the reason that physical planning is ineffective is because local government bodies can ignore it. And the reason why it can be ignored is that in almost all states, plans are developed by or under the aegis of local governing bodies. It is suggested that there ought to be a legal requirement that the local governing bodies adopt plans. If they are not officially adopted it can be expected that the local governing bodies would be sufficiently communicated to them to make sure that they are kept up to date and properly administered. If local planning were a continuous, disciplined and accountable process, in time, stakeholders will be educated and the general public willparticipateeffectively in the planning process. UN Habitat

(1990 a), AAK, (2010) in their re-assessment of urban planning and development regulations in African cities, outlined many factors which contribute to non- compliance to urban development control regulations including;

a) **Restrictive building regulations**

The existing standards, by-laws, codes and regulations pertaining to house and building are restrictive and do not take account of the available local materials. There has been insufficient dissemination of appropriate building technology for low income groups. This has resulted in the mushrooming of squatter settlements and illegal developments

b**) Laxity in approving plans**

The law requires that all developers must submit their development proposals to Local Authorities for approval. This has been reported to take unnecessary long period of time thus delaying developments in most Local Authorities. Developers have had to go ahead with their developments with no regard for submitted plans. In Kenya, a strategy of fast-tracking a plan approval process has beendeveloped through the use of a Result Based Management (RBM) approach involving adoption of citizen service Delivery Charter and the Rapid Result Initiatives (RRI).

c) **Restrictive Planning regulations**

Explicit urban development and planning regulations have been adopted in developing countries. The various Acts regulating urbandevelopment seem to be outdated and notconforming to the countries current social, economic and political circumstances. Planning regulations and standards have been considered to be too static and inflexible e.g. the developments control code, the building and zoning regulations.

d) **Poor policy implementation**

Implementation of urban development policies has been characterized by failures. These have their roots in remote bureaucratic decisions, delays and poor execution of projects and programmes by specialized bodies, ineffective local institutions and staff, lack of institutional and inter-sectoralcoordination framework for development planning and the lack of or inadequate participation by beneficiary population.

e) **High poverty levels**

The proportion of the population living in poverty has increased in most developing countries to as much as 50% of the population in some cases. With a large proportion of urban population in poverty struggling to make a living, compliance to urban development regulations is not in their scheme of priorities.

Lack of comprehensive urban development policy that would guide regulations that are in line with the needs of the people and the current social-economic realities such as urban poverty has contributed to the high degree of non-compliance to urban development and planning regulations.

f) **Weak financial position**

Most local authorities have limited finances for development control.

g) **Weak institutional and legal framework**

Institutional coordination problems arise between the Ministry of Local Government through Local Authorities and the Ministry of Lands and physical planning in allocation of open spaces and the abuse of the same by the developers in the past that violated planning regulations. There has been weak management in the local authorities as well as failure of the local authorities to attract staff. To address challenges associated with

institutional frameworks in Kenya, the Urban Areas and Cities Act 2012, designates urban areas as Cities andMunicipalities and to be under new management to be led by the City Manager and the Municipal/Town Management Board. Figure 2 shows a flow diagramof how urban areas and Cities are to be managed in Kenya under the new Urban Areas and Cities Act 2011.

h) **Political interference**

Political interference in the urban development control systems has limited the local Authorities ability to fully regulate and control development. Powerful government officials have been known in the past to enforce approvals which do not meet the stipulated requirements.

i) **Lack of political will**

There is lack of political will and public support for planning. Planning is viewed as unnecessary interference in private property rights. Obudho (1992), notes that implementation of these plans depends on very much on the good will of Local Authority.

j) **Poor enforcement machinery**

Although most developers tend to comply with planning regulations, there are some violators especially of buildings. This is because fees levied on the offenders are low and affordable hence do not deter them, when compared to the gains they make from inefficient mode of production.

In an effort to enforce urban planning regulations in the face of increasing economic hardships and the attendant unemployment problems, many conflicts have been experienced between the vendors, hawkers and in various towns in Kenya in the past.

k) **High professional fees**

High professional fees charged by various professionals like Planners, Architects, land Surveyors and Engineers have been identified as a serious hindrance to development within the legal framework in Kenya. These have discouraged developers to engage these professionals in making building plans, thus leaving room for the quacks to ruin

the built environment. In Kenya, the effect of this situation is manifested in incessant collapse of buildings especially in the urban areas.

l) Lack of awareness of the existence of urban development and planning regulations

In examining the degree of compliance with therequired regulations, the extent to which people are aware of the existence of these regulations is important because it partly determines the extent to which people will comply with the regulations. A large portion of people in the urban areas are not aware of the regulations (UNCHS Habitat 1999).

5.2 CONCLUSION AND RECOMMENDATIONS

The rate of urban growth in Kenya has outstripped management capacity and financial resources for maintenance of sustainable livelihoods. The rate of uncontrolled and unplanned urbanization has brought with it complex urban problems in the form of proliferation of slums, traffic congestion, shortage of housing and inadequate provision of all manner of infrastructure facilities. The existing urban development control instruments and practices have not been effective in guaranteeing sustainable living despite being in existence in Kenya from as early as 1947 in the name of Town and County Planning Act. There is need for all stakeholders in the built environment to address themselves to such areas as the need to;

a) Review and harmonize all conflicting and contradictory laws and regulations and eliminate duplication of efforts and mandates. Planning and implementation must be brought to operate under one roof.

b) Foster public private partnerships in urban development control as enunciated in Agenda

c) Technocrats in the name of professional bodies of the Architectural Association of Kenya (AAK), Kenya Institute of Planners (KIP), Schools of planning and their associates should take the lead in formulating the right endogenous planning paradigms, standards and models appropriate for the country in the 21st century.

d) Adequate resource allocation should be mobilized to facilitate plan preparation and effectuation

e) Seizure of opportunities presented by the Kenya constitution 2010, the Urban Areas and cities Act 2011 and the Environment and Land Court Act which are already in force butexplicitly anchors spatial planning at theNational and County levels. Planners need to fill the gaps and weakness which used to exist in the past and devise better approaches of working with new institutions that will be created by the National and County governments; including the County Assembly, County Public Service Board, County executives, Town management Boards and the like.

f) Adopt innovative planning approaches involving use of modern technology such as the planning portal and paperless applicationorder to shorten time taken and merry-go- round as well as reducing congestion in offices.

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